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Supreme Court of the United States

OCTOBER TERM, 1957

No. 77

MOOG INDUSTRIES, INC., PETITIONER,

vs.

FEDERAL TRADE COMMISSION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 4, 1957
CERTIORARI GRANTED MARCH 25, 1957

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

No. 15,370.

CIVIL.

MOOG INDUSTRIES, INC.,
PETITIONER,

VS.

FEDERAL TRADE COMMISSION,
RESPONDENT.

PETITION TO REVIEW ORDER OF FEDERAL TRADE COMMISSION.

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UNITED STATES OF AMERICA

Before

FEDERAL TRADE COMMISSION

Docket No. 5723

In the Matter of

MOOG INDUSTRIES, INC.

COMPLAINT.

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described, since June 19, 1936, has violated and is now violating the provisions of Subsection (a), Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C., Title 15, Section 13), hereby issues its complaint, stating its charges with respect thereto as follows:

Paragraph One: Respondent Moog Industries, Inc., formerly titled St. Louis Spring Company, is a corporation organized and doing business under and by virtue of the laws of the State of Missouri, with principal office and place of business located at 6650 Easton Avenue, St. Louis, Missouri.

Paragraph Two: Respondent is now, and for several years last past has been, engaged in the business of the manufacture, sale and distribution of automotive products and supplies to different purchasers of the same located in the various States of the United States and in the District of Columbia. Said products and supplies are sold by the respondent for use, consumption or resale within the United States and the District of Columbia, and respondent causes said products and supplies so sold to be shipped and transported from the State or States of location of its places of business to the purchasers thereof located in States

other than the State or States wherein said shipment or transportation originated. Respondent maintains, and at all times mentioned herein has maintained, a course of trade and commerce in said products and supplies among and between the States of the United States and in the District of Columbia.

Paragraph Three: Respondent, in the course and conduct of its business as aforesaid, is now, and since June 19, 1936, has been engaged in active and substantial competition with other corporations, partnerships, firms, and individuals manufacturing, selling, and distributing comparable automotive products and supplies in commerce to purchasers of the same in manner and method and for purposes as aforestated. Many of said purchasers and many of the aforesaid purchasers from the respondent are competitively engaged each with the other.

Paragraph Four: Respondent, in the course and conduct of its business as aforesaid, is now, and since June 19, 1936, has been, directly or indirectly discriminating in price between the aforesaid different purchasers of its said automotive products and supplies of like grade and quality sold and distributed in manner and method and for purposes as aforestated, by selling said products and supplies at higher and less favorable prices to numerous small businessmen purchasers than said products and supplies are sold to various larger purchasers generally competitively engaged as aforestated with said less favored purchasers.

Paragraph Five: The effect of respondent's aforesaid discriminations in price between the said different purchasers of its said automotive products and supplies of like grade and quality sold in manner and method and for purposes as aforestated, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and the aforesaid favored purchasers are engaged, or to injure, destroy or prevent competition with said respondent, said favored purchasers, or with customers of either of them.

Paragraph Six: The aforesaid acts and practices of respondent constitute violations of the provisions of Sub-

section (a) of Section 2 of the Clayton Act (U. S. C., Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936.

Wherefore, the Premises Considered, the Federal Trade Commission, on this 20th day of December, A. D. 1949, issues its complaint against said respondent.

NOTICE.

Notice is hereby given you Moog Industries, Inc., a corporation, respondent herein, that the 3rd day of February, A. D. 1950, at 2 o'clock in the afternoon, is hereby fixed as the time, and the offices of the Federal Trade Commission in the City of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you will have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violations of the law charged in the complaint.

You are notified and required, on or before the twentieth day after service upon you of this complaint, to file with the Commission an answer to the complaint. If answer is filed and if your appearance at the place and on the date above stated be not required, due notice to that effect will be given you. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule VIII) provide as follows:

In case of desire to contest the proceeding the respondent shall, within twenty (20) days from the service of the complaint, file with the Commission an answer to the complaint. Such answer shall contain a concise statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state.

* * *

Failure of the respondent to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission, without further notice to respondent, to proceed in regular course on the charges set forth in the complaint.

If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent admits all the material allegations of fact charged in the complaint to be true. Such answer will constitute a waiver of any hearing as to the facts alleged in the complaint and the Commission may proceed to make its findings as to the facts and conclusions based upon such answer and enter its order disposing of the matter without any intervening procedure. The respondent may, however, reserve in such answer the right to other intervening procedure, including a hearing upon proposed conclusions of fact or law, in which event he may in accordance with Rule XXIV file his brief directed solely to the questions reserved.

Upon request made within fifteen (15) days after service of the complaint, any party shall be afforded opportunity for the submission of facts, arguments, offers of settlement or proposals of adjustment where time, the nature of the proceeding and the public interest permit, and due consideration shall be given to the same. Such submission shall be in writing. The filing of such request shall not operate to delay the filing of the answer.

In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D. C., this 20th day of December, A. D. 1949.

By the Commission.

/s/ D. C. Daniel
Secretary

(Part 1, Page 2) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

Motion for Bill of Particulars.

(Federal Trade Commission Received Jan 16 1950 Secretary)

Now comes the respondent and moves for a Bill of Particulars in the above entitled matter, specifying in particular the following:

1. The dates on which the acts complained of are alleged to have occurred.

2. The names and addresses of persons who have received the alleged discriminatory terms.

(a) The names and addresses of persons alleged to have been discriminated against.

3. The places at which said acts are alleged to have been committed.

4. A description of the nature of the alleged direct and indirect discriminations in price.

5. A description of the practices of the respondent alleged to constitute violations of subsection (a) of Section 2 of the Clayton Act (U. S. C., Title 15, Sec. B), as amended by the Robinson-Patman Act.

Moog Industries, Inc.,
by /s/ H. A. Apple

January 10, 1950.

I hereby certify that the above motion is not interposed for purposes of delay in the disposition of the above entitled matter.

/s/ Edwin S. D. Butterfield
Attorney for Moog Industries, Inc.
111 W. Washington St.
Chicago 2, Illinois

(Part 1, Page 6) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

ORDER DENYING MOTION FOR BILL OF PARTICULARS.

This matter coming on to be heard by the Commission upon the motions of counsel for respondent filed January 16, 1950, for extension of time in which to file answer and for a bill of particulars and answer in opposition to respondent's motions as filed by counsel supporting the complaint January 17, 1950, and the Commission having duly considered said motions and answer thereto and record herein and now being fully advised in the premises:

It Is Ordered that the time in which respondent may answer the complaint herein be, and the same hereby is, extended to February 15, 1950.

It further appearing to the Commission that the complaint, in Paragraph Four, alleges that respondent, in the course and conduct of its business is now, and since June 19, 1936, has been, discriminating in price by selling its automotive products and supplies of like grade and quality in commerce to numerous small businessmen purchasers at higher and less favorable prices than said products and supplies are sold to other larger purchasers generally competitively engaged with said less favored purchasers; and

It appearing that the evidence relied upon by counsel supporting the complaint was either supplied by the respondent or said purchasers who had obtained it from respondent, or developed as a result of the respondent's business practices and policies; and

The Commission being of the opinion that the complaint is sufficient to advise the respondent of the nature of the charges against it, and, further that the specific acts and practices bearing on said charges may be obtained by the respondent from its own records:

It Is Further Ordered that respondent's motion for bill of particulars be and it hereby is denied.

By the Commission.

O. K. Carson — s/ D. C. Daniel

Issued: January 20, 1950. — Secretary

(Part 1, Page 11) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

AMENDED ANSWER.

(Federal Trade Commission Received Jun 20 1950 Secretary.)

Now comes the respondent and denies that it has violated since June 19, 1936, the provisions of Subsection (a), Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C., Title 15, Section 13), and further denies that it is now violating said act or any part thereof, and specifically alleges that it is conducting its businesss in a legal and lawful manner in accordance with the laws of the United States, and the Statutes in such cases made and provided, and for answer to the Complaint heretofore filed herein, admits that it is a Missouri corporation with principal office and place of business located at 6650 Easton Avenue, St. Louis, Missouri, and that it is engaged in the manufacture of automotive products, which said products manufactured by it are sold to resellers in a legal manner and accordance with the custom and practice prevailing in the automotive industry.

1. Respondent denies each and every allegation of said complaint not hereinbefore specifically admitted and asks for strict proof thereof.

2. Further answering, Respondent states that of the type of automotive products manufactured by it, almost all of such automotive products are manufactured by or distributed through the three major car manufacturers, and their subsidiaries; that respondent follows the pricing, pricing methods, and trade practices established by said car manufacturers, their suppliers and subsidiaries, in order to meet in good faith the equally low price of such competitors, or the services or facilities furnished by such competitors.

3. Alleges that if the conclusions stated in paragraphs Four, Five and Six of said Complaint as to the alleged acts and practices of the respondent, are deemed to constitute violations of the provisions of Subsection (a) of Section 2 of the Clayton Act (U. S. C., Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, then said Act if so interpreted and if applied to the respondent

is violative of Respondent's constitutional rights under Article V of the Amendments to the Constitution of the United States and an unreasonable and unlawful exercise of the power granted under Subsection Three of Section 8 of Article I of the Constitution of the United States.

4. Alleges that the provisions of Subsection (a) of Section 2 of the Clayton Act (U. S. C., Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, are so vague and indefinite that an attempt to enforce said provisions in this proceedings against this respondent would constitute a violation of respondent's Constitutional rights under Article V of the Amendments to the Constitution of the United States.

5. Respondent further states that the practices and conditions existing in the Motor Vehicle Industry in regard to competition as set forth in the one thousand and seventy-seven (1,077) page report of this Honorable Commission to the House of Representatives on June 5, 1939, on the Motor Vehicle Industry, pursuant to Joint Resolution No. 87 (H. J. Res. 594), Seventy-Fifth Congress, Third Session, and known as House Document No. 468, 76th Congress, 1st Session, have become more widespread in usage and conditions have not improved but rather deteriorated over the last decade, making it increasingly more and more difficult for the small manufacturer, such as the respondent, to efficiently compete in the market for the products manufactured by it or to secure the benefit of competitive pricing in the field of its raw materials.

6. That any cease and desist order entered herein against this Respondent under the conditions now existing in the Motor Vehicle Industry, without the correction of said conditions, will not promote competition but will rather destroy the competition in the industry now being offered by this Respondent.

7. Respondent prays that this Honorable Commission will exercise the powers given to it to protect this Respondent and other similar small automotive manufacturers in their competitive positions against the existence and growth of monopoly power both in the markets in which the re-

spondent purchases its raw materials and in which the Respondent sells its finished products.

Moog Industries, Inc.,
By /s/ Edwin S. D. Butterfield
Its Attorney at Law

St. Louis, Missouri
June 20, 1950

Edwin S. D. Butterfield,
Attorney for Respondent,
111 W. Washington Street,
Chicago 2, Illinois.

(Part 1, Page 17) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

MOTION TO QUASH SUBPOENAS.

(Federal Trade Commission Received Oct 19 1950 Secretary.)

Now comes Moog Industries, Inc., a corporation, respondent in the above entitled matter by Edwin S. D. Butterfield, its attorney herein, and moves to quash the *subpoenas ad testificandum and duces tecum* heretofore issued herein on the grounds set forth in the answer and amended answer heretofore filed herein, and on the following grounds:

That the Federal Trade Commission is without jurisdiction of the person or the subject matter of said complaint in that said complaint is directed against this respondent which does not manufacture or sell more than a fraction of one percent of the competitive commodities of like grade and quality sold in the American market; that said proceeding and compulsory process violates the constitutional rights of the persons under subpoena and is beyond the scope and power granted to the Congress of United States under Section 8 of Article I of the Constitution of the United States of America; that said purported process is in violation of fundamental legal rights of the persons sub-

poenaed, being contrary to and in derogation of the fundamental purpose of American government as exemplified in the preamble of the Constitution of the United States; and that the rights of said persons are by said subpoena being placed in jeopardy in violation of the IV, V, VI, VIII, IX, X, XIII and XIV Amendments to the Constitution of the United States of America.

Moog Industries, Inc.
By: /s/ Edwin S. D. Butterfield
Attorney for Respondent

St. Louis, Missouri
October 19, 1950

(Part 1, Page 27) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

AFFIDAVIT.

H. P. Moog, being first duly sworn upon his oath, states that he is President of Moog Industries, Inc., respondent in the above entitled matter; that he has been engaged in the sales of automotive products for 31 years; that Moog Industries, Inc., does not manufacture, sell or deliver an amount equal to more than 1/10 to 1/100 of one percent on some of its manufactured products and less than one percent on all of its products of the total amount of said products of like grade and quality manufactured and sold in the United States and any other market; that Moog Industries, Inc., is a small business concern in the automotive market; and that said fact is a matter peculiarly within the power, knowledge and capacity of the Federal Trade Commission to ascertain.

/s/ H. P. Moog

Subscribed and sworn to before me, a Notary Public, this 19th day of October, 1950.

My term expires: 11/15/50

/s/ Charles S. Sigoloff
Notary Public

(Part 1, Page 28) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

MOTION TO STRIKE EXHIBITS AND EVIDENCE AND DISMISS COMPLAINT.

(Federal Trade Commission Received Jun 4 1952 Secretary.)

Now comes respondent, Moog Industries, Inc., by E. S. D. Butterfield, its attorney, and upon affidavit of its president H. P. Moog that said respondent does not manufacture, sell or deliver in excess of one percent of the amount or quantity of any product or item of like grade and quality now being manufactured, sold and delivered in interstate commerce in the United States of America and moves to strike all exhibits and testimony heretofore received in evidence herein on the ground

1. that there is no pricing practice of Moog Industries, Inc., which could by the extension of the interpretation of the Robinson-Patman Act to the extreme limits of its lawful intent possibly result in a discrimination which might have the effect substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them;

2. that the relative insignificance of the respondent's participation in the Automotive market of the United States was brought to the attention of the Federal Trade Commission by proper affidavit shortly after the complaint was filed herein:

3. that no evidence has been introduced to the contrary herein;

4. that the evidence heretofore introduced herein over objection of the respondent fails in any manner to establish a violation of the Robinson-Patman Act or any other provision of the anti-trust laws and

5. that to compel respondent to proceed to further defend against said complaint will incur needless onerous expense and place an unconscionable burden on the respondent beyond the contemplation, intent, or power of Congress and in denial of due process of law to respondent in direct violation of respondent's constitutional rights and in complete perversion of the authority, intent and power of Congress and the Federal Trade Commission in the premises.

Moog Industries, Inc.
By /s/ Edwin S. D. Butterfield
Attorney for respondent

June 2, 1952.

(Part 1, Page 41) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

AFFIDAVIT.

H. P. Moog, being first duly sworn upon his oath deposes and says that he is president of Moog Industries, Inc., respondent herein; that he has been engaged in the sale of automotive products for over thirty-three years, and further deposes and says that there is no item being manufactured, sold or delivered by Moog Industries, Inc., which exceeds in amount or quantity one percent of the amount or quantity of a like item of the same grade and quality manufactured, sold or delivered in interstate commerce in the United States of America.

/s/ H. P. Moog

Subscribed and sworn to before me this 2nd day of June, A. D. 1952.

/s/ Mary A.
Notary Public

My Comm. expires Dec. 2, 1955

(Part 1, Page 42) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

MOTION FOR BILL OF PARTICULARS.

(Federal Trade Commission Received Jun 4 1952 Secretary)

Again comes the respondent, Moog Industries, Inc., by E. S. D. Butterfield, its attorney, at the conclusion of the evidence on behalf of the Federal Trade Commission in the above entitled matter and moves for a Bill of Particulars in the above entitled matter, specifying in particular the specific discrimination charged against the respondent and wherein the Federal Trade Commission charges that:

1. The effect thereof may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or

2. The effect thereof may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them; and

3. The particular customer or customers which the Federal Trade Commission charges has or have been discriminated against within the purport, meaning and intent of Subsection (a) of Section 2 of the Clayton Act (U. S. C., Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936;

4. The particular pricing practice which the Federal Trade Commission charges is in violation of said Robinson-Patman Act;

5. The particular marketing practice which the Federal Trade Commission charges is in violation of said Robinson-Patman Act;

6. The particular act or acts of the respondent which the Federal Trade Commission alleges constitute a violation or violations of subsection (a) of Section 2 of the Clayton Act (U. S. C., Title 15, Sec. 13), as amended by the Robinson-Patman Act approved June 19, 1936.

Moog Industries, Inc.
/s/ Edwin S. D. Butterfield
Attorney for Respondent.

June 2, 1952

(Part 1, Page 43) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

SUGGESTIONS IN SUPPORT OF FOREGOING MOTION FOR A BILL OF PARTICULARS.

1. Motion for Bill of Particulars was heretofore made before hearings were commenced in said matter and same was denied, the answer of counsel in support of complaint to motion for Bill of Particulars and the order denying said motion being served on respondent's attorney in the same registry mail.

2. An examination of all documents in evidence and all testimony adduced in support of the Complaint consisting of 506 pages of testimony and approximately 1350 pages of Exhibits does not reflect in what manner or respect the Federal Trade Commission charges an alleged violation of the Robinson-Patman Act.

3. The failure to specify the alleged violation will cause aggravated and unnecessary expense to the respondent for

the reason that the record fails to specify in what manner or how the respondent is purported to have offended the provisions of the Robinson-Patman Act.

4. Appended hereto is the Affidavit of the president of the respondent alleging that the respondent does not manufacture, sell or deliver more than one percent of any item of like grade and quality manufactured, sold or delivered in interstate commerce in the United States of America.

5. That to require the respondent to show the economic and marketing conditions in the automotive industry in order to properly negative the charges made in the complaint in the absence of a Bill of Particulars specifying the acts relied upon in support of said charges and official notice taken of matters dehors the record is to place an unconscionable burden upon the respondent, denying to it due process of law and effecting a result opposite to that contemplated by Congress, namely: handicapping instead of protecting the small manufacturer's right to compete in interstate commerce.

(Part 1, Page 44) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

AFFIDAVIT.

H. P. Moog, being first duly sworn upon his oath deposes and says that he is president of Moog Industries, Inc., respondent herein; that he has been engaged in the sale of automotive products for over thirty-three years, and further deposes and says that there is no item being manufactured, sold or delivered by Moog Industries, Inc. which exceeds in amount or quantity one percent of the amount or quantity of a like item of the same grade and quality manufactured, sold or delivered in interstate commerce in the United States of America.

s H. P. Moog

Subscribed and Sworn to before me this 2nd day of June, A. D. 1952.

/s/ Mary A.
Notary Public

My Comm. expires Dec. 2, 1955.

(Part 1, Page 45) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

MOTION FOR BILL OF PARTICULARS DENIED.

(Part 2, Page 509) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

ORDER TO SHOW CAUSE.

(Federal Trade Commission Received Mar 6 1953 Records Serv DCD Secretary)

This matter is before the Hearing Examiner upon request by counsel for the respondent to set a hearing at Wichita, Kansas, for approximately one week.

On March 4, 1952, the attorneys in support of the complaint stated upon the record that they were closing their case in chief and thereafter the following hearings were held to receive evidence offered by respondent: St. Louis, Missouri, June 2, 1952, two days; Denver, Colorado, October 13, 1952, two days; Dallas, Texas, October 21, 1952, two days; New Orleans, Louisiana, October 27, 1952, two days; Memphis, Tennessee, November 19, 1952, two days; and New York, New York, January 12, 1953, three days.

With the exception of the St. Louis hearing and one day of the Memphis hearing all testimony was confined to that of jobber customers as to whether or not they had been competitively injured by respondent's pricing practices. The testimony of all of the witnesses both in direct and

cross examination was substantially the same and to a great extent identical.

At the close of the hearings in New Orleans the Hearing Examiner announced that he considered further testimony of jobber witnesses along the same line to be cumulative. Upon representation that testimony of witnesses in the New York area would be of a different nature a further hearing was set for New York. At this hearing the testimony of the witnesses was substantially the same as that of the previous witnesses called.

At both the hearings in New Orleans and New York City the attorneys in support of the complaint offered to stipulate that if additional jobber witnesses are called their testimony on both direct and cross examination will be substantially the same as the testimony of the jobber witnesses previously called in this proceeding.

The Hearing Examiner, being of the opinion that, in the absence of a showing to the contrary, the further testimony of jobber customers would be cumulative to that already adduced in this proceeding and that further hearings to take such testimony would not be warranted;

It Is Therefore Ordered that hearing to show cause why hearing should be held at Wichita, Kansas, be set for Friday, March 13, 1953, at 10:00 A. M., EST, in Room 332, Federal Trade Commission Building, Washington, D. C.

/s/ Earl J. Kolb
Hearing Examiner.

March 5, 1953.

(Part 1, Page 50) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

ANSWER TO ORDER TO SHOW CAUSE WHY HEARING SHOULD BE SET IN WICHITA, KANSAS.

(Federal Trade Commission Received Mar 20 1953 Secretary.)

On October 8, 1951, and March 4, 1952, at Washington, D. C., the attorney in support of the Complaint offered in

evidence Exhibits Nos. 61 to 79G in the above entitled cause consisting of twenty-eight (28) pages and including Six hundred twenty-three (623) items purporting to show illegal price differences in the sale of commodities by the respondent to the purported purchasers named therein in a total of Two hundred thirty-six (236) communities in twenty-three (23) States of the United States including:

Alabama	New Jersey
Arkansas	New Mexico
Colorado	New York
District of Columbia	North Carolina
Florida	Oklahoma
Georgia	Pennsylvania
Iowa	South Carolina
Kansas	Tennessee
Kentucky	Texas
Louisiana	Virginia
Mississippi	West Virginia
Missouri	

Said Exhibits did not specify any particular item purported to have been sold nor was there any evidence offered to establish that the commodities sold were in fact either competitive, similar or identical.

(Part 1, Page 54) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

Over objection of counsel said Exhibits were received in evidence by the hearing Examiner and were included in and made a part of the record under the Complaint.

Without producing a single witness to testify that any business enterprise named in said Exhibits, or not named therein, has been or would be injured competitively by any pricing practice of the respondent and without producing a single witness who testified that the effect of such differences might substantially lessen competition or tend to create a monopoly in any line of commerce sold by respondent, or to injure, destroy, or prevent competition with

any person who either grants or knowingly receives the benefit of such differences, or with the customers of either of them, the attorneys in support of the Complaint, which charged the respondent with the sole offense of violation of Subsection (a) of Section 2 of the Clayton Act (U. S. C., Title 15, Sec. 13) as amended by the Robinson-Patman Act, approved June 19, 1936, closed the Government's case.

Immediately upon the denial of respondent's motion to refuse said exhibits in evidence on March 2, 1952, the following took place:

"Mr. Mayer: Mr. Examiner, this closes the case for counsel in support of the Complaint.

Mr. Butterfield: If your Honor please, at this time I make a motion to dismiss the Complaint and ask that a time be set for hearing on an argument.

(Part 1, Page 55) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

Trial Examiner Kolb: You can proceed with the argument, if you wish, now.

Take a recess of about five minutes and then proceed with your argument."

Despite the argument as to the failure of proof the motion to dismiss the Complaint was denied.

Thereupon the matter was set for hearing on June 2, 1952, at which time the motion to strike said Exhibits was renewed and again denied.

Thereupon the motion for Bill of Particulars was renewed and again denied.

Thereupon the motion to impound said Exhibits was renewed and again denied.

Whereupon the respondent had identified and offered in evidence charts relating to certain of said Exhibits which demonstrated that the items purchased by the respective purchasers shown on said Exhibits were neither identical nor similar but were in fact not competitive with one another together with the supporting invoices which said

charts and invoices were refused in evidence on the ground that whether or not the items sold to the respective purchasers were in fact non-competitive was irrelevant to the charge of competitive injury.

Whereupon the respondent offered in evidence the entire invoices showing sales to customers shown on F.T.C. Exhibit 67 covering Birmingham, Alabama together with charts analyzing all the items embraced in the figures shown on F.T.C.

(Part 1, Page 56) (The Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

Exhibit 67 which said charts were refused in evidence although the invoices supporting the same were so received.

Whereupon Respondent requested settings for the purpose of taking testimony of the persons named in F. T. C. Exhibit 67 residing in Birmingham, Alabama but no hearing was ever set for said purpose although respondent needs such testimony for the purpose of properly defending itself against said complaint.

Hearings were set for Denver, Colorado respecting F. T. C. Exhibit No. 66; for Dallas, Texas respecting F. T. C. Exhibits Nos. 73, 74, 76 and 79F; for New Orleans, Louisiana respecting F. T. C. Exhibit Nos. 62, 72, 78, 79C; for Memphis, Tennessee respecting F. T. C. Exhibits Nos. 61, 70A, 71B, 78, and 79F; for New York City, New York respecting F. T. C. Exhibits Nos. 63, 64, 68; and for Des Moines, Iowa respecting F. T. C. Exhibit No. 65, but no specific date has yet been set for the last named hearing.

F. T. C. Exhibit No. 76 recites names of purported purchasers of Moog products in dollars and cents relating to sales in El Dorado, McPherson, Wichita and Winfield, Kansas, as well as purported sales in Arkansas, Oklahoma, Texas and New Mexico.

At the hearings at which persons named on the F. T. C. Exhibits were called most of the witnesses testified that they have not been injured competitively by the pricing practices of the respondent and

although great latitude was extended to the attorneys in support of the Complaint in cross examination,

(Part 1, Page 57) (This Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

no witness called testified to any competitive injury by virtue of the pricing practices of the respondent.

Each community stands on its own particular facts and no two witnesses have testified to the same business experience. However, because of the enormous burden placed upon the respondent to meet the facts in each particular instance in 236 communities in the 23 States which the Government Exhibits Nos. 61 to 796 inclusive, the respondent has offered to stipulate that if all the witnesses named in said Exhibits were called, each would testify that he knows whether or not he was and is being injured competitively by virtue of the pricing practices of the respondent and that based upon that knowledge he would testify that he was not and is not being competitively injured by said pricing practices and that each would testify on cross-examination substantially the same as those who have already been called.

To allow the F. T. C. Exhibits Nos. 61 to 79G to remain in evidence as not being cumulative and to deny the respondent the opportunity to meet that evidence on the ground that it would only be cumulative would be in effect allowing the Government to freely put in the record evidence which the respondent is not allowed to rebut and such a ruling would amount to a flagrant denial of due process, a failure to permit, allow and grant a fair and impartial hearing and a direct violation of the rights guaranteed to the respondent under the Constitution of the United States of America and the Amendments thereto.

(Part 1, Page 58) (This Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

The respondent again moves to strike Government Exhibits 61 to 79G inclusive; and if such motion is denied, the

respondent again moves that the Government be required to make an election as to on what facts and in what area it intends to rely in support of the Complaint and upon the failure to make a reasonable election in regard thereto that the complaint be dismissed; and that if both such motions are denied that the Hearing Examiner set such hearings at such reasonable times as will afford the respondent an opportunity to meet the Complaint and rebut the evidence received herein on behalf of the Government and over respondent's objection.

Moog Industries, Inc.
By /s/ E. S. D. Butterfield
Attorney for Respondent
111 West Washington Street
Chicago 2, Ill.

(Part 1, Page 59) (This Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

Motion denied upon the record at hearing held June 23, 1953, at Washington, D. C.

/s/ Earl J. Kolb
Hearing Examiner

(Federal Trade Commission Received Jun 23, 1953 Secretary.)

Moog Industries, Inc. by E. S. D. Butterfield its counsel moves that the Hearing Examiner issue a rule on the attorneys in support of the Complaint to make the following elections:

1. Which of the many hundreds of commodities being sold by the respondent do the attorneys in support of the Complaint maintain are or have been sold by the respondent in violation of section 2(a) of the Clayton Act (Robinson-Patman Amendment) (U. S. C. Title 15, Sec. 13.)

2. Which of the effects, direct or indirect, do the attorneys in support of the Complaint maintain the respondent have been or are adversely and unlawfully affecting interstate commerce in violation of the Robinson-Patman Act (U. S. C. Title 15, Sec. 13).

3. In which of the 235 communities in 23 states as shown on the tabulations offered over objection and received in evidence herein do the attorneys in support of the Complaint maintain that sales by the respondent have been or are being made in violation of the Robinson-Patman Amendment to Section 2 of the Clayton Act, U. S. C. Title 15, Sec. 13.

4. Which of the following effects do the attorneys in support of the Complaint maintain that sales made by the respondent have, or are having and charged to be in violation of U. S. C. Title 15, Sec. 13:

(Part 1, Page 63) (This Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

(a) substantially to lessen competition

(b) tend to create a monopoly

(c) to injure competition

(d) to destroy competition

(e) to prevent competition

5. To which of the following persons do the attorneys in support of the Complaint maintain that any one of the effects set forth in paragraph 4 above result in competitive injury, destruction, prevention, lessening or monopolizing in respect to commodities which have been or are being sold by respondent:

(a) a competitor

(b) a customer knowingly receiving

(c) a customer of a competitor

(d) a customer of respondent

(e) a knowing customer of respondent's customer

(f) a customer's customer

6. In which one of the many months shown on the exhibits offered by the attorneys in support of the Complaint do said attorneys maintain that the violations charged in the Complaint occurred.

Respondent further moves that the attorneys in support of the Complaint be required to answer said rule upon a short date to be set for hearing upon said rule and answer and that upon default of answer thereto that the Complaint against the respondent be dismissed forthwith.

As grounds for said motions respondent respectfully represents that by virtue of the undue proliferation of the evidence by the attorneys in support of the Complaint who have offered, and there have been received, over objection of respondent, in evidence voluminous tabulations of dollar amounts and percentage extensions of differences as small as one one hundredth of one percent without regard to the hundreds of commodities

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included in a single figure and involving many thousands of invoices in hundreds of communities in almost half of the United States covering sales over many many months and years, there has been placed upon the respondent an almost insurmountable burden of analysis and proof, requiring the breakdown of thousands of invoices and cost allocations requiring the addition of thousands of man hours of time, extensive, exhorbitant and needless expense and causing such delay and obstruction to the proper and judicious disposition of this matter on its merits to the extent that a fair and impartial hearing without needless delay is in effect so denied to the respondent as to amount to a denial to this respond-

ent of a fair and impartial hearing as provided by Congress under the Administrative Procedure Act, Title 5, Sections 1004, 1006 and 1011 and as guaranteed by the Fifth Amendment to the Constitution of the United States of America and so as to deny the respondent a hearing conducted consistently with fundamental principles which inhere in due process of law and in denial and disparagement of those rights not enumerated in the Constitution or the amendments thereto but guaranteed by the Ninth Amendment of the Constitution of the United States of America as being retained by the sovereign people.

Moog Industries, Inc.
By /s/ E. S. D. Butterfield
Counsel for Respondent.

(Part 1, Page 65) (This Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

(Motion to Elect was denied at Part 3, Page 962.)

NOTICE OF INTENTION TO APPEAL FROM HEARING EXAMINER'S DENIAL OF MOTION FOR RULE ON ATTORNEYS IN SUPPORT OF COMPLAINT TO MAKE CERTAIN ELECTIONS.

(Federal Trade Commission Received Jul 2, 1953 Secretary.)

Now comes Moog Industries, Inc. by E. S. D. Butterfield its attorney and files this its notice of intention to appeal from the denial of motion by respondent for a rule on attorneys in support of the Complaint herein to make certain elections set forth in said motion filed on June 23, 1953, and denied by the Hearing Examiner on the same day. Re-

spondent represents that the prompt decision of such appeal is necessary to prevent unusual delay and expense.

Moog Industries, Inc.
By /s/ E. S. D. Butterfield
Attorney for Respondent.

(Part 1, Page 78) (This Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

ORDER DENYING APPEAL.

This matter came on to be heard by the Commission upon respondent's appeal filed on July 20, 1953, from the ruling by the hearing examiner denying respondent's motion that the hearing examiner issue a rule on the attorneys in support of the complaint to make certain specified elections, and upon answer to said appeal filed by counsel supporting the complaint.

Respondent's appeal is an interlocutory appeal. Rule XX of the Commission's Rules of Practice provides that, with certain exceptions not here pertinent, "parties shall have the right to prosecute interlocutory appeals from rulings of a hearing examiner during the time the proceeding is pending before him only when it is shown to the satisfaction of the Commission that the prompt decision of such appeal is necessary to prevent unusual expense and delay and such showing shall be made in the appeal." In order to justify an interlocutory appeal a party must show that the unusual expense involved is other than that usual and necessary in adversary proceedings. The respondent has made no such showing.

(Part 1, Page 95) (This Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

The Commission having duly considered respondent's appeal and the answer thereto, and being of the opinion

that respondent has failed to show that a prompt decision on its appeal is necessary to prevent unusual expense and delay:

It Is Ordered that respondent's appeal from the ruling of the hearing examiner denying respondent's motion that the hearing examiner issue a rule on the attorneys in support of the complaint to make certain specified elections be, and it hereby is, denied.

By the Commission.

/s/ D. C. Daniel
Secretary

Issued: July 31, 1953

E. H.

(Part 1, Page 96) (This Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of MOOG INDUSTRIES, INC., a corporation, formerly titled ST. LOUIS SPRING COMPANY, a corporation	Docket No. 5723

To the Honorable Earl J. Kolb, Hearing Examiner:

RESPONDENT'S PROPOSED FINDINGS AND CONCLUSIONS.

(Federal Trade Commission Received Jan 11 1954 Secretary.)

(The following proposed findings and conclusions are submitted in compliance with Rule XXI of the Commission's Rules of Practice for consideration by the Hearing Examiner, upon the condition that in so doing, the respondent, Moog Industries, Inc., does not thereby waive any of the factual, legal or procedural questions in the record

of this proceeding which it may subsequently present to the Commission or the Courts for decision.)

Respondent, Moog Industries, Inc., formerly titled St. Louis Spring Company, is a corporation organized and doing business under and by virtue of the laws of the State of Missouri, with principal office and place of business located at 6650 Easton Avenue, St. Louis, Missouri.[1]

Respondent is now, and for several years last past has been engaged in the business of the sale and distribution of certain automotive products, to wit: coil action parts, leaf springs, coil springs, chassis parts and piston rings, to different purchasers of the same, located in the various States of the United States and in the District of Columbia.[2] Some of said products are purchased by respondent for resale while others are manufactured and sold as aforesaid.[3] All of said products are sold by the respondent for resale within the United States and the District of Columbia, and respondent causes said products so sold to be shipped and transported from the State or States of location of its places of business to the purchasers thereof located in States other than the State or States wherein said shipment or transportation originated.[4] Respondent maintains (Part 1, Page 102), and at all times mentioned herein has maintained, a course of trade and commerce in said products among and between the States of the United States and in the District of Columbia.[5]

Respondent, in the course and conduct of its business as aforesaid, is now, and since June 19, 1936, has been, engaged in active, but not in substantial, competition with other corporations, partnerships, firms, and individuals manufacturing, selling and distributing comparable automotive products in commerce to purchasers of the same in manner and method and for purposes as aforestated.[6] While many of said purchasers and many of the aforesaid purchasers from the respondent may be competitively engaged each with the other, as alleged in the Complaint, the evidence wholly fails to identify specifically which purchasers are competitively engaged with other specifically identified purchasers.[7]

The Complaint charges that "Respondent, in the course and conduct of its business as aforesaid, is now, and since

June 19, 1936, has been, directly or indirectly discriminating in price between the aforesaid different purchasers of its said automotive products and supplies of like grade and quality sold and distributed in manner and method and for purposes as aforestated, by selling said products and supplies at higher and less favorable prices to numerous small businessmen purchasers than said products and supplies are sold to various larger purchasers generally competitively engaged as aforestated with said less favored purchasers."[8]

The Complaint also charges that "The effect of respondent's aforesaid discriminations in price between the said different purchasers of its said automotive products and supplies of like grade and quality sold in manner and method and for purposes as aforestated, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and the aforesaid favored purchasers are engaged, or to injure, destroy or prevent competition with said respondent, said favored purchasers, or with customers of either of them."[9]

Analysis of the foregoing charges demonstrates that the violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C., Section 13, charged against the respondent is limited to the allegation of discriminating in price

(a) in the sale of automotive products and supplies "of like grade and quality";

(b) between "small businessmen purchasers" and "larger purchasers";
(Part 1, Page 103.)

(c) at higher and less favorable prices to the "small businessmen purchasers" than to the "larger purchasers"; and

(d) between different purchasers competitively engaged in the resale of automotive products and supplies of like grade and quality purchased from respondent;

and to the allegation that the effect of respondent's aforesaid discriminations in price between the said different

purchasers of its said automotive products and supplies of like grade and quality sold in manner and method and for purposes as aforestated, may be substantially

(e) to lessen competition or tend to create a monopoly in the line of commerce in which respondent is engaged;

(f) to injure, destroy or prevent competition with the respondent;

(g) to lessen competition or tend to create a monopoly in the line of commerce in which the aforesaid favored (larger) purchasers are engaged;

(h) to injure, destroy or prevent competition with said favored (larger) purchasers; or

(i) to injure, destroy or prevent competition with customers of either the respondent or said favored (larger) purchasers.[10]

Respondent specifically denied the alleged violation of the aforesaid statute[11] and upon the issue joined evidence in support of and in opposition to the foregoing charges was heard by the Hearing Examiner.[12]

To support the Complaint the testimony of three officers of the respondent,[13] nine automotive parts jobbers,[14] the Presidents of two incorporated groups of automotive parts jobbers,[15] and two FTC accountants[16] was taken and Commission Exhibits numbered 1 to 79, inclusive, with many lettered series, were introduced.[17] (Part 1, Page 104)

In opposition the testimony of three officers of the respondent,[18] eighteen automotive parts jobbers,[19] the Secretary-Treasurer of an incorporated group of automotive parts jobbers,[20] and a stipulation relative to the testimony of additional automotive parts jobbers was taken[21] and Respondent's Exhibits 5 to 26, inclusive, with many lettered series, were introduced.[22]

The evidence, as a whole, tends to establish the general system of pricing used by the respondent in the sale and distribution of its automotive products and supplies.[23] This system of pricing, which includes published cumulative volume rebates or discounts that are available to all

purchasers according to the quantity purchased during a given period of time, is typical of the systems of pricing used generally throughout the automotive replacement parts industry by independent manufacturers of automotive products and supplies, including respondent's competitors, in the sale and distribution of such products and supplies.[24]

With respect to the two percent cash discount allowed by respondent as a trade practice for payment of an invoice within a certain number of days after the date of the invoice and prior to the usual net payment thereof, such trade discounts are uniform and are extended to all purchasers.[25] There is no reliable, probative and substantial evidence to the contrary and such discounts are without question legally valid.[26]

The automotive producers and supplies sold and distributed by the respondent are identified as coil action parts, leaf springs, coil springs, chassis parts and piston rings.[27] The classification "leaf springs, coil springs and chassis parts" is a general term designed by the respondent as a catch-all to include everything but coil action parts and piston rings. It includes five separate distinct classes of parts, namely, leaf springs, coil springs, tie rod ends, shackles and king bolts.[28] These types of automotive products and supplies are not interchangeable[29] and each type includes non-interchangable parts, particularly those designed for different makes of automobiles and trucks.[30]

The meaning of the phrase "commodities of like grade and quality" as used in Section 2(a), above referred to, has not been the subject of any close court contest or Commission decision, and there are therefore no judicial or quasi-judicial opinions subjecting the language to any very searching examination. The phrase has, however, been involved in a few cases which clearly support the view that interchangeability should be the controlling test.[31] There are no decisions in conflict with this view and it is herein (Part 1, Page 105) adopted and approved.[32]

The evidence offered to support the Complaint does not establish separate sales of interchangeable automotive

parts at different prices, but depends almost entirely upon charts showing total annual purchases in dollars from which the Commission's accountants have computed allowable volume rebates or discounts.[33]

While the charts list a large number of purchasers and reflect the total amounts of purchases from respondent during certain periods of time, they do not establish that any purchasers named compete in the resale of interchangeable automotive parts purchased from respondent.[34]

Analysis of the testimony taken in support of the Complaint, shows the following: Four jobbers located at New Orleans, Louisiana, testified that they purchased automotive products and supplies from respondent.[35] Two purchased during 1949,[36] one since April, 1949,[37] and one only during 1948.[38] The parts purchased were referred to by each purchaser as follows: (1) springs and front end suspension line,[39] (2) coil springs, leaf springs, king bolt sets, tie rod ends, and coil suspension parts,[40] (3) springs and front end suspension parts,[41] and (4) leaf springs, chassis parts, and coil action parts.[42] Only the total sums paid by each purchaser were given, with no reference to quantity or type of each part purchased.[43] While all four testified that they competed to some extent with other jobbers, not a single competitor was identified, the amount of the resales of each separate type of part, the prices paid, and the identities or functions of the purchasers thereof were not stated.[44] One testified that in reselling parts bought from respondent about ten percent was at retail and the balance went into "our own repair work."[45] The other three testified that they resold respondent's parts about ninety percent wholesale and ten percent retail.[46]

In addition, four jobbers located at Memphis, Tennessee, and one jobber located at Greenwood, Mississippi, testified that they purchased respondent's automotive parts during 1949.[47] It is not shown whether Ozburn & Abston Company (one of the Memphis jobbers) purchased from Ozburn, Crowe and Yantis Company or from the respondent.[48] The parts purchased by all five were referred by each purchaser as follows: (1) flat springs, leaves, coil action parts, and piston rings,[49] (2) front end parts and

springs,[50] (3) front end parts, coil springs, U-bolts and steel,[51] (4) coil action parts,[52] (5) springs, mainly leaves, front end repair parts, and tie bolts.[53] Only the approximate (Part 1, Page 106) sums paid by four purchasers were given in this testimony and there was no reference to the quantity of each type of part purchased.[54] While all five testified that they competed to some extent with other jobbers, not a single competitor was identified, and the amount of the resales of each separate type of part, the prices paid, the identities or functions of the purchasers thereof were not stated.[55]

The testimony of the Presidents of the two incorporated groups of the automotive parts jobbers lists the nine jobbers of one group[56] and seventeen jobbers of another group.[57] This testimony fails to show the quantity of each interchangeable part purchased by each member of these groups. It also fails to show the total amount paid by each member for each interchangeable part. It fails to identify any jobbers competing with any of these members in the resale of a particular interchangeable automotive part.[58]

This testimony is so hopelessly confused and utterly lacking in important and necessary detail that it wholly fails to establish that any of the jobbers referred to are competitively engaged in the resale of automotive products and supplies of like grade and quality, that is interchangeable products and supplies, purchased from the respondent.[59]

In addition there is no evidence (1) establishing the relative size of the jobbers purchasing the respondent's automotive products and supplies, (2) establishing that respondent discriminated in price between "small businessmen purchasers" and "larger purchasers," or (3) establishing that "small businessmen purchasers" paid higher and less favorable prices than "larger purchasers."[60]

From the foregoing the conclusion is reached that the charges above set out in (a), (b), (c), and (d) are not supported by reliable, probative and substantial evidence.[61]

Turning to the determination of the sufficiency or insufficiency of the evidence to support the charges above

set out in (e), (f), (g), (h) and (i) relative to the effect of respondent's alleged discriminations in price analysis thereof shows the following:

In the primary line of commerce the evidence shows that respondent is not engaged in substantial competition with its competitors,[62] that respondent's pricing practices are the general pricing practices in the automotive parts industry employed by independent manufacturers of automotive replacement parts in the sale and distribution of automotive parts,[63] that respondent's competitors have (Part 1, Page 107) in effect competitive pricing practices substantially the same as the pricing practices used by the respondent,[64] that respondent does not occupy a monopolistic position in and has no monopolistic control over any portion of the automotive parts market,[65] that respondent has not engaged in monopolistic practices and its pricing practices have not diverted trade to any substantial degree from its competitors,[66] that there is no evidence of a tendency toward monopoly in the respondent or to indicate any increase in sale of respondent's products over that of a competitor in any market,[67] that there is no evidence establishing that respondent's pricing practices have in the past or may in the future injure, destroy, prevent, or lessen competition with respondent.[68]

In the secondary line of commerce in which the purchasers of respondent's products and supplies are engaged, the evidence fails to establish competition between purchasers in the resale of respondent's automotive products and supplies of like grade and quality, that is, interchangeable parts, purchased from respondent and there is, of course, no injury to competition.[69]

If competition between such purchasers in the resale of respondent's automotive products and supplies of like grade and quality, that is, interchangeable parts, purchased from respondent, is assumed, further assumed that respondent is discriminating in price between such competing purchasers, and still further assumed that the price difference is reflected in resale prices, there is a supportable inference that the effect "may be" to injure competitors of the purchaser receiving the lower price.[70] If in these assumed circumstances it is also assumed that the

inferred injury to competition is "substantial," it may then be said that a prima facie case has been established.[71]

If a prima facie case is considered to have been established by evidence of all of the foregoing assumed facts, the case against the respondent will nevertheless fail since the inference of injury to competitors of the favored purchasers is rebuttable and in this case was completely rebutted by the testimony and a stipulation of fact.[72]

This testimony and stipulation clearly show, without dispute, that while some jobbers would like to receive a larger discount, respondent's larger discounts or rebates were not reflected in resale prices and did not influence or affect resales of respondent's automotive products and supplies.[73] Moreover this testimony and stipulation establish affirmatively that the purchasers receiving the lesser discounts or rebates were not competitively injured,[74] that in buying respondent's products and supplies a (Part 1, Page 108) jobber is not necessarily interested in the cheapest net price; that a jobber may pay more and yet make more profit than if he pays less; that a jobber paying less may have his capital tied up in stock on the shelf, his stock may contain unpopular merchandise (the cats and dogs), the stock may have a slow turnover, the stock may become obsolescent, and maintenance of stock on the shelf adds transportation and bookkeeping costs; and a jobber may prefer to keep his volume of stock low because his business is largely repair work.[75]

There is therefore no reliable, probative and substantial evidence that the effect of respondent's pricing practices may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and the aforesaid favored purchasers are engaged, or to injure, destroy or prevent competition with said respondent, said favored purchasers,[76] or with customers of either of them.[77]

The conclusion is therefore reached, after due consideration of the entire record, that the respondent's pricing

practices do not constitute violations of the Act (U. S. C., Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936.[78]

Hearing Examiner

Respectfully submitted,

Moog Industries, Inc.,
Respondent,

By /s/ Edwin S. D. Butterfield
/s/ James W. Cassidy
Attorneys for Respondent

(Part 1, Page 109)

REFERENCES TO THE RECORD--AUTHORITIES RELIED ON.

1. Complaint and Answer, Tr. 6, 7.
2. Complaint and Answer, Tr. 6, 7, 556, 987 to 996.
3. Tr. 1012 to 1014.
4. Complaint and Answer, Tr. 6, 7.
5. Complaint and Answer, Tr. 6, 7.
6. Complaint and Answer, Tr. 6, 7, 367, 987-996, 1012-1014.
7. Complaint and Answer, Tr. 6, 7.
8. Paragraph Four of the Complaint.
9. Paragraph Five of the Complaint.
10. Analysis of charges in Paragraphs Four and Five of the Complaint.
11. Answer.
12. Evidence received at all hearings.
13. Tr. 8 through 293.
14. Tr. 297 through 341, 360 through 392.
15. Tr. 342 through 360, 392 through 401.
16. Tr. 407 through 439, 449 through 494.
17. Commission Exhibits 1 to 79, inclusive, with lettered series.
18. Tr. 513 through 579, 962 through 1148, 1150 through 1170.
19. Tr. 583 through 826, 856 through 909.
20. Tr. 828 through 854.
21. Tr. 943.

22. Respondent's Exhibits 5 to 26, inclusive.

23. Tr. 8 through 293, Commission's Exhibits 1 through 19, inclusive, Tr. 360, 977, 986.

24. Tr. 8 through 293, Commission's Exhibits 1 through 19, inclusive, Tr. 360, 977, 986.

25. Tr. 964 through 966.

26. National Nut Co. v. Kelling Nut Co., (D. C. Ill.) 61 F. Supp. 76, 82.

27. Tr. 79 through 84.

28. Tr. 556.

29. Tr. 1017, 1018.

30. Tr. 1017, 1018.

31. Package Closure Corporation v. Sealright Company, Inc., (1943) unreported (D. C. N. Y.), reversed in part and affirmed in part on appeal, 141 F. 2d 972, 979-980 (2nd Cir. 1944); Bruce's Juices, Inc., v. American Can Company, (1949) 87 F. Supp. 985 (D. C. Fla.), affirmed 187 F. 2d 919, 5th Cir., 1951, modified and petition for rehearing denied 190 F. 2d 73, 5th Cir. 1951, petition for certiorari dismissed on motion of petitioner 342 U. S. 875, 96 L. Ed. 64; McWhirter v. Monroe Calculating Machine Co., Inc., (1948) 76 F. Supp. 456 (D. C. Mo.); CCH Trade Reg. Serv. (9th Ed.), Court Decisions, 1941-1943, Par. 52, 969.

(Part 1, Page 110.)

32. Recommended conclusion of law.

33. Commission Exhibits 20 through 79, inclusive, with lettered series (charts only).

34. Commission Exhibits 20 through 79, inclusive, with lettered series (charts only).

35. Tr. 297, 303, 309, 321.

36. Tr. 297, 303.

37. Tr. 321, 773.

38. Tr. 309, 311.

39. Tr. 299.

40. Tr. 305.

41. Tr. 312.

42. Tr. 323.

43. Tr. 300, 312, 327, 738, 739, Commission's Exhibits 62, 79c.

44. Tr. 299, 306, 310, 322-328; Tr. 298, 755, 304, 308, 310, 322, 774-776.

45. Tr. 774-776.

46. Tr. 298, 755, 308, 310.

47. Tr. 334, 361, 373, 381, 387.

48. Tr. 361, 364, 365.

49. Tr. 337.

50. Tr. 364.

51. Tr. 376.

52. Tr. 384.

53. Tr. 390.

54. Tr. 335, 365, 377, 385.

55. Tr. 337, 364, 371, 375, 384, 389, 390.

56. Tr. 392-394.

57. Tr. 342-344.

58. Tr. 392-394; Tr. 342-344.

59. Notes 35 to 58, inclusive.

60. Unable to find this evidence in the entire record.

61. Note 10.

62. Tr. 367. Statement of Hearing Examiner; Tr. 987 through 996, 1012 through 1014.

63. Tr. 360, 977, 986.

64. Tr. 318, 319, 360, 977, 1020, 1030-1034, 1036-1040, 1041-1043, 1066; Respondent's Exhibits 22, 23, 24, 25, inclusive, with numerical and lettered series, Tr. 1099, 1104, 1105, 1109, 1112, 1157, 1158.

65. Tr. 1155.

66. Unable to find in this record any selling below cost or other monopolistic practice by respondent; unable to find any substantial evidence of diversion of trade from respondent's competitors caused by respondent's pricing practices.

(Part 1, Page 111.)

67. Unable to find in this record any evidence of a tendency toward monopoly in respondent; see Tr. 1155, 1025, 1026, 987-996.

68. Conclusion drawn from foregoing statements and notes 62 through 67.

69. Notes 34 through 60, inclusive.

70 and 71. FTC v. Morton Salt Co., 334 U. S. 37, 68 S. Ct. 822, 92 L. Ed. 1196.

Zlinkoff & Barnard, Basing Points and Quantity Discounts: The Supreme Court and a Competitive Economy, in 48 Columbia L. Rev. 984 Austin, Price Discrimination and Related Problems under the R-P Act, pp. 42, 43, 48. "Prima facie evidence is the minimum quantity necessary to raise a presumption of fact or is sufficient, if not rebutted, to establish the fact." In the matter of Pillsbury Mills, Inc., Docket No. 6000, decided by the FTC December 28, 1953.

72, 73, 74 and 75. Tr. 795-797, 739-752, 768-783, 763, 764, 943.

Unable to find in this record any evidence showing that respondent's larger discounts or rebates were reflected in resale prices, or that they influenced or affected resales of respondent's automotive products and supplies.

76 and 77. Unable to find in this record any reliable probative and substantial evidence of these effects.

78. This case falls far below the standards referred to in:

(1) the Speech of FTC Chairman Edward F. Howrey, entitled "Revaluation of Commission's Responsibilities", ABA Section of Antitrust Law, August 26-27, 1953;

(2) the recent cases of The Maico Company and Pillsbury Mills, Inc. decided by the FTC on December 7th and 28th, 1953, respectively; and

(3) the dissenting opinion of Mr. Justice Jackson in FTC v. Ruberoid Co., 343 U. S. 470, 480, 96 L. Ed. 1081, 1091 (1952). If the Commission and the Courts follow these standards, we submit that any other conclusion by the Hearing Examiner will not be upheld.

(Part 1, Page 112.)

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of MOOG INDUSTRIES, INC., a corporation, formerly titled ST. LOUIS SPRING COMPANY, a corporation.	Docket No. 5723

PROPOSED FINDINGS, CONCLUSIONS AND PROPOSED ORDER BEFORE HEARING EXAMINER.

(Federal Trade Commission Received Jan 11 1954 Secretary.)

To: Hearing Examiner Earl J. Kolb:

Pursuant to Rule XXI of the Rules of Practice of the Federal Trade Commission, Eldon P. Schrup and Francis C. Mayer, attorneys supporting the complaint in the above-entitled proceeding, submit to the Hearing Examiner their proposed findings, conclusions and proposed order therein, together with the reasons therefor, as hereinafter set forth:

First Proposed Finding:

Respondent Moog Industries, Inc., formerly titled St. Louis Spring Company (hereinafter referred to as "Moog"), is a corporation organized and doing business under and by virtue of the laws of the State of Missouri, with principal office and place of business located at 6650 Easton Avenue, St. Louis, Missouri, with selling and distributing subsidiaries known as the St. Louis Spring Suspension Service Company of Texas, Moog Industries, Inc., of Ten-

nessee, Moog Industries, Inc., of Colorado, and St. Louis Spring Suspension Service Company of Nebraska.

Moog is now, and for several years last past has been, engaged in the business of the manufacture, sale and distribution of automotive products and supplies, principally coil action parts, leaf springs, coil springs, chassis parts, piston rings and other related items. Said products and supplies are sold by the respondent for use, consumption, or resale within the United States and the District of Columbia, to different purchasers of the same therein located, and respondent causes said products and supplies, so sold, to be shipped to the purchasers thereof located in states other than the state or states wherein said shipment or transportation originated. (Part 1, Page 114)

Moog maintains, and at all times mentioned herein had maintained, a course of trade in commerce in said products and supplies among and between the states of the United States and in the District of Columbia.

Moog, in the course and conduct of its business, as aforesaid, is now and since June, 1936, has been, engaged in active and substantial competition with other corporations, partnerships, firms and individuals manufacturing, selling and distributing comparable automotive products and supplies in commerce to purchasers of the same in manner and method and for the purposes as aforesaid. Many of said purchasers and many of the aforesaid purchasers from Moog are competitively engaged each with the other.[1]

Second Proposed Finding:

Moog, in the aforesaid course and conduct of its business, has been and is now marketing its above products of like grade and quality under its own brand name of Moog, throughout the forty-eight states, with the aid of twenty-five branches and warehouses maintained in principal cities.[2] In offering its products for sale, Moog classi-

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[1]Page 1 of amended answer; Tr. 6-8; Tr. 120-126; Tr. 195-198; Tr. 1051-1070.

[2]CX 16; Tr. 119, amended answer.

fies said products generally into three lines: leaf spring line, including coil springs and chassis parts; coil action line; and the piston ring line.[1] At all times since 1936, Moog has offered and sold a leaf spring line and a piston ring line to its purchasers, adding the coil action line in 1939, which was supplemented by major additions in 1946.[2]

During the year 1949, Moog sold to approximately 1,200 coil action accounts, 800 leaf spring and chassis parts accounts, and 400 piston ring accounts.[3] In relation to the total sales of Moog, the leaf spring line and coil action line have always predominated, with the piston ring line accounting for a rather small portion of the total overall sales.[4] (Part 1, Page 115)

Third Proposed Finding:

During the year 1949, Moog distributed its products on the basis of contracts with its distributors and other customers hereinafter described, mainly according to the prices shown on the applicable Distributors Net Cost Sheet.[5]

As shown by the exhibits of record, a retroactive merchandise bonus was paid to the purchasers of coil action parts as follows:

Net Purchases During Each Fiscal Year	Retroactive Rebate	Net Purchases During Each Fiscal Year	Retroactive Rebate
Under $1,000	None	$15,000 to $17,499	14%
$ 1,000 to $ 4,999	5%	17,500 to 19,999	15%
5,000 to 7,499	7½%	20,000 to 22,499	16%
7,500 to 9,999	9%	22,500 to 24,999	17%
10,000 to 12,499	10%	25,000 to 27,499	18%
12,500 to 14,999	12%	27,500 and over	19%

On the piston ring line, a merchandise bonus was paid to the purchasers of piston rings on the following basis:

[1]CX 1; Tr. 120-124.

[2]Tr. 83; Tr. 120-124; Tr. 963; Tr. 1058-59.

[3]Tr. 239.

[4]Tr. 125; Tr. 1169.

[5]CX 4A and B; CX 6; CX 15.

Net Purchases During Each Fiscal Year	Retroactive Rebate	Net Purchases During Each Fiscal Year	Retroactive Rebate
Under $2,000	None	$ 9,000 to $ 9,999	13%
$2,000 to 2,999	2%	10,000 to 11,999	14%
3,000 to 3,999	5%	12,000 to 14,999	15%
4,000 to 4,999	7%	15,000 to 17,999	16%
5,000 to 5,999	9%	18,000 to 20,999	17%
6,000 to 6,999	10%	21,000 to 24,999	18%
7,000 to 7,999	11%	25,000 to 29,999	19%
8,000 to 8,999	12%	30,000 and over	20%

Beginning July 1, 1949, Moog introduced a retroactive merchandise bonus plan applicable to the leaf spring line, including coil springs and chassis parts, which was paid on the following basis:

Net Purchases During Each Fiscal Year	Retroactive Bonus	Net Purchases During Each Fiscal Year	Retroactive Bonus
Under $2,000	None	$ 8,000 to $ 9,999	8%
$2,000 to $2,999	3%	10,000 to 14,999	9%
3,000 to 3,999	4%	15,000 to 19,999	10%
4,000 to 4,999	5%	20,000 to 27,499	11%
5,000 to 5,999	6%	27,500 to 34,999	12%
6,000 to 7,999	7%	35,000 and over	13%

(Part 1, Page 116.)

Prior to July 1, 1949, Moog granted to some leaf spring group and other accounts a discount not offered or granted to its leaf spring accounts generally. These accounts and the amounts of discounts were:

Cotton States, Inc.	Greenwood, Miss.	5%
Ozburn, Crow & Yantis Co.	Memphis, Tenn.	8%
Mid-South Distributors	Memphis, Tenn.	5%
Henderson Rim & Wheel Co.	Salt Lake City, Utah	5 and 10%.[1]

Under the above rebate plans purchasers were granted and received rebates by virtue of a retroactive method, thereby receiving on all their individual purchases the rebate according to the rebate bracket applicable to their total annual purchases. Any individual purchase price is retro-

[1]Tr. 205; Tr. 238; Tr. 242; Tr. 249-250.

actively determined by all subsequent purchases according to the terms of the retroactive rebate plan which is totally unrelated to the size or number of the individual purchase. Thus, purchasers buying in identical quantities and dollar amounts at the same time may actually pay different prices for the same merchandise, since such prices are determined by the prior or subsequent purchases made by such purchasers within any given contract year.

Illustrative of the actual net differences in purchase prices paid by Moog purchasers for such merchandise due to the granting by Moog and the receipt by such purchasers of the foregoing rebates and discounts are the exhibits of record, showing tabulations of sales in certain localities.[1] Such exhibits reflect differences in net buying prices in varying amounts and percentages, with some differences amounting to as much as 19%.[2]

The amounts involved in the granting by Moog of the merchandise bonus are substantial and reflect the importance which is attached to said rebates by the various purchasers. Rebates were granted by Moog and received by some but not all the purchasers of the coil action line for the following years in the following amounts:[3]

1947	$ 163,392.66
1948	203,478.53
1949	106,255.91

(Part 1, page 117.)

Rebates were also granted by Moog and received by some but not all the purchasers of the piston ring line for the following years in the following amounts:[4]

1947	$ 57,561.89
1948	21,011.19
1949	22,380.88

[1]CX 61, 62, 63, 64, 65, 66, 67 and 68; CX 79.

[2]CX 68.

[3]CX 44A, 45A and 46A.

[4]CX 50A, 51A and 52A.

Rebates were likewise granted by Moog and received by some but not all purchasers on purchases of the leaf spring line in the year 1950 in the amount of $81,300.00.[1] Particularly significant, in analyzing the various rebate plans of Moog, are the figures appearing on Commission's Exhibit 69, a copy of which is attached hereto.

(Part 1, Page 118.)

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[1]CX 70A and B 71, B and C, 72, 73, 74, 75, 76, 77. Note: This represents only a portion of the purchasers receiving rebates on purchases of this line.

Summary by Discount Brackets of No. of Customers and Average Annual Coil Action Purchases — 1947, 1948 and 1949:

Net Purchases	Rebate	1947 No. of Customers	1947 Average Annual Purchases	1948 No. of Customers	1948 Average Annual Purchases	1949 No. of Customers	1949 Average Annual Purchases
Under $1,000	None		$		$		$
$ 1,000 to 4,999	5%	369	2,238	425	2,143	352	1.911
5,000 to 7,499	7½%	38	6,235	59	5,895	27	5,499
7,500 to 9,999	9	22	8,279	26	7,705	4	8,372
10,000 to 12,499	10	8	11,031	8	8,770	6	10,660
12,500 to 14,999	12	5	13,676	10	11,945	4	13,667
15,000 to 17,499	14	2	16,237	2	13,715	5	9,277
17,500 to 19,999	15	3	18,966	5	15,138	2	18,735
20,000 to 22,499	16	1	20,940	0	—	0	—
22,500 to 24,999	17	1	22,734	1	22,987	1	23,444
25,000 to 27,499	18	0	—	0	—	1	26,887
27,500 and over	19	7	38,488	11	36,065	5	33,471

(Part 1, Page 119)

This exhibit shows that in 1947, 466 purchasers participated in the rebate plan on coil action line sales; in 1948, 557 purchasers participated; and in 1949, 407 purchasers participated in the rebate plan. In none of the years selected did as many as half of the purchasers from Moog receive a rebate on their purchases, and for the most part, only approximately one-third of the purchasers from Moog were favored with the lower prices resulting from the granting of said rebates. This graphically demonstrates the inequities arising from the annual volume rebate plan based solely upon total yearly purchases and which completely ignores the size and quantity of individual purchases. The record in this case does not demonstrate that the purchasers receiving such rebates, purchased in single transactions in as large or larger amounts than that great majority of purchasers who did not participate in the rebate plan.

Fourth Proposed Finding:

Moog, in the course and conduct of its business, has been and is now marketing its above products of like grade and quality through its Moog distributors and through its other customers—The Moog Chassis Parts Wholesaler; The Moog Parts Jobber; and The Moog Associate Ring Jobber.[1]

The Moog Chassis Parts Wholesaler purchases Moog suspension parts under the terms of the Moog Chassis Parts Wholesaler Agreement and according to the prices shown on the Chassis Parts Wholesalers Net Cost Sheet.[2] The Agreement, prepared and distributed by Moog, provides for the maintenance of a certain minimum of stock of Moog parts. Each Moog Chassis Parts Wholesaler Agreement specifically provides for the signature of the Chassis Parts Wholesaler, the signature of the Moog distributor, and the acceptance signature of Moog. The prices appearing on the Chassis Parts Wholesaler's net cost price sheet are substantially higher than those appearing on the Moog Distributors Net Cost Sheet.[3]

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[1]CX 10, 11, 12, 13; Tr. 182-6.

[2]CX 10 and 15.

[3]CX 15.

The Moog Parts Jobber purchases Moog parts under the terms of the Moog Parts Jobber agreement and according to prices shown on the Moog Confidential Net Cost Sheet.[1] The Agreement, prepared (Part 1, Page 120) and distributed by Moog, provides for the maintenance of certain minimum stocks of Moog parts. Each Moog Parts Jobber Agreement specifically provides for the signature of the Moog jobber, the signature of the Moog distributor, and the acceptance signature of Moog.

The Moog Associated Ring Jobber purchases Moog piston rings under the terms of the Moog Associated Ring Jobber Contract and according to prices shown on the Moog Associated Ring Jobbers Net Cost Sheet.[2] The contract, prepared and distributed by Moog provides for the maintenance of a certain minimum inventory of Moog piston rings. Each Moog Associated Ring Jobber Contract specifically provides for the signature of the Moog jobber, the signature of the Moog distributor and the acceptance signature of Moog.

Moog publishes and causes to be circulated to the above three classifications of accounts, the catalog material and pertinent price lists, including resale price lists. Moog representatives call upon all of the above accounts as a regular part of their duties for the purpose of inspecting stocks and drawing up orders for submission to Moog.[3] The degree of control exercised by Moog over sales to the Moog Chassis Parts Wholesaler, the Moog Parts Jobber and the Moog Associated Ring Jobber was such that said sales were in all essential respects sales by Moog. These indirect accounts are, therefore, "purchasers" from Moog within the meaning of the Clayton Act, as amended.[4]

(Part 1, Page 121)

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[1]CX 11, 12 and 15.

[2]CX 13, 15.

[3]Tr. 182-6.

[4]See Docket No. 3977, In the Matter of Champion Spark Plug Co., Findings as to the Facts and Conclusions, Paragraph Nine, decided by the Commission July 10, 1953. See also on such point, In the Matter of Kraft Phoenix Cheese Corp., (1937) 2 FTC 537, 546; In the Matter of Luxow Ltd., (1940) 31 FTC 658; In the Matter of Dentists Supply Co., (1943) 37 FTC 345; Carter Carburetor v. FTC, (1940) 112 F. 2d 722, 731 (C. C. A. 8); Elizabeth Arden v. FTC, (1946) 156 F. 2d 132, 135 (C. C. A. 2).

Fifth Proposed Finding:

MOOG BUYING-GROUP JOBBERS.

Customers so classified purchase Moog products on the basis of the merchandise prices appearing on the current Moog Distributors' Net Cost Sheet. The purchasing procedure in a group-buying operation provides for the forwarding by the individual jobber-member to the seller directly or through the group office of the individual jobber's particular purchase requirement. Merchandise so ordered is shipped by the seller direct to the individual jobber-member with billing for the same being directed to the group office. Monthly settlements are made between the seller and the group office for the aggregate purchase orders of all the jobber-members so received and each jobber-member also settles monthly with the group office for its own individual purchases so made.

Such rebates, discounts and allowances as are collected from the seller by the group office on the aggregate purchases thus made are distributed by the group office to each individual jobber-purchaser in proportion to the amount of such jobber's individual purchases so made.[1]

Illustrative of the monetary benefits derived by the individual jobber-member of such group-buying organizations, as opposed to those individual purchasers buying without the benefits of such group consolidation of purchases, is the following tabulations:[2]

See Attached Tabulation.

(Part 1, Page 122)

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[1]Tr. 52-57; Tr. 299; Tr. 349; 351; Tr. 604; Tr. 704-706; Tr. 863-865.

[2]The figures showing actual net purchases of each jobber-member and the actual amount of discount paid were taken from CX 21 V and CX 21 W.

Automotive Jobber "Group-Buying" Method of Purchasing

	-1-	-2-	-3-	-4-	-5-	-6-
Manufacturer's Published Discount Schedule to Trade						
Net Purchases	**Retroactive Rebate**	**Actual Net Purchases Each Member Jobber**	**Mfr's Schedule Discount Rate Applicable**	**Mfr's Schedule Discount Amount Due**	**Mfr's "Group" Discount Rate**	**Mfr's "Group" Discount Amount Paid**	**Actual Price Difference**
		1. $ 1,369.08	5%	$ 68.45	19%	$ 260.13	$ 191.68
		2. 2,408.24	5%	120.41	19%	457.57	337.16
Under $1,000	None	3. 1,530.00	5%	76.50	19%	290.70	214.20
$ 1,000-$4,999	5%	4. 585.96	None	—	19%	111.33	111.33
5,000- 7,499	7½%	5. 2,594.97	5%	129.75	19%	493.05	363.30
7,500- 9,999	9%	6. 1,483.65	5%	74.18	19%	281.89	207.71
10,000-12,499	10%	7. 3,728.45	5%	186.42	19%	708.41	521.99
12,500-14,999	12%	8. 6,656.06	7½%	609.20	19%	1,264.65	655.45
15,000-17,499	14%	9. 2,759.69	5%	137.98	19%	524.34	386.36
17,500-19,999	15%	10. 3,440.61	5%	172.03	19%	633.72	481.69
20,000-22,499	16%	11. 1,492.70	5%	74.64	19%	283.61	208.97
22,500-24,999	17%	12. 750.92	None	—	19%	142.67	142.67
25,000-27,499	18%	13. 3,610.53	5%	180.53	19%	686.00	505.47
27,500 and over	19%	14. 1,072.02	5%	53.60	19%	203.68	150.08
	Totals	$33,482.88		$1,883.69		$6,361.75	$4,478.06

(Part 1, Page 123)

During the sample year 1949, Moog products were sold to various members of different group-buying organizations entering into the Moog distributors' franchise agreement. Sales were made during 1949 to members of the following group-buying organizations:

Name	Address
Ark-La-Tex Warehouse Distributors, Inc.	Marshall, Texas
Associated Parts Company	Somerville, Mass.
Automotive Jobbers, Inc.	Cleveland, Ohio
Automotive Parts Distributors, Inc.	Athens, Ga.
Automotive Southwest, Inc.	Dallas, Texas
Cotton States, Inc.	Greenwood, Miss.
Metropolitan Automotive Wholesalers	New York, N. Y.
Mid-South Distributors, Inc.	Memphis, Tenn.
Mid-West Warehouse Distributors	Kansas City, Mo.
Ozburn, Crow & Yantis Co.	Memphis, Tenn.
Six-States Associates	Boston, Mass.
Southern California Jobbers, Inc.	Los Angeles, Calif.
Southwest Automotive Distributors,	Los Angeles, Calif.
Southwestern Warehouse Distributors	Dallas, Texas
Warehouse Distributors, Inc.	Chattanooga, Tenn.

Through the above group-buying organizations Moog offered its rebate plan on such a basis to 566 jobber-members of such organizations and approximately 90% of the said jobber-members received rebates in accordance with rebates paid the group-buying organizations on their total purchases.[1]

The rebates and discounts, as shown by the tabulations in evidence, were granted and allowed by Moog on the purchases of each individual member of the said buying-groups irrespective of whether or not the amount of such individual member's purchases met with the requirements of any particular bracket of the Moog merchandising bonus schedules set forth in the Moog distributors' franchise agreement.[2]

It is clear from the foregoing and the testimony and exhibits of record in this proceeding that a group-buying or-

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[1]CX 39-A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X; CX 71A and B.

[2]CX 70A and B; CX 71A, B and C; CX 72, 73, 74, 75, 76 and 77.

ganization is in reality but a bookkeeping device for the collection and distribution of rebates, discounts and allowances received from sellers on the purchases made by its jobber-members. Jobber-members of a group-buying organization so purchasing merchandise from Moog are, therefore, "purchasers" from Moog within the meaning of the Clayton Act, as amended.[1]

(Part 1, Page 124.)

Sixth Proposed Finding:

Moog Automotive products and supplies sold and distributed in the manner as afore-described, are commodities of like grade and quality.[2]

Purchasers of automotive products and supplies located in the same city or town and purchasing Moog merchandise for resale are competitively engaged each with the other in such trade areas.[3] The trade area in which such purchasers are competitively engaged in the resale of Moog merchandise is usually not restricted to the city or town of their mutual location, but may and variously does further extend beyond such limits and into the sales territories of other purchasers also purchasing such merchandise for competitive resale.[4] Thus, Moog Distributors, Moog Chassis Parts Wholesalers, Moog Parts Jobbers and Moog Associated Ring Jobbers are competitively engaged each with the other when some or all resell such merchandise in their respective mutual sales territories.

Seventh Proposed Finding:

The net purchase price paid by purchasers for resale of Moog merchandise is the purchase price paid subject

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[1]Tr. 52-57; Tr. 297; Tr. 302; Tr. 335.

[2]CX 15.

[3]Tr. 299, 301, 306, 310, 322, 337, 363, 370, 375, 384 and 390.

[4]For example, Tr. 297 and 298 (4 salesmen covering New Orleans, and a hundred mile radius); Tr. 309 and 310 (3 salesmen, all of La. and part of Miss.); Tr. 602 (10 salesmen, all of Colorado and Southern Wyoming and Western Kansas). See also Tr. 297, 310, 336, 342, 364, 375, 383, 389, 602 and 725.

to and following all applicable rebates, discounts and allowances.[1] In the observance of the seller's suggested resale price the favorable competitive effect following a lower net purchase price as opposed to a higher net purchase price with relation to the higher profit margin thereby gained by a purchaser for resale, is self-evident.[2] Similarly, in the non-observance of the seller's suggested resale price the ability of the purchaser for resale to offer for sale and sell at a lower price with a higher profit margin resulting from a lower net purchase price as opposed to a higher net purchase price, is obvious.[3]

The importance of the net purchase price difference attributable to the volume rebate schedules contained in the Moog Distributors Franchise in its application to purchases of automotive products and supplies made thereunder is universally recognized by those purchasers who seek to purchase and do purchase the same through the use of a group-buying organizational device.[4] Moog, through recognition of such group-buying organizational device, also secured new and additional customers not previously purchasing Moog products. Each buying group, in order to attain the maximum rebate bracket, actively promotes the

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[1]CX 57.

[2]"Price competition is but one form of competition. Additional service to customers, additional salesmen to call on them, carrying a larger and more varied stock, branch houses, proximity to customers—all aid respondent's customers to stay in business and to prosper. The institution or expansion of these competitive aids depends directly on operating profit margin, a major factor in which, on this record, is cost of merchandise purchased." See Para. Eleven, Initial decision of Hearing Examiner, Docket No. 5771, In the Matter of Namsco, Inc., adopted by the Commission as of March 17, 1953 (Part 1, Page 125).

[3]See "III. Discounts to purchasers of by-products" opinion of United States Supreme Court, Corn Products Refining Company v. F.T.C. (1945) 324 U. S. 726.

[4]CX 58A and B 59, 25-Z-14, 24-O, 24-P; Tr. 709-710 and 865. See also Tr. 860 where, in response to the question as to why the jobber-witness joined a buying group, the following answer was made: "By buying through the group we would get a better price."

Moog line of products as opposed to competitive lines not made available under the group purchasing arrangement.[1]

The record, based on the tabulations in evidence in this proceeding, discloses substantial differences in net purchase prices paid by competing purchasers of Moog merchandise for resale far exceeding in amount a sum represented by the 2% cash discount extended and taken by these purchasers on such purchases. The substantiality of the amount represented by such price differences with relation to the purchasers' net profit margin is conclusively shown when compared with the competitive effect of the amount represented by the 2% cash discount always taken on such purchases, when available.[2]

(Part 1, Page 126.)

Eighth Proposed Finding:

The numerous prohibited discriminatory price differentials granted by Moog and received by the purchasers from Moog, as set forth on the various tabulations in evidence in this proceeding, are not such differentials as make only due allowances for differences in the cost of manufacture, sale or delivery by Moog resulting from differing methods or quantities in which such commodities were sold or delivered to such favored purchasers.

The record in this matter is barren, not only of any adequate showing of a cost-justification, but of any attempt by Moog to show a cost justification for any of its aforesaid prohibited price differentials.[3]

Reference must again be made to the fact that involved in this proceeding is a retroactive volume rebate granted on the sole basis of total purchases, which ignores entirely

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[1]CX 20-O, 25-Z-7, 25-Z-14; Tr. 605, 710. See also CX 27-R, which states; "Its purpose is to offer to manufacturers its business as nearly 100% as possible." See also Docket No. 3840. In the Matter of Simmons Co., 29 FTC 727, 743-44, 746.

[2]CX 57; 314-15, 323-24, 398-401, 771. Particular reference in such connection is made to the following cases: Docket No. 3200, H. C. Brill Co., Inc., 26 FTC 666, 677-81, and FTC v. Morton Salt Company, 334 U. S. 37.

[3]See H. C. Brill Co., Inc., supra, 26 FTC 666, 679-680.

the costs attendant to individual purchases and their size and number.

Ninth Proposed Finding:

The numerous prohibited discriminatory price differentials granted by Moog and received by the purchasers from Moog, as set forth on the various tabulations in evidence in this proceeding, were not made in good faith to meet the equally low, lawful price of a competitor.[1]

Pertinent to any attempted defense by Moog in such regard would be the corresponding prices and discount structures of its competitors for an identical time period. Moog has made no attempt to and has not related any of its competitors' prices and discount structures to its own discriminatory prices and discount structures for such a time period sufficient to meet any test of probative value.[2]

The testimony and exhibits in evidence relating to its competitors' pricing practices, as presented by Moog in this proceeding, fail to show that Moog in any instance granted its aforesaid discriminatory prices to each favored purchaser to meet in good faith the equally low, lawful price of a competitor in order to retain such purchaser as a customer.[3]

(Part 1, Page 127.)

Moog's further claim that its prohibited discriminatory prices to its customers were necessitated by the low replacement part prices given by vehicle manufacturers to their customers, while not relevant to any defense in this proceeding, is negatived by the documentary evidence presented in such connection. In each of the three examples selected by Moog the net price from the vehicle manufacturer to its car dealer is substantially higher than the net price for a comparable part sold by Moog to its purchasers. The difference in the price in favor of the Moog purchaser is even more substantial when a volume

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[1]See Standard Oil Co. v. FTC, (1951) 340 U. S. 231; Also FTC v. A. E. Staley Manufacturing Co., (1945) 324 U. S. 746.

[2]RX 6A-D, 13, 22, 24, 25A-D; Tr. 1119-43.

[3]Tr. 1130.

rebate is granted by Moog, thus further lowering the net price to the purchaser from Moog.[1]

CONCLUSIONS.

1. Moog products purchased for resale are of like grade and quality.

2. Moog's different rebates, discounts and allowances on purchase price results in a substantially higher price being paid by some than other competing purchasers of said products for resale.

3. Moog's prohibited discriminatory price, when reflected in the resale price of said products, enables the favored purchaser to attract business away from the non-favored purchaser, or force the non-favored purchaser to resell at a substantially reduced profit. In the observance of a suggested resale price, the above prohibited discriminatory price enables the favored purchaser to resell said products at a substantially higher profit margin than that obtainable by the non-favored purchaser in such resale.[2]

4. Competitive purchasers from Moog of the foregoing products for resale in their respective mutual sales territories are the following:

(a) Moog Distributors;

(b) Moog "Group-Buying" Jobbers;

(c) Moog Chassis Parts wholesalers;

(d) Moog Parts Jobbers; and

(e) Moog Associate Ring Jobbers.[3]
(Part 1, Page 128.)

5. The higher net purchase prices paid by the non-favored purchasers of said products are such as may tend

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[1]T 1088-90; T. 1122-25.

[2]Section 2(a) is violated whether or not the seller's lower discriminatory price is reflected in the purchaser's resale price. See Corn Products Refining Co. v. F.T.C., 324 U. S. 726.

[3]See F.T.C. v. Ruberoid Co., (1952) 343 U. S. 470, at 475, with reference to the above descriptive terminology as applied by the seller to "purchasers who in fact compete."

to and do injure, destroy and prevent competition between Moog and its seller competitors,[1] and between the said favored and non-favored purchasers competitive in their respective mutual sales territories.[2]

(Part 1, Page 129.)

PROPOSED ORDER.[3]

It Is Ordered that respondent Moog Industries, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in or in connection with the sale, for replacement purposes, of automotive products and supplies in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

A. Discriminating, directly or indirectly, in the price of said automotive products and supplies of like grade and quality:

1. By selling, in competition with others said products to any purchaser at net prices higher than the net price charged any other purchaser reselling at the same level of distribution as the purchaser paying the higher price;

2. By selling to any direct purchaser at net prices higher than the net prices charged any other direct purchaser who, in fact, competes in the resale and distribution of said products with the purchaser paying the higher price.

3. By selling to any indirect purchaser at net prices higher than the net prices charged any other direct

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[1]See Footnote 3, page 11.

[2]See Footnote 4, page 11.

[3]See O. C. D. in Docket No. 6042, In the Matter of American Biltrite Rubber Company, Inc., issued by the Commission March 9, 1953; and O. C. D. in Docket No. 3977, In the Matter of Champion Spark Plug Company, issued by the Commission July 10, 1953. See also F.T.C. v. Ruberoid Co., supra, to the effect that the order need not be limited in its prohibitions to the specific price differentials shown to have been adopted in past violations of the statute (Part 1, Page 130).

or indirect purchaser who, in fact, competes in the resale and distribution of said products with the purchaser paying the higher price.

Wherefore, it is requested that the Hearing Examiner find that the respondent's above-described acts and practices are in violation of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended (U. S. C., Title 15, Sec. 13), and that the above proposed order to cease and desist be herein entered.

Respectfully submitted,

/s/ Eldon P. Schrup
/s/ Francis C. Mayer
Counsel Supporting the Complaint.

January 8, 1954.
(Part 1, Page 131.)

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

In the Matter of MOOG INDUSTRIES, INC., a corporation, formerly titled ST. LOUIS SPRING COMPANY, a corporation.	Docket No. 5723

ORDER DISPOSING OF PROPOSED FINDINGS AND CONCLUSIONS:

(Federal Trade Commission Received Mar 8 1954
Recording Secretary.)

This matter is before the Hearing Examiner for disposition of proposed findings of fact and conclusions which were filed by counsel supporting the complaint and counsel for the respondent. The Hearing Examiner has given consideration to the various proposed findings and conclusions submitted by counsel and the record herein and has made the following rulings with reference to such proposed findings and conclusions:

I.

Proposed Findings and Conclusions Filed by Counsel in Support of the Complaint.

Proposed Findings 1-2. Adopted in substance.

Proposed Finding 3. Adopted in substance, except as to discounts prior to July 1, 1949, to certain group buyers which is not material.

Proposed Finding 4. Refused as not material.

Proposed Finding 5. Adopted in substance.

Proposed Finding 6. Adopted to the extent that products are of like grade and quality and that purchasers for resale are in competition in their respective trading areas. (Part 1, Page 135.)

Proposed Findings 7-9. Adopted in substance.

Proposed Conclusions 1-3 and 5. These conclusions have been adopted in substance, either in the conclusions to the Initial Decision or have been covered by the Initial Decision itself.

Proposed Conclusion 4. Refused.

II.

Proposed Findings and Conclusions Submitted by Counsel for Respondent.

The proposed findings submitted by respondent have not been presented in such a manner as to permit a ruling on specific proposed findings. The findings proposed with reference to organization of respondent, its method of doing business and its pricing practices, and proposed findings as to absence of proof of primary line injury to competition have been adopted in substance. Proposed findings that respondent's business is not substantial; that evidence does not show respondent's customers are competitively engaged; that interchangeability should be the controlling test of like grade and quality; and that no injury to competition has been shown, have been refused for reasons more fully set out in the Initial Decision. The remaining proposed findings are refused as not material, not essential

to the Initial Decision or constituting conclusions and argument rather than findings of fact.

The document submitted by the respondent as proposed findings has been duly considered by the Hearing Examiner, all matters raised therein have been fully covered in detail in the Initial Decision filed in this proceeding.

/s/ Earl J. Kolb
Hearing Examiner.

March 5, 1954.

Mailed Mar 24 1954 Legal

INITIAL DECISION

By Earl J. Kolb Hearing Examiner

(Federal Trade Commission Received Mar 8 1954
Records Serv. Secretary AAP)

This proceeding is before the undersigned Hearing Examiner for final consideration on the complaint, answer thereto, testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel.

1. The complaint in this proceeding charges that the respondent Moog Industries, Inc., has discriminated in price between different purchasers of its products in violation of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U. S. C., Title 15, Section 13).

2. The price differentials which are charged to be in violation of the Clayton Act arise from respondent's pricing practices, involving the granting of an annual retroactive volume rebate to its customers and also in the granting of such retroactive volume rebate to group purchasers on the basis of their aggregate purchases instead of upon the individual purchases of the members.

3. The general system of pricing used by the respondent, as developed by the record, and the variations therefrom in the case of group buyers, is not disputed by the respondent but was instead defended on the basis that the

merchandise sold by the respondent to its various

(Part 1, Page 137) (This Transcript as filed is in 9 parts, and references to the Transcript are to particular part and page.)

customers was not of like grade and quality; that the pricing practices of respondent has not resulted in any injury to competition; and that respondent's prices, discounts and allowances were made to meet competition. No attempt was made by respondent to justify its price differentials on the basis of differences in cost of manufacture, sale or delivery. Evidence as to primary line injury to competition between respondent and its competitors is not sufficient to warrant any finding, and consideration of this matter must be limited to secondary line injury to competing customers of the respondent.

4. Respondent Moog Industries, Inc., is a Missouri corporation with its principal office and place of business located at 6650 Easton Avenue, St. Louis, Missouri, with selling and distributing subsidiaries known as the St. Louis Spring Suspension Service Company of Texas, Moog Industries, Inc., of Tennessee, Moog Industries, Inc., of Colorado, and St. Louis Spring Suspension Service Company of Nebraska.

5. Since June, 1936, the respondent has been engaged in the manufacture and in the sale and distribution in interstate commerce of automotive replacement parts, consisting of coil action parts, leaf springs, coil springs, chassis parts, piston rings and other related items in competition with other concerns who were also engaged in the sale and distribution of similar products in interstate commerce.

6. The market in automotive replacement parts is highly competitive. The amount of business transacted by the respondent in the replacement parts field is substantial. In an advertising circular distributed by respondent to its customers in 1949, it was stated "The company with a small beginning back in 1919, has become one of the country's large industries and recently consolidated its manufacturing divisions: St. Louis Spring Co., Moog Coil Action Parts Co., and Moog Piston Ring Company, into

Moog Industries, Inc." The respondent sells its products in every state of the United States and in 1950 maintained 25 branches and warehouses in the principal cities.

7. The respondent, during the times mentioned herein, has sold its replacement parts to jobbers, who were designated by the respondent as distributors, who

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resold such products to garages, service stations, fleet owners and to other jobbers. The respondent separated the products into three classifications (a) leaf spring line, which consists of leaf springs, coil springs, tie rod ends, shackles and kingbolts; (b) Coil action line, which consists of front wheel spring assembly parts exclusive of coil springs; and (c) piston ring line. A portion of the replacement parts in each of these lines was sold in the form of kits or packages containing complete unit installations for various makes of cars. From time to time respondent issued its distributor's price list on each of these lines which listed the basic prices used by the respondent in the sale and distribution of its various replacement parts. Any discounts, allowances or rebates were off said distributor's price list. Respondent also from time to time issued suggested resale price lists for use by distributors and dealers in the resale of respondent's products. During the year 1949, respondent sold approximately 1,200 coil action accounts, 800 leaf spring and chassis parts accounts, and 400 piston ring accounts. In relation to total sales, the leaf spring line and coil action line have always predominated with the piston ring line accounting for a small proportion of the total overall sales.

8. The net purchase price paid by distributors for respondent's products is the purchase price paid subject to and following all applicable rebates, discounts and allowances. The automotive replacement parts sold and distributed by respondent were all of one grade and quality. Respondent sold such products of like grade and quality to its distributors at varying net prices. Such distributors of respondent were competitively engaged in the resale of

respondent's replacement parts in the various territories and places where such distributors carried on their businesses.

9. The annual volume rebates, provided for in respondent's pricing plan, were incorporated in, and made a part of, its distributor franchise agreement. The volume rebate on the coil action line and the piston ring line has been a retroactive volume rebate in substantially the same amount since 1947. Prior to July 1, 1949, respondent allowed a non retroactive rebate on its leaf spring line, but subsequent thereto has granted a retroactive volume rebate. The retroactive volume rebates as set out in respondent's franchise agreements with its distributors are as follows:

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Coil Action Parts:

Net Purchases During Each Fiscal Year	Retroactive Rebate	Net Purchases During Each Fiscal Year	Retroactive Rebate
Under $1,000	None	$15,000 to $17,499	14%
$ 1,000 to $4,999	5%	17,500 to 19,999	15%
5,000 to 7,499	7½%	20,000 to 22,499	16%
7,500 to 9,999	9%	22,500 to 24,999	17%
10,000 to 12,499	10%	25,000 to 27,499	18%
12,500 to 14,999	12%	27,500 and over	19%

Piston Ring Line:

Net Purchases During Each Fiscal Year	Retroactive Rebate	Net Purchases During Each Fiscal Year	Retroactive Rebate
Under $2,000	None	$ 9,000 to $ 9,999	13%
$2,000 to 2,999	2%	10,000 to 11,999	14%
3,000 to 3,999	5%	12,000 to 14,999	15%
4,000 to 4,999	7%	15,000 to 17,999	16%
5,000 to 5,999	9%	18,000 to 20,999	17%
6,000 to 6,999	10%	21,000 to 24,999	18%
7,000 to 7,999	11%	25,000 to 29,999	19%
8,000 to 8,999	12%	30,000 and over	20%

Leaf Spring Line, Including Coil Springs and Chassis Parts:

Net Purchases During Each Fiscal Year	Retroactive Rebate	Net Purchases During Each Fiscal Year	Retroactive Rebate
Under $1,000	None	$11,000 to $14,999	11%
$1,000 to 2,999	5%	15,000 to 19,999	12%
3,000 to 4,999	7%	20,000 to 27,499	13%
5,000 to 7,999	9%	27,500 to 34,999	14%
8,000 to 10,000	10%	35,000 and over	15%

In addition to the above volume rebate, the respondent allowed a 10 percent warehousing and redistributing commission to distributors who resold respondent's products to other jobbers who had been approved by the respondent, provided the combined earnings of the warehousing and redistributing commission and the volume rebate on any line cannot exceed the earnings figured at the maximum rebate for that line. The retroactive volume rebate was paid by respondent on all purchases of the distributor

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including merchandise resold by the distributor to other jobbers.

10. Under the retroactive rebate plan, purchasers were granted and received rebates on all their individual purchases according to the rebate bracket applicable to their total annual purchases. Any individual purchase price was retroactively determined by the total of all purchases during the year according to the terms of the retroactive rebate plan.

11. The amounts involved in the granting by respondent of the volume rebates were substantial and reflect the importance which was attached to said rebates by the various purchasers. Rebates were granted by respondent and received by some, but not all, the purchasers of the coil action line for the following years in the following amounts:

1947	$163,392.66
1948	203,478.53
1949	106,255.91

Rebates were also granted by respondent and received by some, but not all, the purchasers of the piston ring line for the following years in the following amounts:

1947	$ 57,561.89
1948	21,011.19
1949	22,380.88

Rebates were likewise granted by respondent and received by some, but not all, purchasers on purchases of the leaf spring line in the year 1950 in the amount of $81,300.

12. During the year 1949, respondent sold its products to jobber members of various group buying organizations, entering into the Moog distributor's franchise agreement. Sales were made during 1949 to members of the following group buying organizations:

Name	Address
Ark-La-Tex Warehouse Distributors, Inc.	Marshall, Texas
Associated Parts Company	Somerville, Mass.
Automotive Jobbers, Inc.	Cleveland, Ohio
Automotive Parts Distributors, Inc.	Athens, Ga.
Automotive Southwest, Inc.	Dallas, Texas

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Cotton States, Inc.	Greenwood, Miss.
Metropolitan Automotive Wholesalers	New York, N. Y.
Mid-South Distributors, Inc.	Memphis, Tenn.
Mid-West Warehouse Distributors	Kansas City, Mo.
Ozburn-Crow & Yantis Co.	Memphis, Tenn.
Six-States Associates	Boston, Mass.
Southern California Jobbers, Inc.	Los Angeles, Calif.
Southwest Automotive Distributors	Los Angeles, Calif.
Southwestern Warehouse Distributors	Dallas, Texas
Warehouse Distributors, Inc.	Chattanooga, Tenn.

13. The purchase procedure in a group buying operation provided for the forwarding of purchase orders by the

individual jobber member to the seller directly or through the group office. Merchandise so ordered was shipped by the respondent direct to the individual jobber member with billing for same being directed to the group office. Monthly settlements were made between respondent and the group office for the aggregate purchase orders of all the jobber members so received and each jobber member also settles monthly with the group office for his own individual purchases so made. The annual volume rebate allowed by the respondent was based upon the aggregate purchases of the group members and was paid to the group office, which in turn distributed such volume rebate to the jobber members in proportion to the amount of such jobber's individual purchases. The rebates and discounts, as shown by tabulations in evidence, were granted and allowed by respondent to each individual member of the said buying groups on the basis of the total purchases of all the members irrespective of whether or not the amount of such individual member's purchases met with the requirements of any particular bracket of respondent's volume rebate schedules set forth in the respondent's distributors' franchise greement. The group buying organization was in reality a bookkeeping device for the collection of rebates, discounts and allowances received from sellers on purchases made by its jobber members. Such jobber members, in fact, purchase their requirements of respondent's products direct from the respondent and at the same time receive a more favorable price or higher rebate based upon the combined purchases of all of the members.

14. Illustrative of the monetary benefits derived by the individual jobber member of such group buying organizations, as opposed to those individual purchasers buying without the benefits of such group consolidation of purchases is the following tabulation taken from Commission's Exhibits 21-V and 21-W, dealing with the transactions between respondent and the Mid-South Distributors, Inc.:

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AUTOMOTIVE JOBBER "GROUP-BUYING" METHOD OF PURCHASE

-1-	-2-	-3-	-4-	-5-	-6-
Manufacturer's Published Discount Schedule to Trade					
Net Purchases	Retroactive Rebate	Actual Net Purchases Each Member Jobber	Mfr's Schedule Discount Rate Applicable	Mfr's Schedule Discount Amount Due	Mfr's "Group" Discount Rate	Mfr's "Group" Discount Amount Paid	Actual Price Difference
		1. $ 1,369.08	5%	$ 68.45	19%	$ 260.13	$ 191.68
		2. 2,408.24	5%	120.41	19%	457.57	337.16
Under $1,000	None	3. 1,530.00	5%	76.50	19%	290.70	214.20
$ 1,000-$4,999	5%	4. 585.96	None	—	19%	111.33	111.33
5.000- 7,499	7½%	5. 2,594.97	5%	129.75	19%	493.05	363.30
7,500- 9,999	9%	6. 1,483.65	5%	74.18	19%	281.89	207.71
10,000-12,499	10%	7. 3.728.45	5%	186.42	19%	708.41	521.99
12,500-14,999	12%	8. 6,656.06	7½%	609.20	19%	1,264.65	655.45
15,000-17,499	14%	9. 2,759.69	5%	137.98	19%	524.34	386.36
17,500-19,999	15%	10. 3,440.61	5%	172.03	19%	653.72	481.69
20,000-22,499	16%	11. 1,492.70	5%	74.64	19%	283.61	208.97
22,500-24,999	17%	12. 750.92	None	—	19%	142.67	142.67
25,000-27,499	18%	13. 3,610.53	5%	180.53	19%	686.00	505.47
27,500 and over	19%	14. 1,072.02	5%	53.60	19%	203.68	150.08
	Totals	$33,482.88		$1,883.69		$6,361.75	$4,478.06

15. In following the pricing practices hereinabove described, respondent has discriminated in price by means of rebates allowed by it in the sale of its various automotive products and related items as between respondent's competing distributors and also between respondent's distributors and competing group buying jobbers, and the effect of such discriminations may be to substantially lessen, injure, destroy or prevent competition between customers receiving the benefit of said discriminations and the customers who do not receive the benefit of such discriminations.

16. The respondent did not grant exclusive territory to any of its customers and has had more than one distributor in various trade areas who were, in fact, in competition with each other and also in competition with group buying jobbers, who sold respondent's replacement parts to dealers and other purchasers in their respective trade areas. The price discriminations received by some distributors as compared with others, competing with them in the same trade are, as a result of respondent's pricing plan, is shown by a number of tabulations taken from the respondent's books and records which were received in evidence as Commission's Exhibits 61 through 79-G, inclusive. These tabulations show the prices paid and the rebates received by purchasers located in various trade areas throughout the United States during the years 1947 through 1950. Testimony was taken of distributors of the respondent in four trading areas, as shown on the tabulations—New Orleans, Memphis, Denver, and Dallas. The amounts purchased by the distributors in these areas and the discounts and rebates received by them on both the leaf spring line and the coil action line are as follows:

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Leaf Spring, Coil Spring and Chassis Parts Line:

Name of Purchaser	Net Purchases	Amount	Percentages
New Orleans			
Greiner Auto Parts Co.*	$ 3,373.71	$ 472.32	14.00
Auto Chassis & Spring Co.	1,687.68	84.38	5.00
Dealers Truckstell Sales, Inc.	447.30	22.36	5.00
Memphis			
Mills-Morris Co.*	5,301.09	792.84	14.96
Ozburn-Abston & Co.	14,681.31	2,201.12	14.99
J. B. Cook Auto Machine Co.	1,260.25	189.04	15.00
Dealers Truckstell Sales, Inc.	922.54	46.13	5.00
McKee-Moog Spring Co.	26,230.04	3,409.91	13.00
Dallas			
Automotive Appliance Co.*	216.63	26.00	12.00
Motor Supply Co. of Dallas*	1,301.62	156.19	12.00
American Gear & Parts Co.*	553.76	74.59	13.47
Terry Automotive Supply*	955.42	143.31	15.00
Henderson Auto Parts	523.18	–0–	–0–
Truett-Worrell Spring & Aligning	4,090.16	298.15	7.29

*Greiner Auto Parts Co. was a member of Cotton States, Inc., a group buying organization; Mills-Morris Co., a member of Mid-South Distributors, Inc.; Ozburn-Abston & Co., a member of Ozburn-Crow & Yantis Co.; Automotive Appliance Co. and Motor Supply Co. of Dallas, members of Ark-La-Tex Warehouse Distributors, Inc.; American Gear & Parts Co., a member of Automotive Southwest, Inc., and Terry Automotive Supply, a member of Southwestern Warehouse Distributors.

Coil Action Line:

Name of Purchaser	Net Purchases after deducting cash discount and excise tax and other credits	Amount of Rebate	Percentage
New Orleans			
Auto Spring & Brake Serv.	$5,765.40	$ 432.41	7½%
Auto Chassis & Spring Co.	296.30	–0–	–0–
Auto Shock Absorber Sales	1,241.69	66.69*	5%
Greiner Auto Parts Co.*	749.88	67.48	9%

Memphis			
J. B. Cook Auto & Machine Co.	1,643.60	164.36	10%
McKee-Moog Spring Co.	5,497.27	412.30	7½%
Ozburn-Abston Co.*	9,101.10	1,729.21	19%
Mills-Morris Co.*	1,546.91	247.51	16%
Denver			
Foster Auto Supply Co.	56.83	10.38**	17%
Steckel Auto Supply Co.	2,646.06	132.30	5%
B. K. Sweeney Elec. Co.	3,548.45	177.42	5%
Western Spring Service Co.	900.67	–0–	–0–

*Greiner Auto Parts Co. was a member of Cotton States Inc., a group buying organization; Ozburn-Abston Co., a member of Ozburn-Crow & Yantis Co.; and Mills-Morris Co., a member of Mid-South Distributors, Inc.

**Computed on "Net Sales" before deducting "Cash Discount" and "Excise Tax".

17. There is nothing in the record to indicate that the above trading areas are unique or different from other trading areas where respondent sells its products at differing prices. It is therefore concluded that competitive conditions shown to exist in these four areas, with respect to purchase and resale of respondent's products are typical and representative of the other areas in the United States and that respondent's distributors reselling respondent's products in the same trading area are in competition with each other in the resale of such products.

18. The inequities arising from the annual volume rebate plan based solely on total yearly purchases and which completely ignores the size and quantity of individual purchases is illustrated by Commission's Exhibit 69 which is set out as follows:

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D. 5723 — MOOG INDUSTRIES, INC.

Summary by Discount Brackets of No. of Customers and Average Annual Coil Action Purchases — 1947, 1948 and 1949.

Net Purchases	Rebate	1947 No. of Customers	1947 Average Annual Purchases	1948 No. of Customers	1948 Average Annual Purchases	1949 No. of Customers	1949 Average Annual Purchases
Under $1,000	None		$		$		$
$ 1,000 to 4,999	5%	369	2,238	426	2,143	352	1,911
5,000 to 7,499	7½%	38	6,235	59	5,895	27	5,499
7,500 to 9,999	9	22	8,279	26	7,705	4	8,372
10,000 to 12,499	10	8	11,031	8	8,770	6	10,660
12,500 to 14,999	12	5	13,676	10	11,945	4	13,667
15,000 to 17,499	14	2	16,237	2	13,715	5	9,277
17,500 to 19,999	15	3	18,966	5	15,138	2	18,735
20,000 to 22,499	16	1	20,940	0	—	0	—
22,500 to 24,999	17	1	22,734	1	22,987	1	23,444
25,000 to 27,499	18	0	—	0	—	1	26,887
27,500 and over	19	7	38,488	11	36,065	5	33,471

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This exhibit shows that in 1947, 456 purchasers participated in the rebate plan on coil action line sales; in 1948, 557 purchasers participated; and in 1949, 407 purchasers participated in the rebate plan. In none of the years selected did as many as half of the purchasers from respondent receive a rebate on their purchases, and for the most part, only approximately one-third of the purchasers from respondent were favored with the lower prices resulting from the granting of said rebates.

19. The record, based upon the tabulations in evidence in this proceeding, disclosed substantial differences in the net purchase prices paid by competing purchasers of respondent's products for re-sale. The substantiality of the amount represented by such price differences with relation to the purchasers' net profit margin is conclusively shown when compared with the competitive effect of the amount represented by the 2 percent cash discount. Distributors of respondent, who testified in this proceeding, stated that they invariably took advantage of the 2 percent cash discount as being essential in the conduct of their respective businesses and that such discount reduced the cost of acquisition of respondent's products. This 2 percent reduction in cost of acquisition is substantial and may account for a substantial portion of the margin of profit. One jobber of respondent, ranking third or fourth in the Dallas, Texas, trade area, testified that the overall net profit for his company ran less than 4 percent. By the very nature of the business operated by the various jobber customers of respondent their profit was necessarily based upon an accumulation of small margins of profit on many items. Some of the witnesses handled 15 to 75 lines, involving an aggregate of thousands of items. Practically all of respondent's jobber customers extend the same cash discount they received to their customers, however, on a mark-up of acquisition cost, the discount actually given by such customer to its purchaser on resale will be greater than the 2 percent cash discount.

20. In the course of this proceeding it was the contention of the respondent that no injury to competition existed by reason of respondent's pricing prac-

tices because its customers generally followed the suggested resale price lists, issued by the respondent, in the resale to their respective customers. In support of this contention, the respondent introduced testimony of a

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number of distributors that they had not suffered any injury by reason of differing or higher prices paid by them as compared with prices paid by competitors in their respective trade areas. On cross-examination, these witnesses admitted that their reasons for stating that they had not been competitively injured was due to the fact that their competitors all followed the suggested resale price of the respondent and that there was no price competition in their particular trade areas.

21. The fact that price competition may have been eliminated in some areas because of uniformity of resale price does not eliminate the question of injury to competition. Any saving or advantage in price obtained by one competitor as against another increases his margin of profit, permits additional services to be extended to customers, the use of additional salesmen, the carrying of larger and more varied stocks, and the establishment of branch houses for expansion of the business. While price competition among customers was more or less nonexistent, except in isolated instances, in the areas where testimony was taken, the possibility of price competition is ever present where lower prices to certain competing customers exists.

22. The contention by the respondent that no injury to competition can be proven or inferred where the discriminatory discount has not been used to reduce the sale price, is without merit as a defense in this proceeding and has been so held by the United States Supreme Court. In F. T. C. v. Morton Salt Company, 334 U. S. 37, the Supreme Court held that where purchasers, buying and competing in the resale of the same merchandise, are charged different prices therefor, the conclusion is inescapable that in-

jury to the competitive efforts of the unfavored purchasers is present. In this connection the Court said, "It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence." In the present case the evidence more than meets this test.

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23. It was also contended by the respondent that the replacement parts sold by it to competing customers have not been shown to be of like grade and quality, and as a basis for this contention respondent has taken the position that such parts to be of like grade and quality, under 2(a) of the Clayton Act, must pass the test of interchangeability. This would, in effect, be saying that merchandise to be of like grade and quality must be identical. If Congress had intended to so require it would have said so. We do not have here different grades of merchandise designed to sell at different price levels, such as first quality line and a second or inferior quality line. All of respondent's products are of the same grade and quality.

24. Respondent's distributors purchased respondent's replacement parts, not as individual items, but as part of a line designed to supply the needs of garages and others engaged in the repair of motor vehicles. The respondent has grouped its automotive replacement parts for discount purposes into three separate categories which are referred to as respondent's coil action line, leaf spring line and piston ring line. Each one of these lines carries a separate and different retroactive volume rebate. Respondent has made the selection of the parts to go into the various lines,

and the rebates granted to purchasers of such lines apply to each and every item in the line. Having grouped its parts for discount purposes, the respondent cannot logically contend that items within the group are not of like grade and quality, or that distributors in the same trade area, who purchase items within the group for resale, are not competitive.

25. The Robinson-Patman Act is an antitrust statute designed to preserve equal competitive opportunity. Respondent's contention of interchangeability places the existence of like grade and quality solely on functional similarity and thereby ignores the effect upon competitive opportunity. When the respondent sells replacement par... classified into the three lines described above, to its distributors, who resell in competition with each other in their respective trade areas, the functional similarity of the individual items in each class is no longer of consequence because from a competitive standpoint they are all of like grade and quality. It also appears from the record that distributors in order to supply the needs of their garage customers would purchase substantially all of

(Part 1, Page 151) (This Transcript as filed in 9 parts, and references to the Transcript are to particular part and page.)

the items in respondent's various lines over a period of time, their purchases of the items being dependent upon the demands of their customers. It must accordingly be concluded that the discriminations in price herein found were, in fact, made in connection with the sale and distribution of merchandise of like grade and quality and that the defense that such products must pass the test of interchangeability is without merit.

26. The respondent in its answer did not assert a defense of meeting competition under Section 2(b) of the Clayton Act and did not request a finding on this issue in its proposed findings submitted to the Hearing Examiner. However, the attorney for the respondent did announce on the record that he intended to introduce testimony on the defense of meeting competition. While respondent did

consider and compare competitors' prices in preparing its price list, the price differentials and the discriminations in price did not occur from the use of the price list or deviations from such price list to individual customers, but instead arose out of the pricing practice involved in the use of a pricing plan consisting principally of a non-retroactive volume rebate. There is no evidence that the respondent either met the price of a competitor or any rebate or discount schedule used by a competitor. In fact there was no uniformity in the discount schedules of competitors; some used a retroactive volume rebate; some a non-retroactive volume rebate; some a flat percentage discount; and others an incentive rebate based on turnover of merchandise or maintenance of stock.

27. The activity of the respondent in meeting competition was summed up by respondent's executive vice president who said, in referring to the use by respondent of the discount schedule of the Wausau Motor Parts Co., in determining respondent's pricing policy, "We would examine it. We would try to evaluate the effect of Wausau on our market, how close we would have to come to meeting the competitive offer and how far away we should stay because of certain pitfalls which it may lead us into, and upon examination of this we would use our own good judgment and experience to try and work this thing in with all of the others and come out with a contract and a schedule which we feel would earn us the greatest amount of profit and lose us the smallest number of customers and attract the most." This might be adopting a pricing practice or sales system best suitable for the respondent in a competitive market, irrespective of any discriminating

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effect, but it does not constitute a showing that lower prices to some favored customers, resulting from the pricing practice, were made in good faith to meet an equally low price of a competitor.

28. Section 2(b) of the Clayton Act does not mean that a seller can use a sales plan which constantly results in

his getting more money for like goods from some customers than he does from other customers competing with them. This was definitely decided by the United States Supreme Court in F. T. C. v. A. E. Staley, 374 U. S. 746, 753, in which the Court stated that Section 2(b) "does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. It speaks only of the seller's 'lower' price and of that only to the extent that it is made 'in good faith to meet an equally low price of a competitor'. The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition * * *. We think the conclusion is inadmissible, in view of the clear Congressional purpose not to sanction by Section 2(b) the excuse that the person charged with a violation of the law was merely adopting a similarly unlawful practice of another." It must therefore be concluded that respondent's price discriminations were not made in good faith to meet an equally low price of a competitor and that respondent's attempted defense under Section 2(b) of the Clayton Act is without merit.

CONCLUSION.

The aforesaid discriminations in price by the respondent as herein found constitute violations of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

ORDER.

It Is Ordered, that the respondent Moog Industries, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale for replacement purposes of automotive replacement parts, consisting of coil action parts, leaf spring, coil spring, chassis

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parts, piston rings and other related items in commerce, as "Commerce" is defined in the Clayton Act, do forthwith

cease and desist from discriminating in the price of such products of like grade and quality:

1. By selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who, in fact, competed with the purchaser paying the higher price in the resale and distribution of respondent's products.

/s/ Earl J. Kolb
Hearing Examiner.

March 5, 1954.

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UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

In the Matter of MOOG INDUSTRIES, INC., a corporation	Docket No. 5723

NOTICE OF INTENTION TO APPEAL FROM INITIAL DECISION.

(Federal Trade Commission Received Mar 26 1954 Secretary)

Please take notice that the respondent Moog Industries, Inc., intends to appeal from the initial decision of the Hearing Examiner filed with the Commission on March 8, 1954, and first notification of which was received by counsel for respondent by ordinary mail on March 25, 1954.

Moog Industries, Inc.,
By /s/ E. S. D. Butterfield
Its Attorney

Chicago, Illinois
March 25, 1954.

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UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Commissioners:

Edward F. Howrey, Chairman
Lowell B. Mason
James M. Mead
John W. Gwynne
Robert T. Secrest

In the Matter of MOOG INDUSTRIES, INC., a corporation	Docket No. 5723

FINAL ORDER.

Respondent Moog Industries, Inc., having filed on July 13, 1954, its appeal from the initial decision of the hearing examiner in this proceeding; and the matter having been heard by the Commission on briefs and oral argument; and the Commission having rendered its decision denying the appeal and affirming the initial decision:

It Is Ordered that respondent Moog Industries, Inc., shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order contained in said initial decision.

By the Commission, Commissioner Mason dissenting.

/s/ Robert M. Parrish
Secretary.

(Seal)

Issued: April 29, 1955

Attached are:

(1) Opinion of the Commission by Commissioner Secrest.

(2) Concurring opinion by Chairman Howrey; and

(3) Dissenting opinion by Commissioner Mason.

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Commissioners:

Edward F. Howrey, Chairman
Lowell B. Mason
James M. Mead
John W. Gwynne
Robert T. Secrest

In the Matter of MOOG INDUSTRIES, INC., a corporation.	Docket No. 5723

OPINION OF THE COMMISSION.

By Secrest, Commissioner:

This case is before us on respondent's appeal from the hearing examiner's initial decision.

Respondent, Moog Industries, Inc., is charged with having discriminated in price between different purchasers of its automotive replacement parts in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.[1] Hearings were held at which testimony and other evidence in support of and in opposition to the complaint were introduced and the hearing examiner, after considering the entire record, made his initial decision in which he found that respondent's pricing practices have resulted in price discriminations between competing customers and that the effect of the discriminations "may be to substantially lessen, injure, destroy or prevent competition between customers receiving the benefit of said discriminations and the customers who do not receive the benefit of such discriminations." The order in the initial decision prohibits respondent from discriminating in price:

"By selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who,

[1] 15 U. S. C., sec. 13.

in fact, competes with the purchaser paying a higher price in the resale and distribution of respondent's products."

Respondent, in its appeal, takes exception to specific findings and conclusions in the initial decision as well as to certain procedural matters, including rulings of the hearing examiner. Exception is also taken to the substance and form of the hearing examiner's order to cease and desist. We consider first respondent's contention that as a result of certain alleged procedural errors it has not been accorded a fair and impartial hearing.

During the course of the proceeding respondent made two requests for a bill of particulars, the first before it filed its answer and the second at the conclusion of the taking of evidence in support of the complaint. The Commission denied respondent's first request and the hearing examiner denied the second. Respondent claims that by such denials prejudicial error was committed. In its order denying respondent's original request for a bill of particulars, the Commission expressed the view that the complaint was sufficient to advise respondent of the nature of the charges against it. We are still of that view.

We are also of the view that the hearing examiner's refusal to grant respondent's motion for a bill of particulars was not prejudicial. The function of a bill of particulars is to enable the moving party to prepare for responsive pleadings and then only to the extent that it is required for that purpose; the office of the bill is related to pleading, not to trial. During the presentation of the case in support of the complaint respondent became fully informed as to the scope and details of the charges against it. Continuances are freely granted in Commission proceedings and respondent had full opportunity to study the record before proceeding. There was no possibility of "surprise" to the respondent or inopportunity properly to prepare its case.

During the course of the hearings respondent moved the hearing examiner to issue a rule requiring counsel supporting the complaint to make certain elections from the evidence which would be relied upon to constitute the case against the respondent. As grounds for the motion

respondent stated, in substance, that by virtue of the undue proliferation of evidence which had been offered and received over respondent's objection, including voluminous tabulations with respect to sales by respondent to customers in many different communities during many months and years, involving hundreds of different automotive parts and thousands of invoices, there had been placed upon the respondent the almost insurmountable burden of analyses and proof, requiring the breakdown of thousands of invoices and cost allocations, requiring thousands of man hours of time and extensive, exorbitant and needless work, and causing respondent to be faced with the situation wherein it was impossible for it to receive a fair and impartial hearing. The hearing examiner denied respondent's motion and the Commission refused to entertain respondent's appeal from that ruling.

Respondent's motion was made at a hearing held on June 23, 1953. Counsel supporting the complaint rested their case on June 2, 1952. In the interval between those dates, at hearings held in St. Louis, Denver, Dallas, New Orleans, Memphis and New York, respondent introduced considerable evidence in opposition to the complaint. There is no indication that respondent did not know the issues it must meet during the presentation of this evidence. The evidence introduced in support of the complaint was that which counsel supporting the complaint believed necessary to establish respondent's practice of price discrimination. It does not appear that respondent has advanced any defense to this proceeding which would require it to analyze or break down each of the numerous transactions represented in the tabulations. We think the motion was properly denied by the hearing examiner and are accordingly rejecting respondent's contention that prejudicial procedural errors were committed which prevented it from having a fair and impartial hearing.

Respondent does a substantial business in the manufacture and sale of automotive replacement parts consisting of coil action parts, leaf springs, coil springs, chassis parts, piston rings and related items. Respondent has classified the products itself into three lines, namely, leaf springs line, including coil springs and chassis parts; coil action

line and piston ring line. Respondent sells its products in every State of the United States and in 1950 maintained 25 branches and warehouses in the principal cities. In 1949 respondent sold its products to approximately 1,200 coil ring accounts, 800 leaf springs accounts, and 400 piston ring accounts.

During the period covered by this proceeding respondent sold its products to customers designated by respondent as distributors at the prices appearing in respondent's distributor net price sheets, less specified discounts, allowances and rebates. Respondent's customers resold these products to garages, service stations, fleet owners and other jobbers. Respondent from time to time issued suggested resale price lists for use by distributors and dealers in the resale of respondent's products. Respondent's base price was the same to all customers. The price differences with which we are concerned arose from the practice of granting discounts or paying rebates to customers, the amount being determined by each customer's total annual net purchases or, in the case of purchasers who purchased through a group buying organization, by the aggregate annual net purchases by all members of a particular group.

The annual volume rebates available to customers were incorporated in and made a part of the franchise agreement which respondent entered into with its distributors and group buying organizations. A different volume rebate schedule was applicable to each of the three lines. For example, on the coil action line the amount of the retroactive volume rebate ranged from 5% on annual net purchases of $1,000 to 19% on annual net purchases of $27,500 or more. On the piston ring line the range was from 2% on annual net purchases of $2,000 to 20% on annual net purchases of $30,000 or more. On the leaf spring line the retroactive volume rebate schedule adopted as of July 1, 1949, provided for rebates ranging from 5% on annual net purchases of $1,000 to 15% on annual net purchases of $35,000 or more. In addition to the volume rebate, respondent allowed a 10% warehousing and redistributing commission to distributors who resold respondent's products to jobbers who had been approved by re-

spondent, provided the combined earnings of the warehousing and redistributing commission and the volume rebate on any line could not exceed the earnings figured at the maximum volume rebate for that line.

In 1949, respondent had franchise agreements with 15 group buying organizations. The jobber members of these groups forwarded their orders for respondent's merchandise either directly to respondent or through the group office. The merchandise was shipped by respondent direct to the jobber members but the billing for same was to the group office. The annual volume rebate, which was computed on the basis of the aggregate of the purchases by all members of a group, was paid to the group office, which in turn made distribution to the jobber members on the basis of each member's purchases. In other words, under this arrangement members of the group buying organizations were granted discounts or paid rebates based on the total purchases by all members of the group rather than on the total purchases of the individual member, with the result that many such purchasers received a more favorable price or higher rebate than other competing purchasers who did not purchase through group buying organizations.

Substantial differences in the net purchase prices paid by competing purchasers have resulted from the above-described pricing practices. The record contains a number of tabulations prepared from respondent's accounts and records showing details of respondent's sales of two of its three lines to customers in a number of different trading areas. These tabulations reflect differences in net buying prices between customers in the same trading area of varying amounts and percentages, with some differences amounting to as much as 19%. For example, respondent in 1950, sold its leaf springs line to six customers in Dallas, Texas, all of whom were in competition with each other in the resale of respondent's products. Four of these purchasers purchased through group buying organizations at net prices ranging from 12% to 15% off list price. One customer received no discount or rebate on its purchases and the largest purchaser received a rebate of 7.29% on its total net purchases.

The inequities of respondent's annual volume rebate plan are further demonstrated by the fact that in 1949, for instance, of the approximately 1,200 purchasers of respondent's coil action line, there were only 407 purchasers who received a rebate on their purchases, and that 352 of these 407 received a rebate of only 5%, all as illustrated by the following tabulation:

Net Purchases	Rebate	Number of Customers	Average Annual Purchases
Under $1,000	None		
$ 1,000 to 4,999	5%	352	$ 1,911
5,000 to 7,499	7½%	27	5,499
7,500 to 9,999	9%	4	8,372
10,000 to 12,499	10%	6	10,660
12,500 to 14,999	12%	4	13,667
15,000 to 17,499	14%	5	9,277
17,500 to 19,999	15%	2	18,735
20,000 to 22,499	16%	0	—
22,500 to 24,999	17%	1	23,444
25,000 to 27,499	18%	1	26,887
27,500 and over	19%	5	33,471

The substantiality of respondent's price differences and the probability of injury to competition can best be shown by comparing it with the competitive effect of the amount represented by respondent's standard 2% discount for cash given to all customers. Distributors of respondent testified that they invariably took advantage of this 2% cash discount and that this discount was essential to the conduct of their respective businesses. Testimony in the record also indicates that the market in which these distributors compete is highly competitive with many dealers handling from 15 to 75 different lines of automotive products consisting of thousands of items, many of which sell for only a few cents. The dealers' financial life depends on the aggregate of small margins of profits made on a number of individual automotive items. One jobber in Dallas, Texas, ranking third or fourth in that area, testified that his overall net profit on automotive items ran less than 4%. With overall net profit so low discounts to favored customers, ranging up to 19%, could well mean the difference between commercial life and death if these discounts

were extended to a sufficient number of items purchased by a distributor. Nor is it controlling that the items herein considered may constitute only a very small part of the dealers' total sales. As the Supreme Court said in the Morton Salt case[2]:

> "There are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. Congress intended to protect the merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock. Since a grocery stock consists of many comparatively small articles, there is no possible way to effectively protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store."

Respondent contends that the evidence in the record does not support the hearing examiner's finding that "the effect of such discriminations may be to substantially lessen, injure, destroy or prevent competition between customers receiving the benefit of said discriminations and customers who do not receive the benefit of such discriminations." This contention appears to be based largely on the fact that respondent's customers testified generally that they had not been injured by reason of the higher prices paid by them as compared with prices paid by their competitors in the same trading area. On cross examination, however, these same witnesses admitted that their reasons for so testifying was due to the fact that both they and their competitors followed the suggested resale prices of the respondent and that there was no price competition in their particular trade areas. The adherence by respondent's customers to its suggested resale prices does not eliminate the question of injury to competition. As the Supreme Court said in the Corn Products case[3]:

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[2]Federal Trade Commission v. Morton Salt Co., 334 U. S. 37 (1948).

[3]Corn Products Refining Co. v. Federal Trade Commission, 324 U. S. 726, 742 (1945).

"But it is asserted that there is no evidence that the allowances ever were reflected in the purchasers' resale prices. This argument loses sight of the statutory command. As we have said, the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect. We think that it was permissible for the Commission to infer that these discriminatory allowances were a substantial threat to competition."

The hearing examiner in his initial decision found that:

"Any saving or advantage in price obtained by one competitor as against another increases his margin of profit, permits additional services to be extended to customers, the use of additional salesmen, the carrying of larger and more varied stocks, and the establishment of branch houses for expansion of the business. While price competition among customers was more or less non-existent, except in isolated instances, in the areas where testimony was taken, the possibility of price competition is ever present where lower prices to certain competing customers exist."[4]

In support of the hearing examiner's finding of the requisite statutory injury, there is in the record reliable respectable probative evidence in the form of testimony that respondent's 2% discounts for cash were invariably taken by respondent's customers and that these customers considered this discount essential to the conduct of their business. Additionally, some witnesses testified that in order to expand their business, it would be necessary to hire additional salesmen, handle more lines, and provide additional services to customers which could only be effected through increased profits. We believe that the hearing examiner was justified in concluding that respondent's annual volume rebate plan resulted in price discriminations violative of the Robinson-Patman Act.

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[4]*Cf.* Initial Decision of the Hearing Examiner, Docket 5771, In the Matter of Namsco, Inc., adopted by the Commission March 17, 1953.

Respondent further contends that the evidence does not establish that it has discriminated in price between any specifically named purchaser of the same type of automotive products or supplies of like grade and quality who were competitively engaged in the resale thereof during the same period of time and in the same market area. Respondent's customers do not purchase respondent's products as individual items. They purchase them as part of a line designed to supply the needs of garages and others to whom the products are resold. The rebates were not granted on the basis of the individual items purchased but on the basis of the total dollar purchases of a particular line. The price differentials involved did not arise from any difference in the grade or quality of the products sold to different customers. Instead, they arose from varying rebates on an entire line, The very nature of the businesses carried on by respondent's customers required that they carry substantially all of the items in a particular line, and many purchasers of the same line of respondent's products were in competition with each other in the resale of such products to garages, service stations, and others. We think the hearing examiner properly found that the discriminations in price were made in connection with the sale and distribution of merchandise of like grade and quality.

We now consider respondent's objection to the order to cease and desist in the initial decision. Respondent contends that the order is too broad in its scope and exceeds the authority of the Commission by including the officers, representatives, agents and employees of the respondent and by covering "piston rings" and "other related items." Respondent additionally contends that the order is faulty in that it is not limited to prohibiting price discriminations which injure secondary line competition; that it is not limited to prohibiting price discriminations in the sale of specific types of automotive replacement parts, and that it contains no guiding yardstick by means of which respondent can determine the lawfulness or unlawfulness of its pricing practices.

In support of its argument that the order should not run against its officers, representatives and employees,

respondent cites the decision of the United States Court of Appeals for the Seventh Circuit in the Reynolds Tobacco case[5] which involved an order issued pursuant to the Federal Trade Commission Act. The Seventh Circuit Court in its more recent decision in the Anchor Serum case[6] held, however, that the order in a Clayton Act case was properly directed against the "officers, representatives and employees" of the corporate respondent and this same holding appears appropriate here.

The further argument that the order should not include "piston rings" and "other related items" appears to be without merit. The record shows that respondent sells piston rings to the same type of purchasers, that is, automotive jobbers, as it sells its other products, and that similar pricing practices were employed. The Commission's power is not limited to prohibiting the identical practices which have resulted in illegal price discriminations. It has the authority and duty to also prohibit acts of the same type or class as those which have been committed in the past.[7]

The Supreme Court in the Ruberoid case[8] considered arguments with respects to the breadth of Commission orders to cease and desist in a Section 2(a) proceeding similar to those here presented by respondent. The Court observed that:

> "Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required

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[5]Reynolds Tobacco Co. v. F. T. C., 192 F. 2d 535 (1951).

[6]Anchor Serum Co. v. F. T. C., 217 F. 2d 867 (1954).

[7]Hershey Chocolate Co. v. F. T. C., 121 F. 2d 968 (1941).

[8]F. T. C. v. Ruberoid Company, 343 U. S. 470 (1952).

to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity."

In rejecting respondent's contention that the order to cease and desist in the initial decision is too broad in scope, it is pointed out that under the decision in the Ruberoid case the fact that the order does not spell out in detail every phase of the statute does not in any way prejudice the respondent. Implicit in every Commission order are all the statutory defenses by means of which respondent can determine the lawfulness or unlawfulness of its practices just as if the order had set them out *in extenso*. We believe that the order, as drafted, is proper and that the statute and the courts have provided respondent with a proper yardstick for determining, under the order, the lawfulness or unlawfulness of its future practices.

Finally, we consider respondent's contention that:

> "Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, as construed and applied in this proceeding offends the constitutional standards of definiteness and reasonableness of due process of law under the Fifth Amendment to the Constitution of the United States."

Respondent argues under this contention that Section 2(a) of the amended Clayton Act "is admittedly a vague, indefinite ambiguous statute," and that it is well settled that "a statute may be so vague as to violate the due process clause of the Fifth Amendment to the Constitution of the United States." If, as we construe it, respondent's contention in this regard can be interpreted as raising the issue of the constitutionality of Section 2(a) of the amended Clayton Act, the obvious answer is that it is not within the province of this Commission to pass upon the constitutionality of the statutes it is charged with administering.

". . . an administrative agency, invested with discretion, has no jurisdiction to entertain constitutional questions where no provision has been made therefor[10]."

We believe that the initial decision of the hearing examiner is adequate and appropriate to dispose of this proceeding, and respondent's appeal therefrom is accordingly denied.

Commissioner Mason dissents.

April 29, 1955

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Commissioners:

Edward F. Howrey, Chairman
Lowell B. Mason
James M. Mead
John W. Gwynne
Robert T. Secrest

In the Matter of MOOG INDUSTRIES, INC., a corporation. } Docket No. 5723

Chairman Howrey, concurring:

The record contains direct and substantial evidence showing probability of injury to competition in the secondary line, namely, in the distribution of automotive parts through jobbers and dealers. For this reason I concur in the majority opinion.

April 29, 1955

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[10]Engineers Public Service Co. v. Securities & Exchange Commission, 138 F. 2d 936.

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Commissioners:

Edward F. Howrey, Chairman
Lowell B. Mason
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Robert T. Secrest

In the Matter of MOOG INDUSTRIES, INC., a corporation.	Docket No. 5723

DISSENTING OPINION.

By Mason, Commissioner

This is a Section 2 (a), Clayton Act case. Three elements must be found present to legitimatize a cease and desist order here. They are:

1. Interstate commerce;
2. Disparate discounts or rebates to competing customers (these two we need not consider because in the instant case both sides concede their existence); and
3. The disparate discounts must have at least one of the following effects:
   a. May substantially lessen competition;
   b. Tend to create a monopoly;
   c. Injure, destroy or prevent competition.

As long as the billion dollar auto parts makers are around, we need not fear defendant Moog will destroy General Motors, Ford, Chrysler, et al., nor is this independent auto parts maker apt to create a monopoly or substantially lessen, destroy or prevent competition with these or any of the other big companies in the primary line of commerce.

This leaves but one question for us to answer. Has there been injury in the secondary line of commerce; that is, injury to those customers of Moog who got smaller quantity discounts than others?

The Supreme Court has always held that an inference of injury can be drawn from the substantial difference in discounts alone, without any direct testimony of injury. For as the late Mr. Justice Jackson once opined:

> "The law of this case, in a nutshell, is that no quantity discount is valid if the Commission chooses to say it is not."[1]

Relying on this carte blanche authority granted us,[2] the prosecutor based his case on the disparate discounts admitted by both sides.

At this stage in the case if the Commission chose to infer (and it did) that the discounts injured some of Moog's customers, it could do so, and well enough. The prosecution's contention that injury to competition existed was based upon inferences drawn from the fact that there were differences in discounts and rebates.

This is as far as the prosecution had to go, though, of course, the direct and most sensible way to ascertain the real truth regarding injury would be to call those who were supposed to be injured; that is, Moog's customers who received the smaller quantity discounts.

These, the prosecution by-passed.

However, before the trial was over, the defendant himself subpenaed the missing witnesses.

This meant traveling all over the country—Dallas, Denver, New Orleans, Memphis and New York City. Of course, defendant could have avoided these long journeys if it had been willing to admit for the sake of the record

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[1] F. T. C. v. Morton Salt Co., 334 U. S. 37, at page 58.

[2] "The Commission is authorized by the Act to bar discriminatory prices upon the 'reasonable possibility' that different prices for like goods to competing purchasers may have the defined effect on competition." F. T. C. v. Morton Salt Co., 334 U. S., at page 47.

that it had injured its customers, but it refused to do so. In the ensuing safari, every witness called positively denied he suffered any competitive injury from the challenged discounts or rebates[3]—a position they all stoutly maintained in spite of the badgering the prosecutor gave them for ruining the Government's case.

In this day and age of phony informers, it is heartening to behold American businessmen reject Government's cozening of witnesses to get them to say they were injured, when in fact they weren't. The Government's position is faintly reminiscent of the personal injury lawyer whose advice at the scene of an accident was to "lie down and groan until the claim agent arrives."

Only in the instant case the so-called "injured competitors" refused to lie down or groan.

To top all of this, the Government was finally forced to concede that if all other jobber witnesses who received the lesser discounts were to be summoned to the stand, they, too, would deny they had been injured.[4]

If there had been no direct evidence on the question of injury, inferences could fill in the empty spaces. But the spaces had best be empty of direct facts before an inference is invited in.

With many hundreds of witnesses[5] admittedly ready to back up the testimony of a dozen or more who had already denied the injury, and with not a soul willing to impeach their assertions of no injury, we find an entirely different aspect put upon the case.

Justice requires that we give precedence to direct evidence over inferences.

For inferences and facts are two different things. Their standing might be compared to mistresses and wives.

Inferences are compliant things, swaying to the whim of those who draw them. While facts, like wives, can be

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[3]See digest of testimony in appendix.

[4]R. p. 943.

[5]The number of defendant's accounts is not set out with exactitude, but the Hearing Examiner's report indicates they run into the thousands.

harsh, unbending, and often block the selfish aims of those who must live with them; they do nevertheless carry a badge of legitimacy that no unsupported inference has ever been able to achieve.

To prevent predelictions guiding our judgments rather than cold facts, reviewing courts frown on us if our orders are based on inferences when direct testimony to the contrary bars the way. For as Mr. Justice Stephens says in United States v. U. S. Gypsum:

> "A fact may not be inferred from a proven fact or facts where unimpeached and uncontradicted testimony consistent with such proven fact or facts but inconsistent with the fact sought to be inferred, is in the record."[6]

Like a belligerent wife crashing in on an assignation with a hussy, the direct testimony of the alleged injured customers that they in fact were not injured, broke up the inference of injury so necessary to the Government's case.

In spite of this, my learned majority of the Commission has

> Divorced Cold Solid Reason from its bed
> And taken Inferences Instead.[7]

On such a pretense Government has snatched itself a victory, but at what a cost.

In my opinion, the effectiveness of cease and desist orders rests on the respect their paternity commands.

An order born from the legitimate union of direct facts naturally ranks highest. In the absence of direct factual testimony, findings on inferences may support an order, but it will be countenanced with about the same degree of condescension a common law wife receives in polite society.

But not even this low degree of acceptance will be accorded the order in the instant case, for in the face of direct testimony controverting the inferences of guilt, the

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[6]67 F. Supp. 397, (1946) at page 450.

[7]With apologies to Omar Khayyam.

Commission has drawn an order which commands neither the respect of the public nor, in my opinion, will it receive the approval of reviewing courts.

We are judged by the level at which we solve our problems.

To take inferences that serve our ends and reject facts presents an inaccurate and unhappy picture of what should be our most sacred institution—the judiciary.

The Commission has won a cease and desist order.

But I doubt if the ends are worth the means.

For myself—

I am against it.

/s/ Lowell B. Mason,
Commissioner.

April 18, 1955.

APPENDIX.

(Digest of testimony, R. pages 617-899.)

Q: Have the pricing practices of Moog in the leaf spring line or in this coil action sales line, have either or both of them injured you competitively necessarily?

A: No.

* * *

Q: I will ask you whether you know whether or not the fact that an allowance of 15 percent was made to the Terry Automotive Supply Company injured your company, American Gear and Parts Company, competitively in the distribution of Moog Industries' leaf springs, coil springs, and chassis parts during the period indicated?

A: No, sir.

Q: Do you know whether it did?

A: No, sir. Frankly, I didn't know Terry Automotive had Moog up until three or four months ago.

Q: Well, were you injured competitively by it?

A: No, sir.

Q: By virtue of the spread you were not?

A: No, sir.

• • •

Q: And I will ask you if you know whether or not you were injured competitively during that period of time by virtue of the fact of this differential spread on allowances off distributor's net prices in the purchase of Moog leaf springs, coil springs and chassis parts resold by you to your customers?

A: Yes.

Q: You were so injured?

A: No.

• • •

Q: I ask you if you know whether or not for that period of time the Motor Supply Company of Dallas suffered any competitive injury by virtue of this differential in allowances off of distributor's net prices in purchases of leaf springs, coil springs and chassis parts from Moog Industries, which they purchased from Moog and resold to its customers?

Q: Do you know whether or not you were injured?

A: I do.

Q: Were you so injured?

A: No.

• • •

Q: And I will ask you would you know whether or not by virtue of the spread and differential in allowances off of distributor's net prices the Henderson Auto Parts Company was competitively injured in the purchase of leaf springs, coil springs and chassis parts from Moog Industries, Inc., in the sale of such products to its customers?

A: Yes.

Q: Was it so injured?

A: I do not think so.

• • •

Q: Do you know whether by virtue of this difference in percentages in payment for coil action parts from Moog

Industries by your company and the other companies shown there, do you know whether or not you were injured competitively?

A: Yes I know.

Q: Were you injured competitively?

A: No, I was not injured competitively, in my opinion.

* * *

Q: Now do you know whether for that period of time so shown on that exhibit Auto Chassis and Spring Company was injured competitively in the purchase and sale of Moog coil action parts in New Orleans, by virtue of that differential from the distributor's net prices or difference in allowances?

A: No, it was not.

Q: It was not?

A: It was not hurt.

* * *

Q: Do you know whether you suffered an injury or not?

A: No I didn't suffer.

Counsel for Prosecution: Just a minute. We aren't so interested in getting your answer you are making as we are to find out whether or not you have the knowledge, yes or no, whether you know, and at that time I would like to make my objection.

The Witness: You want to know what, now? What is your question?

Counsel for Prosecution: I think Mr. Butterfield has a question pending.

Trial Examiner: Mr. Witness, the question is directed to your knowledge as to whether or not you know, not whether or not you did or did not, but whether or not you know whether you did or not. That calls for a yes or no answer.

The Witness: Whether I know I was injured, that is the question he asked me, was I injured.

Trial Examiner: Do you know whether or not you were injured? You know or you don't know. He will ask you a further question on that.

The Witness: My answer still was no.

Counsel for Prosecution: I think the witness misunderstands the question.

The Witness: You asked me if I was injured.

Counsel for Defendant: I ask if you know whether or not you were injured.

The Witness: Do I know whether or not I was injured?

Q: Yes.

A: The answer is I don't think I was injured. I don't see how I could be injured. I would say, whether I know whether I was injured or not?

Q: Yes, do you know?

A: I don't know as far as either way. I am not injured in any way. I mean, the question was asked, am I injured. We have, all the fellows are competitors.

Q: Who in your organization would know better than you whether you were injured or not?

A: Whether I was injured, in what way are you asking? Your question is whether or not I was injured?

Q: That is right.

A: No, I am not injured.

Counsel for Prosecution: I still move that answer be stricken and we have a yes or no answer to the question.

Trial Examiner: We will let the answer stand.

Counsel for Defendant: You may cross examine.

Trial Examiner: It is too complicated to get straightened out.

• • •

Trial Examiner: The question is whether or not you know; not whether or not you were injured, but whether or not you know whether or not you were injured.

Witness: Yes, I would know.

Counsel for Defendant: Were you so injured? What was the company, how was the company injured by virtue of the differentials?

Witness: We were not to my knowledge.

• • •

Q: I ask you to study this exhibit showing these sales and rebates, and I ask you if, by virtue of any of the differentials shown in rebates or commissions or differences on this sheet, whether you know if American Motor Specialties was injured competitively in its resale of the coil action parts of Moog Industries, Inc., for the years indicated?

A: No. The same as it was in the other case.

Q: And by "no" you mean that you were not injured competitively by reason of the differentials shown on this sheet.

• • •

Q: Do you know whether you were competitively injured?

A: No, I don't believe I have been.

Q: By that you mean that you have not been competitively injured?

A: No.

• • •

Counsel for Defendant: I will ask you to examine this chart and tell me whether or not you know whether Sapiro Auto Parts Company was or was not competitively injured by virtue of the differentials in rebates shown on that chart?

Counsel for Prosecution: We have the same objection we have had heretofore.

Trial Examiner: Objection overruled.

Witness: As far as I can say, we in Sapiro Auto Parts Company more or less mind our own business, and we are not interested in what Clinton Square Auto Parts gets, or what they do, because there seems to be enough business in the territory for all of us, and we all get our share of the business, and we all make our profit.

Counsel for Defendant: Do you know whether or not you were injured competitively by virtue of these differentials?

Witness: Not as far as I know, no.

Q: By "not as far as you know," you mean that you were not injured competitively?

A: That is right.

* * *

April 29, 1955.

Petition to United States Court of Appeals, 8th Circuit to Review Decision and Order of Federal Trade Commission (Filing Date June 27, 1955).

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

Civil No. 15370

Moog Industries, Inc., Petitioner,

vs.

Federal Trade Commission, Respondent.

PETITION TO REVIEW ORDER OF FEDERAL TRADE COMMISSION.
(Filed June 27, 1955.)

Comes now Petitioner Moog Industries, Inc., a corporation, and presents this petition to review an order of the Respondent Federal Trade Commission made and entered on the 29th day of April, 1955, in a proceeding before said body entitled "In the Matter of Moog Industries, Inc., a corporation, Docket No. 5723" and in support respectfully show:

I.

Nature of Proceeding to Be Reviewed.

1. On December 20, 1949, the Respondent issued a Complaint charging in substance that Petitioner has discriminated in price between different purchasers, and that

such acts may be substantially to lessen competition or tend to create a monopoly, or to injure, destroy or prevent competition in violation of Subsection (a) of Section 2 of the Clayton Act (U. S. C. Title 15, Section 13), as amended by the Robinson Patman Act approved June 19, 1936.

2. Petitioner filed its motion for a bill of particulars January 16, 1950, which was denied by the Respondent on January 20, 1950.

3. Petitioner filed its answer February 13, 1950, and its amended answer by leave on June 20, 1950, specifically denying any violation of law as charged in the Complaint.

4. Hearings were had before Honorable Earl J. Kolb, Respondent's duly appointed Hearing Examiner, and testimony and other evidence was offered and received on behalf of the Respondent and on behalf of Petitioner from time to time thereafter.

Counsel for the Commission in support of the Complaint introduced the testimony of three officers of the Petitioner, four automotive parts jobbers located at New Orleans, Louisiana, four automotive parts jobbers located at Memphis, Tennessee, one automotive jobber located at Greenwood, Mississippi, the presidents of two incorporated groups of automotive parts jobbers and two Federal Trade Commission Accountants, together with Commission Exhibits Nos. 1 to 79 inclusive.

At the conclusion of the evidence in support of the Complaint on March 4, 1952, Petitioner's oral motion to dismiss the Complaint was denied. Subsequently on June 2, 1952, Petitioner filed its written motion to dismiss the Complaint which was overruled June 4, 1952.

Petitioner filed its second motion for a bill of particulars on June 2, 1952, which was denied June 4, 1952.

Thereafter the Petitioner in opposition to the Complaint introduced the testimony of three officers of Petitioner, the Secretary-Treasurer of an incorporated group of automotive parts jobbers, five automotive parts jobbers from Denver, Colorado, four automotive parts jobbers from Dallas, Texas, three automotive parts jobbers from New Orleans, Louisiana (who had previously testified for the

Commission), two automotive parts jobbers from Memphis, Tennessee (one of whom had previously testified for the Commission), one automotive parts jobber from West Orange, New Jersey, one from Brooklyn, New York, one from New Brunswick, New Jersey and one from Newark, New Jersey, together with Respondent's Exhibits 5 to 26 inclusive. All of these witnesses testified that they had not been injured by the pricing practices of Moog Industries which was the subject of the Complaint. In addition counsel for the Commission entered into a stipulation with your Petitioner that if additional jobbers were called upon to testify "their testimony would be the same as that of the witnesses previously called," to the effect that they had not been competitively injured or damaged by Moog's pricing system nor did any of the witnesses called by the Commission testify that they had been competitively injured or damaged by the pricing system of Moog Industries.

In the course of taking evidence in its behalf your Petitioner filed its motion June 23, 1953, to require Commission Counsel to make certain elections from the mass of evidence which they had introduced, which would be relied upon to constitute the Commission's case. This motion was denied by the Hearing Examiner, appeal was taken from this ruling and on July 31, 1953, the Commission issued its order denying the appeal.

Hearings were concluded on September 16, 1953, and on order of the Hearing Examiner on February 19, 1954, the proceeding was closed.

5. On March 5, 1954, the Hearing Examiner made the Initial Decision and Order filed March 8, 1954, finding that your Petitioner has discriminated in its prices in violation of Subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (Section 13, Title 15, U. S. Code) and order your Petitioner to cease and desist therefrom.

6. Appeal was duly made to the Commission and the matter was briefed and argued by both sides; on April 29, 1955, the Respondent Commission issued and filed its opinion and order overruling Petitioner's exceptions and

denied the appeal of Petitioner and issued its conclusion, its order to cease and desist, together with the dissenting opinion of Lowell B. Mason.

7. A copy of the Initial Decision and Order of the Hearing Examiner, the opinion of the Federal Trade Commission and its final Order with the dissenting opinion of Commissioner Mason are annexed hereto, marked Exhibit A and made a part hereof.

II.

Statute and Facts Upon Which Venue Is Based.

This Court has venue and jurisdiction by virtue of Section 21 of the Clayton Act (Section 21, Title 15, U. S. Code), which provides in part as follows:

"If such person fails or neglects to obey such order of the Commission or Board while the same is in effect, the Commission or Board may apply to the United States Court of Appeals within any Circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order. . . ."

"Any party required by such order of the Commission or board to cease and desist from a violation charged, may obtain a review of such order in said United States court of appeals by filing in the court a written petition praying that the order of the Commission or Board be set aside. A copy of such petition shall be forthwith served upon the Commission or Board, and thereupon the Commission or Board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission or Board as in the case of an application by the Commission or Board for the enforcement of its order, and the findings of the Commission or Board as to the facts, if supported by substantial evidence, shall in like manner be conclusive.

"The jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission or Board shall be exclusive.".

The Facts.

1. Petitioner, Moog Industries, Inc., has its principal office and manufacturing plant in St. Louis, Missouri, within this Eighth Circuit.

2. The Petitioner is in the business of manufacturing, selling and distributing automotive replacement parts to purchasers located in all States of the United States and District of Columbia; some of the parts so sold are purchased by Petitioner for resale, the balance being manufactured in its own plant. It is now and has for many years prior to the effective date of the Robinson-Patman Act (June 19, 1936) been continuously engaged in this business. Petitioner in the conduct of its business has been and is now engaged in competition with other corporations, firms and persons who are manufacturing, selling and distributing similar automotive replacement parts in Interstate Commerce to purchasers in the various States of the United States and the District of Columbia.

Petitioner separates its various automotive replacement parts into three classifications or lines as follows:

(a) Coil Action Parts;

(b) Leaf Springs, Coil Springs and Chassis Parts;

(c) Piston Rings.

The above types of automotive replacement parts represents different items of varying design and function and which are used in the repair and maintenance of many various makes and models of automobiles and trucks.

Similar automotive replacement parts are manufactured and sold by various other manufacturers and distributors, including all of the automobile and truck manufacturers themselves. Petitioner's role in the automotive replacement parts industry is that of the producer and seller of an insignificant percentage of the total annual production

of the automotive replacement parts industry, and petitioner's function is characteristically that of a small national business operation. It sells less than one per cent (1%) of the total sales in the replacement parts industry, its total average annual sales over the period involved herein being only approximately Four Million Four Hundred Thousand Dollars ($4,400,000.00).

One jobber might purchase from petitioner only one item of one type for one make of automobile or a number of items of several types for a number of makes and models. Another jobber might purchase entirely different items of another type for other makes or models. Some jobbers might purchase a portion of replacement parts in one classification or line while other jobbers purchase a portion of another classification or line. Jobbers are not compelled to and do not necessarily purchase all the various types of parts in any of the three classifications or lines. Some of the replacement parts in each of the three lines are sold by Petitioner in kits or packages which contain a complete unit installation of replacement parts for certain makes and models of cars. A jobber has his choice according to his own needs and requirements of purchasing one or more items, types, kits, or lines for one or more of the various makes and models of automobiles and trucks from either the Petitioner or from the dozens of other producers of similar products.

The system of volume rebates used by Petitioner and which was the subject matter of the Commission's Complaint herein is similar to the systems that prevail and are used generally throughout the automotive services industry by independent manufacturers of automotive replacement parts which include your Petitioner's competitors.

Your Petitioner also sells its automotive replacement parts to jobbers, who are designated by it as distributors, who in turn resell such parts to other jobbers as well as to garages, service stations and fleet owners.

From time to time Petitioner issued its price lists on the various items in each of the three lines, which were applicable to all of its customers.

Petitioner also issued from time to time suggested resale price lists for use by its distributors and dealers in the resale of replacement parts. Petitioner's plan of rebates which applied to all purchasers provided for annual volume rebates based on the amount of annual purchases in any one line. The volume rebates on the Coil Action line and the Piston Ring line has been a retroactive volume rebate in substantially the same amount since 1947. Prior to July 1, 1949, Petitioner allowed a non-retroactive rebate on its Leaf Spring line, but subsequent thereto has granted a retroactive volume rebate. These rebates based on volume of annual purchases of the respective three lines are as follows:

Coil Action Parts:

New Purchases During Each Fiscal Year	Retroactive Rebate	Net Purchases During Each Fiscal Year	Retroactive Rebate
Under $1,000	None	$15,000 to $17,499	14%
$1,000 to $4,971	5%	17,500 to 19,999	15%
5,000 to 7,499	7½%	20,000 to 22,499	16%
7,500 to 9,999	9%	22,500 to 24,999	17%
10,000 to 12,499	10%	25,000 to 27,499	18%
12,500 to 14,999	12%	27,500 and over	19%

Piston Ring Line:

Net Purchases During Each Fiscal Year	Retroactive Rebate	Net Purchases During Each Fiscal Year	Retroactive Rebate
Under $2,000	None	$ 9,000 to $ 9,999	13%
$2,000 to $2,999	2%	10,000 to 11,999	14%
3,000 to 3,999	5%	12,000 to 14,999	15%
4,000 to 4,999	7%	15,000 to 17,999	16%
5,000 to 5,999	9%	18,000 to 20,999	17%
6,000 to 6,999	10%	21,000 to 24,999	18%
7,000 to 7,999	11%	25,000 to 29,999	19%
8,000 to 8,999	12%	30,000 and over	20%

Leaf Spring Line, Including Coil Springs and Chassis Parts

Net Purchases During Each Fiscal Year	Retroactive Rebate	Net Purchases During Each Fiscal Year	Retroactive Rebate
Under $1,000	None	$11,000 to $14,999	11%
$1,000 to $2,999	5%	15,000 to 19,999	12%
3,000 to 4,999	7%	20,000 to 27,499	13%
5,000 to 7,999	9%	27,500 to 34,999	14%
8,000 to 10,999	10%	35,000 and over	15%

In addition to the above volume rebate, the Petitioner allowed to its distributors who resold to other jobbers a ten per cent (10%) warehousing and redistributing commission, provided the combined earnings of the warehousing and redistributing commission plus the volume rebate on any line in a given year could not exceed the earnings figured at the maximum rebate for that particular line.

All purchasers were granted and received rebates according to the bracket applicable to their annual purchases.

In addition Petitioner allowed to all purchasers a uniform discount of two per cent (2%) for cash payment by the 10th of the month following month of purchase, which discount is also prevalent throughout the industry.

III.

The Relief Prayed.

Petitioner respectfully prays this Court for relief as follows:

1. That a copy of this petition be forthwith served upon the Respondent Federal Trade Commission, and that said Commission be required forthwith to certify and file in this Court a transcript of the entire record in the proceeding entitled as aforesaid, "In the Matter of Moog Industries, Inc., a Corporation," Docket No. 5723, including all the evidence taken, the Initial Decision of the Hearing Examiner, his Order to Cease and Desist, together with the Opinion of the Commission denying Petitioners' Appeal, the Final Order of the Commission and the Dissenting Opinion of Commissioner Mason.

2. That this Court review the said proceedings and the Commission's Order to Cease and Desist, and enter an Order setting aside the Commission's findings and conclusion, its Opinion, together with its Order to Cease and Desist, or in the alternative, to modify said Order.

3. And that this Court grant Petitioner such other and further relief as to the Court may seem proper and just.

IV.

Points Upon Which Petitioner Intends to Rely.

1. Petitioner contends that the Commission's findings and conclusions are not supported by reliable, probative or substantial evidence as required by Section 7 (c) of the Administrative Procedure Act (Section 1006, Title 5, U. S. Code).

2. That the findings are incomplete and misleading in that they do not include additional material facts which were established by substantial and uncontradicted evidence.

3. That the Commission's conclusion is erroneous as a matter of fact and as a matter of law in that it is not supported by reliable, probative and substantial evidence upon the whole record.

4. That the Commission's Order to Cease and Desist is erroneous and illegal in that it is not supported by findings of fact which are supported by reliable probative and substantial evidence, but, on the contrary, the Order to Cease and Desist is based upon presumptions and inferences of injury to purchaser competitors which presumptions and inferences were rebutted by substantial and uncontradicted testimony.

5. That said Order is based upon findings and conclusions which are mere inferences based upon inferences contrary to established fundamental law.

6. The Commission erred in holding that there was a "reasonable possibility" that competition may be adversely affected by the rebates granted in that there was no basis

whatsoever for such a holding on the whole record, but on the contrary, all the evidence in the record showed no damage or injury to competition at any time. Numerous witnesses engaged in the day-to-day sale of these products attested to this fact of no injury to competition by reason of volume rebates. No witness testified to any such injury. An Order to Cease and Desist issued on such evidence is contrary to established fundamental law as well as contrary to the wording, the meaning and intent of the statute involved.

7. The record evidence fails to prove the violation of Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act (Section 13, Title 15, U. S. Code), as found and concluded by the Commission in that there is no reliable, probative and substantial evidence

(a) that any two named purchasers of petitioner's products were competitively engaged in the resale of the same type of product to the same class of customers in the same marketing area,

(b) that petitioner's pricing practices have caused any actual injurious effects upon competition between purchasers of petitioner's products, or

(c) from which a reasonable inference may be drawn that, as the result of petitioner's pricing practices, any substantial injurious effects upon competition between purchasers of petitioner's products are reasonably probable.

8. The Commission erred in denying Petitioner's two motions for a bill of particulars, in that the allegations of the Complaint are stated in the general words of the statute, containing no details or information as to the exact nature of the charges Petitioner must defend, and were contrary to Section 5 (a) of the Administrative Procedure Act [Section 1004 (a), Title 5, U. S. Code], thereby depriving Petitioner of due process of law as provided by the Fifth Amendment to the Constitution of the United States and contrary to practices of the Commission.

9. The Commission erred in denying Petitioner's motion to require counsel for the Commission to make certain elections from the mass of evidence of a reasonable number of individual sales transactions in any certain item showing certain purchasers favored at a certain time in a certain market area, which would be relied upon to constitute the Commission's case. This mass of evidence as a whole showed the system of rebates used by Petitioner, but did not establish any separate individual sales transaction wherein Petitioner sold the same type of replacement parts at different prices to different jobber purchasers who were competing in the sale of that particular type of automotive parts during the same specified time in the same market area. There was thereby placed upon Petitioner an insurmountable burden of analyzing and breaking down this mass of general evidence which would require thousands of man-hours by high-priced accountants and involving exorbitant and needless expense beyond Petitioner's financial ability to meet and thus Petitioner was deprived of the benefit of the due process of law as required by the Fifth Amendment to the Constitution of the United States.

10. If the Order to Cease and Desist is not erroneous and invalid for the foregoing reasons stated in Points 1 to 8, then said Order is invalid because it is too broad in scope and exceeds the authority of the Commission as follows:

a) It should not have included "piston rings" since there is no evidence of discrimination in prices as to that item.

b) It should not have included the words "and other related items" as there is no evidence in the record of other related items.

c) Its provisions were not limited to price discrimination where the effect was injury to the secondary line competition, as the evidence in the case was directed solely to this secondary line. Price discrimination so as to cause injury to the secondary line competition means injury at the distributor or jobber level.

d) The Order was not limited by its provisions to instances of price discrimination in the sale of specific types of replacement parts of like grade and quality to purchasers competing in the resale of such specific types of like grade and quality of automotive replacement parts.

11. The Order to Cease and Desist contains no guide or yardstick by means of which Petitioner can determine the lawfulness or unlawfulness of its pricing practices.

12. Section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act (Section 13, Title 15, U. S. Code) as construed and applied by the Federal Trade Commission in this proceeding is contrary to constitutional standards of definiteness and reasonableness thereby denying due process of law to Petitioner under the Fifth Amendment to the Constitution of the United States.

Wherefore, your Petitioner prays for the relief set forth in Section III above.

Respectfully submitted,

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TRANSCRIPT OF EVIDENCE AND PROCEEDINGS BEFORE THE FEDERAL TRADE COMMISSION.

In the Matter of MOOG INDUSTRIES, INC. (A Corporation)	Docket No. 5723 United States Court House, 1114 Market Street, St. Louis, Mo.

Tuesday, June 20, 1950.

Before Honorable Earl J. Kolb, Trial Examiner.

Appearances:

Elon P. Schrup, and James E. Corkey, Counsel Supporting the Complaint.

Edwin S. D. Butterfield, Counsel for Moog Industries, Inc.

Respondent, Moog Industries, Inc., in response to a subpoena duces tecum, produced a number of documents (Tr. Part 1, Page 2).

The Trial Examiner granted leave to withdraw the Answer filed by Respondent and granted leave to file an Amended Answer (Part 2, Page 5). The Trial Examiner stated that in view of the facts that the Amended Answer did not contain certain admissions which appeared in the original Answer, with reference to statements in Paragraphs 1, 2, and 3 of the Complaint, that he would take up with counsel each of those paragraphs and determine the extent to which those particular paragraphs were admitted. The Respondent, through counsel admitted the statement appearing in Paragraph 1 of the Complaint that Respondent, Moog Industries, Inc., formerly titled St. Louis Spring Company, is a corporation organized and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business at 6650 Easton Avenue, St. Louis, Missouri (Part 2, Page 6).

The respondent admitted Paragraph 2 of the complaint, which stated that "respondent is now, and for several years

last past has been, engaged in the business of the manufacture, sale and distribution of automotive products and supplies to different purchasers of the same, located in the various States of the United States and in the District of Columbia. Said products and supplies are sold by the respondent for use, consumption or resale within the United States and the District of Columbia, and respondent causes said products and supplies, so sold, to be shipped and transported from the State or States of location of its places of business to the purchasers thereof, located in States other than the State or States wherein said shipment or transportation originated" (Part 2, Page 6).

Respondent maintains and at all times mentioned herein, has maintained a course of trade and commerce in said products and supplies, among and between the States of the United States and in the District of Columbia, existed (Part 2, Page 7).

Respondent admitted paragraph 3 with the exception of the statement that they were engaged in "substantial competition", as the term "substantial competition" applies to the competition in the entire industry.

Respondent now admits paragraph 3 as follows:

"Respondent, in the course and conduct of its business as aforesaid, is now, and since June 19, 1936, has been, engaged in active competition with other corporations, partnerships, firms, and individuals manufacturing, selling, and distributing, comparable automotive products and supplies in commerce to purchasers of the same in manner and method and for purposes as aforestated. Many of said purchasers and many of the aforesaid purchasers from the respondent are comparatively engaged each with the other."

(Pages 7, 8.)

ANTON M. GOETZ, called as a witness for the Commission, testified as follows:

Direct Examination.

My name is Anton M. Goetz, residing at 6034 Odell Street, St. Louis, Missouri. I am Secretary and Controller of Moog Industries, Inc., and have been employed by them for ten years, and held the position of Secretary for that period of time. Prior to being employed by Moog Industries, I was employed with S. D. Leidesdorf & Company, Certified Public Accountants, at St. Louis, Missouri. As Secretary, I watch over all cash outlays, sign checks, am on the Financial Board and on the Board of Directors. I discuss all sales policies and advise with others to arrive at the proper conclusion. I handle all tax problems and anything that a controller similarly situated would do (Part 2, Page 9). I am also in administrative charge of office help and have charge of taking care of all records and documents of Moog Industries, Inc. I am making return on this subpoena duces tecum, addressed to Moog Industries, Inc., and the material so presented was obtained by various members of my staff at my direction and supervision (Part 2, Page 10).

I have a true copy of all contract forms used by respondent in connection with the sale of goods during the calendar years 1947, 1948, and 1949, and including, but not limited to, a distributors' franchise and distributors' companion agreement, a C. P. Wholesaler's agreement, a jobber agreement, and an A. R. J. jobber contract. These documents, so referred to, were marked "Commission's Exhibits 1, 2, 3, 4A, 4B, 5, 6, 7, 8, 9, 10, 11, 12, and 13."

Commission's Exhibit No. 1 is our agreement with the distributor on the sale of our products to him. The figures in the lower left hand corner of this exhibit "12-49" refer to a new franchise agreement that was written up by us to be sent to our customers about the first of the year, and refers to the date the form was printed (Part 2, Page 11).

Commission's Exhibit 2 is an agreement which becomes a part of our distributors' franchise agreement,

marked "Commission's Exhibit 1". It is a supplementary agreement and is not necessarily a part and parcel of Commission's Exhibit 1 (Part 2, Page 12). In some instances Commission's Exhibit 2 does supplement and modify the terms of Commission's Exhibit 1. In the lower left hand column of Commission's Exhibit 2 the figures 4-30-50 indicate the date of printing, and was put into effect after that date with some of our customers. A similar form was used prior to April 30, 1950, but there are some modifications in Exhibit 2 that do not appear in Commission's Exhibit 3. Commission's Exhibit 3 is an agreement printed December 3, 1949, and was used after that date with some of our customers in connection with redistribution of our product (Part 2, Page 13). On April 30, 1950, Commission's Exhibit 2 superseded Exhibit 3.

Commission's Exhibit 4A and 4B in the form of a letter to all Moog distributors, dated August 12, 1949, is an amendment to our franchise agreement with our distributors that has been marked "Commission's Exhibit 6" (Part 2, Page 14).

Commission's Exhibit No. 5 is a letter dated July 22, 1949, was sent to all of our distributors as an amendment to our franchise agreement of November, 1948, which letter was later amended by our letter of August 12-49 (Comm. Exhibit 4A and 4B) (Part 2, Page 15). Commission's Exhibit 6 is a distributor's franchise agreement that went into effect around November, 1948, and which was later amended by our letters to our distributors of July 22nd and August 12, 1949, being Commission's Exhibit 5 and Commission's Exhibit 4A and 4B (Part 2, Page 15).

Commission's Exhibit 6 is an original copy with one of our customers as we had no form copy that had not been previously used. It is similar to the form used by all other customers except a customer named O. C. Y.

Commission's Exhibit 7, purporting to be a distributor's franchise, is an agreement with our customers that was printed in April, 1948, which changed the terms of a previous agreement in some respects. That previous

agreement was dated November, 1947, and is Commission's Exhibit 8.

Commission's Exhibit 7 was a copy of a contract effective for that period, and as we had no unused form in our file, we have supplied one of our original papers (Part 2, Page 16). Commission's Exhibit 7 was superseded by Commission's Exhibit 6.

Commission's Exhibit 8 is a distributor's franchise agreement and is a copy of an agreement we had in effect with Row Auto Parts Company in that period, and the printed date is November, 1947, and was for the period beginning February 12, 1948, in that case. It was used approximately for the year 1948 until amended by Commission's Exhibit 7, and is supplied as a typical distributor's franchise contract, as we had no blank forms for that particular period (Part 2, Page 17). In other words Commission's Exhibit 8, was the form used in the period between November, 1947, and April, 1948.

Commission's Exhibit 9 represents a consignment agreement with our distributors in connection with the sales of our piston rings on a consignment basis and a replenishment of the consigned stock after sale. The date of printing was January, 1950. It was a reprinting of a document which we had printed in May, 1945, without change, and this distributor's consignment agreement was used in connection with consignment sales of piston rings during the period starting in May, 1945.

Commission's Exhibit 10 is a wholesaler's agreement between our customers and their customers in connection with the sale of our products (Part 2, Page 18), and with our approval is used between our wholesale customers and their customers. This particular type of agreement was used during the period January 1, 1947 to December 21, 1949 (Part 2, Page 19).

Commission's Exhibit 11 is another jobber agreement between our customer and one of their classes of customers and is entered into with the consent of Moog Industries, Inc. It was printed around the date of April 30, 1950, to be used in conjunction with Commission's Exhibit 2 (Part 2, Page 19) which is the warehousing and redistributing plan (Part 2, Page 20). The ware-

housing and redistributing plan had been put into effect in December of 1949 generally, but there were a few exceptions prior to that date, but December, 1949, was the first time we found it necessary to use printed forms, because in lieu of this form (Comm. Exhibit 11) we used Commission's Exhibit No. 12 (Part 2, Page 20).

Commission's Exhibit 12 is an agreement between our customers and their customers, approved by us, relating to the sale of our products and it was used by the few warehousing and redistribution plan customers that we had prior to December, 1949; and it was also generally used for our customers as a sales aid in tying customers of theirs to them without a warehousing and redistributing plan having been effected. Commission's Exhibit 12 was in use either in the latter part of 1946 or the early part of 1947 (Part 2, Page 21). It was used up until December 1949, when it was superseded by Commission's Exhibit 11 (Part 2, Page 21).

Commission's Exhibit 13 is an A. R. J. jobber contract and is an agreement between our customer and one of their classes of customers, in regard to the purchase of piston rings by the one customer from the other. The initials "A. R. J." mean "Associate Ring Jobber". It was first used in July, 1947 (Part 2, Page 22).

Commission's Exhibit 14 is the distributor's franchise agreement between our customers and ourselves in relation to the sale of our products, and was in effect from about March, 1945, until November, 1947 (Part 2, Page 22).

Commission's Exhibit No. 8 was the form which superseded the distributor's franchise, marked "Commission's Exhibit 14".

The foregoing represent all the various types of form contracts which were used by Moog Industries, Inc., in connection with the sale of its products during the period January 1, 1947, to December 21, 1949, in the cases in which our name appeared on the contract. For instance, there is a contract form between a class of our customers and one of their customers, in regard to consignment of piston rings by our customer to one of their customers. This was used in connection with Commission's Exhibit

9. It was known as a Moog specialist's contract. This contract was placed in the hands of some of Moog's customers and was used by them in connection with sales of Moog Products to their customers on a consignment basis. Copies of these contracts were forwarded by our customers to us and were kept in Moog's files (Part 2, Page 24).

The foregoing were all the contract forms used during this period by Moog, although we may have had a similar agreement to Commission's Exhibit 12 in use prior to that one. The primary use was as a sales aid to our customer (Part 2, Page 25).

Thereupon, Commission's Exhibits 1, 2, 3, 4A, 4B, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 were offered and received in evidence (Part 2, Page 25).

Commission's Exhibit 15 is a Moog catalogue and is typical of the various catalogues used during the calendar years 1947, 1948, and 1949, and the price lists contained in that exhibit are typical of the various price lists used in connection with merchandising of Moog Products during those years. The essential difference between Commission's Exhibit 15 and any other catalogue or price list, used in that period, would merely be that certain items have been added as new cars came on the market and a few items were deleted because there were no longer any calls for them, and include price changes that may have occurred (Part 2, Page 26). Moog may issue price changes at any time. The scheme of price list uses a different system of colors—a white price list, a yellow price list, a buff price list, a pink price list, and a blue price list—and these have remained constant during the years 1947 through 1949, except the leaf spring line, in connection with which we did not have certain of these colored price lists. In the leaf spring line we merely have three different colored price lists—a yellow, a green and a blue price list—and they remained constant through the years 1947 through 1949 (Part 2, Page 27).

Thereupon Commission's Exhibit 15 was offered and received in evidence (Part 2, Page 28).

Commission's Exhibit 16 is an advertising pamphlet issued by our promotional department to explain to our customers the manufacturing of our leaf spring.

Commission's Exhibit 17 is an advertising pamphlet, similar to Commission's Exhibit 16, but it relates to our coil action parts. (Part 2, Page 28).

Commission's Exhibit 18 is an advertising pamphlet relating to the piston ring line, explaining the manufacture of piston rings.

Thereupon Commission's Exhibits 16, 17, and 18 were offered and received in evidence (Part 2, Page 29).

Commission's Exhibit 16, relating to the spring division of Moog Industries, was published in 1950 and replaced a previous pamphlet of similar nature which I believe was published in 1948.

Commission's Exhibit 17, relating to the coil action division was published and distributed in 1949 and Commission's Exhibit 18, relating to piston rings was published in 1948 (Part 2, Page 29). They were generally distributed to the trade.

Commission's Exhibits 19A through 19F refer to parties designated under Metropolitan Automotive Wholesalers Co-Operative, Inc.

Commission's Exhibit 19A is a distributor's franchise agreement between Moog Industries, Inc., and Metropolitan Automotive Wholesalers Co-Operative, Inc., dated June 1, 1948, executed by Abraham Lonoff, President and by A. A. Apple, and was effective between it and ourselves relating to the sale of our coil action line to them in the period from December 1, 1947, until the contract was changed (Part 2, Page 31). While this contract is dated August 25, 1948, for accounting purposes we have to establish either a fiscal or calendar year to all of our customers to which we apply our merchandise bonus, it so happens that in this particular case the year began with December 1, 1947, and ended November 30, 1948, so the contract was considered effective by Moog and that company although it was not executed until August, 1948. While Page 4 of this contract indicates that Shackles, tierod ends and kingbolt sets are checked as products to be purchased, they may have purchased a few of those sets out of this contract, but the amount was small, and this contract would cover purchase of those parts regardless of amount. If we had any contract executed by the individual mem-

bers of Metropolitan Automotive Wholesalers Co-Operative, it was in error, (Part 2, Page 32).

Commission's Exhibit 19B is a distributor's merchandise agreement between Moog Industries, Inc., and Metropolitan Automotive Wholesalers Co-Operative, Inc., and is one which we received from them after we changed our contract in November of 1948, and it also relates to the sale of our coil action parts to them for the fiscal year 1948 to November 30, 1949 (Part 2, Page 33).

Commission's Exhibit 19C is a letter from Metropolitan Automotive Wholesalers Co-operative, Inc., to Moog Industries, Inc., received by us April 22, 1948.

Commission's Exhibit 19D is a letter dated June 25, 1948, from Moog Industries, Inc., to Metropolitan Automotive Wholesalers Co-operative, Inc., dictated by our Mr. Bushyhead, in regard to their franchise agreement (Part 2, Page 33).

Commission's Exhibits 19E and 19F is a letter to them and a carbon copy of a letter, dated December 21, 1949, explaining the changes in our contract for 1950, in our franchise agreement for 1950 (Part 2, Page 34). There were no other documents in our files relating to Metropolitan Automotive Wholesalers Co-operative, Inc., during the period July 1, 1938, to December 21, 1949.

Thereupon Commission's Exhibits 19A through 19F, inclusive, were offered and received in evidence (Part 2, Page 34).

We have no documents, contracts, franchises, or correspondence with Automotive Group Buyers, Inc., because the period of time in which they operated with us was such that we destroyed all correspondence and documents that we may have had (Part 2, Page 35).

ANTON M. GOETZ, testified further as a witness for the Commission:

Papers in connection with Cotton States, Inc., were marked Commission's Exhibits 20A, 20B, 20C, 20D, 20E, 20F, 20G, 20H, 20I, 20J, 20K, 20L, 20M, 20N, 20O, 20P,

20Q, 20R, 20S, 20T, 20U, 20V, 20W, 20X, 20Y, and 20Z, 20Z-1, 20Z-2, 20Z-3, 20Z-4, 20Z-5 (Part 2, Page 37).

Thereupon Commission's Exhibits Numbers 20A, 20B, 20C, 20D, 20E, 20F, 20G, 20H, 20I, 20J, 20K, 20L, 20M, 20N, 20-O, 20P, 20Q, 20R, 20S, 20T, 20U, 20V, 20W, were offered and received in evidence; and thereupon Commission's 20X, to 20Z-5 were returned to the witness (Part 2, Page 39).

Papers relating to Mid-South Distributors were marked Commission's 21A, 21B, 21C, 21D, 21E, 21F, 21G, 21H, 21J, 21K, 21L, 21M, 21N, 21-O, 21P, 21Q, 21R, 21S, 21T, 21U, 21V, 21W, 21X, 21Y, and 21Z, 21Z-1, 21Z-2, 21Z-3, 21Z-4, 21Z-5, 21Z-6, 21Z-7, 21Z-8, 21Z-9, 21Z-10, 21Z-11, 21Z-12, 21Z-13, 21Z-14, 21Z-15, 21Z-16, 21Z-17, 21Z-18, 21Z-19, 21Z-20, 21Z-21, 21Z-22, 21Z-23, 21Z-24, 21Z-25, 21Z-26, 21Z-27, 21Z-28, 21Z-29, 21Z-30, 21Z-31, 21Z-32, 21Z-33, and 21Z-34. There are no contracts with this company in our files. We have checked all of our files and can find none for the years 1947, 1948, and 1949 (Part 2, Page 39). Thereupon Commission's Exhibits 21A through 21Z-34, were offered and received in evidence (Part 2, Page 41).

Documents relating to Mid-West Warehouse Distributors, Inc., marked Commission's Exhibits 22A, 22B, 22C, 22D, 22E, 22F, 22G, 22H, 22I, 22J, 22K, 22L, 22M, 22N, 22-O, 22P, 22Q, 22R, 22S, 22T, 22U, 22V, 22W, were offered and received in evidence (Part 2, Page 42).

Thereupon documents relating to Ozburn, Crow & Yantis Company, marked Commission's Exhibits 23A, 23B, 23C, 23D, 23E, 23F, 23G, 23H, 23I, 23J, 23K, 23L, 23M, 23N, 23-O, 23P, 23Q, 23R, 23S, 23T, 23U, 23V, 23W, 23X, 23Y, and 23Z, 23Z-1, 23Z-2, 23Z-3, 23Z-4, 23Z-5, 23Z-6, 23Z-7, 23Z-8, 23Z-9, 23Z-10, 23Z-11, 23Z-12, 23Z-13, 23Z-14, 23Z-15, 23Z-16, 23Z-17, 23Z-18, 23Z-19, 23Z-20, 23Z-21, 23Z-22, 23Z-23, 23Z-24, and 23Z-25 were offered and received in evidence (Part 2, Page 43).

Thereupon documents relating to Automotive Parts Distributors, Inc., were marked Commission's Exhibits 24A, 24B, 24C, 24D, 24E, 24F, 24G, 24H, 24I, 24J, 24K, 24L, 24M, 24N, 24-O, 24P, 24Q, 24R, 24S, 24T, 24U, 24V, 24W, 24X, 24Y, and 24Z, 24Z-1, 24Z-2, 24Z-3, 24Z-4, 24Z-5, and 24Z-6 were all offered and received in evidence, ex-

cept Commission's Exhibits 24Z-5 and 24Z-6 which were not introduced in evidence by the Commission and were returned to the witness (Part 2, Page 44).

Mr. Goetz then produced documents relating to Warehouse Distributors, Inc., marked Commission's Exhibits 25A, 25B, 25C, 25D, 25E, 25F, 25G, 25H, 25I, 25J, 25K, 25L, 25M, 25N, 25-O, 25P, 25Q, 25R, 25S, 25T, 25U, 25V, 25W, 25X, and 25Z, and 25Z-1, 25Z-2, 25Z-3, 25Z-4, 25Z-5, 25Z-6, 25Z-7, 25Z-8, 25Z-9, 25Z-10, 25Z-11, 25Z-12, 25Z-13, 25Z-14, 25Z-15, and 25Z-16 were offered and received in evidence (Part 2, Page 46).

Mr. Goetz then produced documents relating to Southwestern Warehouse Distributors, marked Commission's Exhibits 26A, to 26M, inclusive, which were offered and received in evidence (Part 2, Page 47).

Mr. Goetz then produced documents relating to Automotive Southwest, Inc., marked Exhibits 27A, 27B, 27C, 27D, 27E, 27F, 27G, 27H, 27-I, 27J, 27K, 27L, 27M, 27N, 27-O, 27P, 27Q, 27R, 27S, 27T, 27U, 27V, which were offered and received in evidence (Part 2, Page 48).

Mr. Goetz then produced documents relating to Ark-La-Tex Warehouse Distributors, Inc., marked Commission's Exhibits 28A, 28B, 28C, 28D, 28E, 28F, 28G, 28H, and 28-I, which were offered and received in evidence.

Thereupon Mr. Goetz produced documents relating to Six States Associates, marked Commission's Exhibits 29A, 29B, 29C, 29D, 29E, 29F, 29G, 29H, 29-I, 29J, 29K, 29L, 29M, 29N, 29-O, and 29P, which were offered and received in evidence (Part 2, Page 50).

It was understood that Respondent's failure to tender objections to Commission's Exhibits 19A through 29P was not to be construed as any waiver or estoppel of respondent's rights under the issues in its amended answer as to the jurisdictional defense (Part 2, Page 50).

Thereupon Commission's Exhibits, 30A, 30B, 30C, 30D, 30E, 30F, 30G, 30H, 30-I, 30J, 30K, 30L, 30M, 30N, 30-O, 30P, 30Q, 30R, 30S, 30T, 30U, 30V, 30W, and 30X were marked for identification.

I am familiar with this document. It was prepared by us and a copy of which was forwarded to our attorney,

Mr. Butterfield. It contains a list of all the group buying organizations with which Moog Industries has done business, together with the members of those several groups who are purchasers from Moog Industries, Inc. At the top of most of these sheets is the name of the group organization. Below that there is a heading entitled "members" and then a further listing of names under that heading. These members, except the ones which are preceded by a star, are purchasers from Moog Industries, Inc., and are group members from whom we receive group purchase orders for their requirements, with two exceptions. These exceptions are Southwest Automotive Distributors, of Los Angeles, California, and Southern California Jobbers, Inc., of Los Angeles, California. These latter names refer to the pages identified as Commission's Exhibits 30S, 30Q, and 30R (Part 2, Pages 51, 52). The members of Southern California Jobbers, Inc., and of Southwest Automotive Distributors order from Moog on their own regular purchase order forms. The other jobber members of the several group-buying organizations listed in this exhibit ordered from Moog on purchase order forms bearing the name of the group organization, but these order forms, however, are submitted by the individual members of the group. Moog makes shipments pursuant to the order forms submitted by the individual members of the several groups and such shipments are made to members or their customers. So far as I know, these group organizations do not have any warehouses, although I believe there are some who are considerin warehouses. During the period between June 19, 1936 and December 21, 1949, I know of none to whom shipment was made to their warehouses, to the best of my knowledge (Part 2, Page 53). There are some members who themselves warehouse the stock for their branches and from which the branches are being supplied. As far as I know, during the period between June 19, 1936 and December 21, 1949, none of the group-buying organizations had a warehouse for the group itself. When we bill for the purchases made by the several members of a group, we break down the purchases, showing what each member has purchased during the course of a month. That is done for accounting convenience and we send that bill to

group headquarters with a summary statement showing their total purchases. Upon their request we also furnish periodically a summary of the purchases made by the several members of the various groups with whom we deal (Part 2, Page 54).

Q. Mr. Goetz, making specific reference to Metropolitan Automotive Wholesalers, a list of whose members appears upon the document pages identified as 30G and 30H, is it true that in selling to the members of this group shipments were made to the addresses which immediately follow the names of the members, as they are set forth on these pages?

A. Not in all cases because it is possible that the shipments were made to the main office of the member and the shipments then transferred to the branch stores on a basis of their needs.

Q. In other words, Mr. Goetz, again being particular reference to the member known as American Motor Specialties Company, there are three addresses for that member. Your shipments in that case might have been to just one of those addresses? Is that what you are saying?

A. They could have been, yes.

We never made any shipments to 270 Broadway, New York, but payments for purchases were received by us from that address, 270 Broadway, New York (Part 2, Page 55).

Q. Mr. Goetz, there is a note on here to the effect of "starting date, December 1, 1947" followed by a note "sole predecessor group Automotive Group Buyers, Inc., since 1940," but Automotive Group Buyers, Inc., does not appear in this list of group-buying organizations. Can you explain the absence of Automotive Group?

A. It does not appear for the reason that when this statement was prepared it was the groups to whom we sold at that time (Part 2, Pages 55 and 56). At the time of preparation Automotive Group Buyers was not active. When it was active, approximately the same members belonged to Automotive Group Buyers as belonged to Metropolitan Automotive Wholesalers, approximately, although there have been some additions and some losses. During

the existence of Automotive Group Buyers, its members sent us group purchase orders. With reference to Commission's Exhibit 30F, various members listed there also sent us purchase orders on a form headed with the name "Cotton States, Inc." (Part 2, Page 56), and in response to those purchase orders, we shipped from St. Louis to the places of business of the several members or the customers of the members (Part 2, Page 56). In all cases these group-buying organizations operated in similar fashion with respect to their purchases from Moog Industries, Inc., except as to Southern California Jobbers, Inc., and Southwest Automotive Distributors. The difference in these two latter operations was that the purchase orders were not placed on forms bearing the name of the group organization. In the case of those two buying organizations, the purchase order forms submitted to Moog were the regular purchase order forms employed by the several members in the conduct of their business and had their own heading on the form or no heading at all (Part 2, Page 57).

Thereupon, Commission's Exhibits 30A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, and X were offered and received in evidence (Part 2, Page 58).

Mr. Goetz then produced sales summaries kept in the regular order of business and relating to summarizing or evidencing sales made during the calendar years 1947, 1948, and 1949, for the following-named cities: New York City, New York; Brooklyn, New York; Newark, New Jersey; New Brunswick, New Jersey; Orange, New Jersey; Memphis, Tennessee; Nashville, Tennessee; New Orleans, Louisiana; Denver, Colorado; Des Moines, Iowa; Sioux City, Iowa; Fort Smith, Arkansas; Birmingham, Alabama; Mobile, Alabama; Jackson, Mississippi; and Salt Lake City, Utah.

Trial Examiner Kolb: Let the record show that Mr. Goetz, pursuant to the operation of the subpoena just referred to, has produced approximately 1100 cards. It is in the agreement between counsel that these cards be returned to Mr. Goetz for the purpose of numbering, and, when this is completed, Mr. Goetz is to send the cards to the Trial Examiner at Washington for the purpose of

turning them over to the attorneys for the Commission and accepting their receipt therefor. These cards are to be used by the attorneys for the Complainant, or other employes of the Commission, for the purpose of making such analysis as may be desired, and, upon completion, will be returned to Mr. Goetz, of Moog Industries, Inc., unless for any reason it is necessary to use these cards for some other purpose in connection with this proceeding, in which event, request may be made to the Trial Examiner for photostating as may be necessary. In the event any of the cards are photostated, it is agreed by the parties that they will all be treated as originals. Let the record show that each side has answered "Yes".

(Thursday, October 19, 1950.)

At this point counsel for Moog Industries, Inc., asked that it be understood that as to each and every question that is asked of witnesses that appeared to-day under the subpoena ad testificandum, there will be an objection to each question on the ground that the respondent is not deemed to have waived his constitutional rights questioning the jurisdiction, and each of said questions is objected to on the ground that it is beyond the scope, authority, power, and jurisdiction of the Commission (Part 2, Pages 73 and 74).

Trial Examiner Kolb: The objections as specified by counsel for Respondent will be deemed to have been made as to the witnesses testifying in the first instance and as to all questions asked the witness, and will also be deemed to have been denied or overruled by the Trial Examiner.

HUBERT P. MOOG, as a witness for the Commission, testified:

My name is Hubert P. Moog. I live at Congress Hotel, St. Louis, Missouri. I am President of Moog Industries, Inc., whose address is 6650 Easton Avenue, St. Louis, Missouri. I have been President since 1919. The business was founded by my brother and myself in 1919. At that time it was operated under the name of St. Louis Bolt &

Spring Company (Part 2, Page 76). A couple of years after the Company was founded, the name was changed to St. Louis Spring Company, and in 1943 the corporate name was changed to Moog Industries, Inc. Mr. A. A. Apple is Vice-President, Anton M. Goetz is Secretary, and Hubert C. Moog is Treasurer. The same officers are members of the Board of Directors, I believe. I actually don't know (Part 2, Page 77).

Moog Industries, Inc., controls certain subsidiary corporations. They are St. Louis Spring Company of Texas, St. Louis Spring and Service Company of Texas, St. Louis Spring and Service Company of Missouri, and one more in Colorado. I don't recall the name of that one. I believe St. Louis Spring Suspension Service of Nebraska is a part of Missouri, but I am not sure; I don't know; I have forgotten. I know where they are located, but I just can't recall how many subsidiary corporations Moog controls. I don't know what the corporation name is, but I know where the places are (Part 2, Page 78).

The Company first began to manufacture springs and spring products around 1922 or 1923 (Part 2, Page 79). At that time only leaf springs were manufactured (Part 2, Page 80). Our operation in 1922 was a combination of repair work, repairing springs and making a few springs, and buying a lot of odd stuff as a jobber, and we purchased a lot of our stuff in 1936. I think, when we moved into the new place on Easton Avenue. I would say it was a combination of purchases from other manufacturers and manufacturing some parts of it ourselves, up to 1936. I believe up to 1926 or 1927 we operated only in a local way with a few accounts outside of town, but in 1926 or 1927 we decided to go and sell to outsiders, to other jobbers, and bill through a jobber in St. Louis, where we still operated a spring department as part of the business. In 1927 we only were manufacturing leaf springs and leaf spring parts. In 1933 or 1934, when knee action coils, like Buick and Oldsmobile first brought out, we were scared the spring business would not last and bought a piston ring plant from Jamhorst in California under the name of St. Louis Motor Production, I believe is the name of it, and we operated that from 1934 on. In 1937, when more cars came out with

knee action, we decided to go into knee action, what we call coil action parts,—I don't know what the other fellows call it. I believe it was coil springs suspension and all of that sort of stuff. This was largely suggested by Mr. Apple, and he and my brother did all this. I traveled all the time. I traveled from 1927 or 1928 until 1941 (Part 2, Page 82). In 1937 it took us some time to get ready to make knee action parts and coil action parts, as we call them, and it was in 1938 we got into the Chicago show and the S.P.M.A.W.E., a combination show.

Mr. Apple, when he first came with us, was a manufacturer's agent. I think in 1936 or 1937, or a little later he was made Assistant Sales Manager. Up to about 1938, Moog was primarily in the spring line and piston ring line, and in 1938 we added the coil action line. About 1947, I believe, we added a chassis parts lines. At the present time we have a spring line, a coil action line and a piston ring line (Part 2, Page 83). The chassis parts line is not a part of the spring line. It is all in one contract but it is not a part of the spring line at all. It really is a fourth line, when we started it. We now have thrown the coil springs, which was not mentioned, and came in about the same time, and the chassis parts into one line.

As of 1947 we were making a coil action line, a line of springs and spring parts and piston rings line (Part 2, Page 84)., and a line of chassis parts. We were not making too many of these. We purchased a lot of them. I don't know the year that we started selling and distributing a line of coil parts, but it was after the war. That is our complete line as of today. Our manufacturing facilities are located at 6650 Easton Avenue, St. Louis. We have sub-contractors in other places. We own no other manufacturing facilities (Part 2, Page 85). The subcontractors are individual concerns and are not owned or controlled by us. With reference to coil action parts, as to what extent Moog Industries, Inc., produced them, I cannot quite answer that. We manufacture practically 100% of the leaf springs, but sometimes in an emergency, we get help from others. We have the manufacturing facilities for a complete line of these springs (Part 2, Page 86). The coil springs are made by somebody else and we purchase them for re-sale. All of the piston rings are made by us.

After we buy the castings, the finishing process is made by us 100%. The several items that make up the chassis line are spring bolts, tie rods, intermediates, tie rod ends, and shackles. As to the extent that Moog processes or manufactures the tie rod parts, I don't think I would like to answer that one (Part 2, Page 87). We buy the tie rods in that line 100%. The spring bolt set is a purchased line, although we make a small percentage. In respect to shackles, we make only a very small part. We purchase the others and pack it in our own boxes. Most of our chassis line is purchased for re-sale. The coil action parts provide the mechanical equipment which enables the front wheels to be independently suspended from the frame of an automobile, and the words "coil action" were coined by Moog (Part 2, Page 88).

Q. Now, when you speak of coil action parts, you don't include the spring in that, do you?

A. The spring is a part of the assembly that makes all of it. In other words, coil action is the hinges and parts that make it possible for that to work as a spring would work and a shock absorber is part of the assembly which we don't have.

Q. When you refer to Coil action, you refer to the mechanism without the spring part, don't you?

A. It is not a part of the coil action line. It is separate. That's what you are referring to?

Q. That is right.

A. We only have one type of customer and that is our distributor (Part 2, Page 89). It is a jobber which we type as a distributor. I don't know of any industrial accounts that we sell to. There may be, but I can't remember them. Mr. Apple or Mr. Goetz would know that. We do make some springs for some trailer manufacturers. That is a different type of customer. It is a very small percentage of our business to the industry itself. It is small in volume. Our business is replacements (Part 2, Page 90). In the replacement parts market, we refer to our customers as "jobbers" or "distributors" (Part 2, Page 91). In the price lists we call them distributors and when we are talking about them we call them a jobber or wholesaler. They can be referred to as a jobber or wholesaler or distributor.

It is one common definition. With any correctness I cannot estimate the number of these wholesalers, jobbers, or distributors. Mr. Apple or Mr. Goetz could answer that.

As to when our company first initiated the practice of granting a volume rebate, based on volume of purchases, to be honest with you I don't know how to answer that (Part 2, Pages 92 and 93). As of to-day we grant a rebate to our customers based on volume of their purchases. The practice of Moog Industries, Inc., to grant such rebates dates back to the time when we purchased a piston ring plant. We fell heir to that with the piston ring plant—somewhere around 1934, I can't remember dates too well (Part 2, Page 93). We purchased the piston ring business of St. Louis Motor Parts Company from the owner in California at that time (Part 2, Page 93) and changed the name to St. Louis Spring Company.

Q. An annual rebate then, based on volume of purchases, was first instituted by Moog in 1934, is that correct?

A. On what date I can't tell you. We purchased that and that was just part of the piston ring plan. What dates we did it, I could not—I can't remember. In 1934, Moog was not granting an annual volume rebate based on volume of spring purchases. In 1938 Moog was not granting an annual volume rebate based on volume of spring purchases (Part 2, Page 94). The various items that are included in our spring line are leaf springs, main leaf spring parts like bushings, center bolts, rebound clip bolts and coil springs. I can't recall the exact date we began to include coil springs in the spring line (Part 2, Page 95). The sales department could tell you better what is included in the spring line better than I can (Part 2, Page 96). I cannot tell you particularly. Mr. Apple in the Sales Department can (Part 2, Page 96).

Q. Can you answer the question, Mr. Moog?

A. Not completely and not intelligently because I—would rather not.

Q. Can you answer it?

A. It may not be a true picture as far as I know. I leave those details to Mr. Apple.

Q. Do you know the various items that comprise the spring line of the Moog Company?

A. As far as I know, I told you it was leaf springs, bushings, center bolts, rebound clip bolts.

Q. Does it include coil springs?

A. I don't know; I don't know.

Moog Industries, Inc., grants to its customers a rebate based on the annual volume of purchases of coil action parts. It is in the contract. I don't know the date, but I imagine from 1939 or 1938 it has been the policy of Moog to grant a rebate based on the volume of purchases of its customers for its coil action line (Part 2, Page 97).

Q. You testified, Mr. Moog, that you began giving a volume rebate on piston ring purchases back in 1934. Has that policy continued to date?

A. I said before that we fell heir to the volume rebate when we purchased the piston ring plant.

Q. And you have continued it?

A. Could not help it to stay in the ring business.

Q. Have you continued it.

A. Yes, sure (Part 2, Page 98).

At the present time we grant volume rebates on leaf springs (Part 2, Page 101). I don't know how long we have done this, but it runs from around 1949 on July the 1st, or maybe a little bit earlier; you have got the contracts on that; there is no secret to that part of it; I don't know the exact dates.

As to rebates on spring bolts, I am not trying to evade the question, but I believe Mr. Apple can answer that better than I can as to when we started volume rebates. I cannot tell you because I don't know (Part 2, Pages 101, 102).

Mr. Schrupp:

Q. I don't think the question is whether Mr. Apple can answer any better than you can. The question is can you answer it, and, if you can answer it, I wish you would answer it, and if you can't answer, flatly state you cannot answer it.

Witness:

A. I cannot answer it. I don't think so because I don't know (Part 2, Page 102).

I had no dealings with the group organizations that buy from Moog Industries, Inc. (Part 2, Pages 102, 103). I travel a lot. I had no dealings with any of the group organizations. In the course of my selling activity I made it a practice to call on various jobbers.

Q. And did you negotiate with them as to the terms of sale at which they could buy Moog products?

A. I can't remember, but I don't think I did.

Q. You did not discuss price with these customers that you called on, Mr. Moog?

A. No; I didn't necessarily.

Q. Can you explain that?

A. The regular customers that were buying from us I merely went in and worked up an order and took it and wrote it down and sent it in (Part 2, Page 103).

Q. Did you know the price at which those customers bought the products of Moog?

A. Never came up. I'm one salesman I don't think who ever quoted a price to anybody.

Q. For how long were you actively engaged in selling on the road?

A. 1923 or 1924 until 1941 in October. During that time the question of price never came up with the customers I deal with. I am not familiar with the policy of Moog respecting trade allowances. That is in the hands of Mr. Apple and Mr. Goetz.

Q. Were you familiar with the policy of Moog with respect to freight allowances at any time that you were selling on the road?

A. I don't understand the question.

(The question was then re-read.)

A. I don't know how to answer it, to be frank. I would say it did not come up when I was talking to them at any time.

Q. Do you know the current obsolescent policy of Moog?

A. We do the best we can.

(Part 2, Page 104.)

The question of obsolescence once in a while arose when dealing with customers on the road.

Q. Do you know what the obsolescent policy was from 1937 through 1940?

A. I don't think we had one actually.

Q. Have you had a definite policy since 1940?

A. The sales department might have, but I don't know what it is and I don't remember what it is. I can't remember. From time to time I traveled Illinois, Missouri, Kansas, Arkansas, Oklahoma, Colorado, Nebraska, Iowa, North and South Dakota, Minnesota, Wisconsin, and I traveled East through Indiana, Kentucky, West Virginia, Virginia, Pennsylvania and New York. During these travels I can truthfully say I did not contact any members of the group organizations.

Q. Was there any particular type of customers of Moog that you did contact?

A. When I started traveling, back in 1927 and 1928, I called on a lot of people but never discussed those things that you are asking about, or knew whether it was a group or not. It did not make any difference (Part 2, Page 105).

Q. Did you ever have any dealings with Osborn, Crow and Yantis Company?

A. I know Mr. Yantis but I never talked to him about anything like that.

Q. You never made any arrangements with Mr. Yantis as to prices and terms of sale of new products to Osborn, Crow & Yantis?

A. I said I talked to them but not about that particular question. I don't remember talking to them about the subject you are bringing up or the arrangements that you are talking about. I know Mr. Myles of Myles Meyers Company of Memphis, Tennessee. I never discussed price or terms of sale of Moog Products with him. I know Mr. Louis Post of Greenwood, Mississippi. I met him many times in Chicago but I never talked to him about those things. I probably met him at his place of business back

in 1927, 1928, and 1929 in Greenwood (Part 2, Page 106). These meetings in Chicago with him were at the S.P.M.A.W.E. Show. I never met Mr. Lurch of New York.

There was no cross-examination.

(Part 2, Page 107.)

November 8, 1950.

AD APPLE, called as a witness for the Commission, testified as follows:

My name is Ad Apple (Part 2, Page 113); I live at 59 West Sherwood Drive, Overland, Missouri, and my business address is 5660 Easton Avenue, St. Louis, Missouri. I am General Manager of the Respondent, Moog Industries, Inc, and have been such for about eight years. My duties as General Manager are to oversee the different operations and the sales work with the rest of the boys in their departments; the handling of the policy and of that type. As to general supervision, we have an unusual organization in this respect, that our boys pretty well handle their divisions and we work together, more or less, as an operating committee. That is the best way to describe it. Before I became General Manager I was in charge of sales (Part 2, Page 114). I held that position about six or seven years and was a salesman before that. I have been with the organization about twenty-eight years, although Mr. Goetz says it is about twenty-five, so let us put it at about 1925. The business was then known as the St. Louis Spring Company. As to whether that represents merely a change of name of the corporation, I am not as familiar with those particular changes as possibly I should be, but Mr. Goetz is (Part 2, Page 115). It, however, has been a continuing enterprise. I am an officer of the company and hold the title of Vice-President. I can't tell you how long I have held that position but it has been a good many years. I cannot recall whether I was an officer when I became Salesmanager. My memory does not go back as to when that happened (Part 2, Page 116). To the best of my recollection I became

an officer around 1935. It might have been a little sooner than that. I am of the opinion I am a Director, but I am not sure. Mr. Goetz can answer that.

At one time Mr. S. Alva Moog was connected with this Company (Part 2, Page 117). He is now deceased. He was General Manager from 1936 until his death, I believe in 1941. He also was Secretary and Treasurer.

We have a number of organizations like St. Louis Suspension Spring Service of Memphis or of St. Louis. I can think of St. Louis Spring Company of San Antonio, St. Louis Spring Company, Spring Specialist of San Antonio, and Spring Suspension of St. Louis, and Moog Industries of Colorado and of Tennessee. I believe that is the way they are listed (Part 2, Page 118). We have merchandise and automotive parts warehouses in different sections of the country. We pay a fee for those services. We have approximately, twenty or twenty-one of them. All of the actual production facilities are in St. Louis.

Q. Do any of these subsidiary corporations have fabricating facilities?

A. Only for emergencies for some of the business.

Q. But they do have fabricating or production facilities?

A. We wouldn't call them—we wouldn't call it manufacturing or production; we would call it a service operation (Part 2, Page 119).

The witness' attention was directed to Commission's Exhibit 1, and particularly at Page 3 to the word "line" as it appears in the second line and again in the seventh line, and in the plural on the tenth line and was asked whether or not that had any particular meaning to him. The witness answered that that is the standard practice set-up; that it was set up that way to clarify each one of the lines, that is, leaf springs, the spring lines made up of plain leafs, helper springs and so on, and then the other parts are all put down that way in order to clarify them.

Q. Does the word "line" have some significance in your trade, Mr. Apple?

A. Only to this effect that all of our distributors may carry—very few of them carry our complete line. They carry one line or other. One distributor may carry one

and another may carry another line, or maybe one will carry two lines; so that is why that is set up to clarify it.

Q. The word "line" would appear to include the allied items of a particular classification or category of manufacture, would it not?

A. Well, the springs are a good example.

Q. Could you tell us what the various lines are that you now sell to distributors? (Part 2, Page 120.)

A. That we now sell to distributors, not manufacturers, but sellers and distributors, we have our leaf spring line, our coil spring line, our piston ring line our king bolt line, our tie rods ends line, and our shackle line and the helper springs are also classified, which is an auxiliary part, an accessory part, as line. We also have a coil action line. Helper springs are classified under the springs, but in our thinking and selling we sometimes set them up separately because there are customers who buy helper springs. The various items that make up the spring line are leaf springs, plain springs, special springs and helper springs. Certain distributors buy only helper springs of us. At all times since 1936 we have had a leaf spring line as well as a helper spring line (Part 2, Page 121).

The items that make up the coil action line are those items that are used in the individually sprung front ends and consist of pins, bushings, and forgings. We first began selling and distributing the coil action line the latter part of 1938 or early 1939. The development of that line was, in our estimation, necessary because the items we were making were replaced. Our coil action line replaced leaf springs and that was our reason for going into that line (Part 2, Page 122), and at all times since late 1938 or early 1939, we have sold and distributed a coil action line. Since 1936 we have sold and distributed a line of piston rings. As to when we first began the sale and distribution of the line of coil springs, dates like that are hard to remember. I would say it started approximately in 1946. I may be a litfle off on that. We had partial coverage.

King bolts, tie rod ends and shackles are items in the chassis line. "Chassis parts" is a broad term. It consists of a lot of other items. As to when we first began selling and distributing tie rod ends, I would have to guess again,

and say it was around 1946 or 1947. That is the newest part of our operation. As to when we began the sale and distribution of king bolts, they all practically started together. There was not too much difference; they dovetailed (Part 2, Page 123). I refer by that to the king bolts, the tie rod ends and the spring shackles. We would classify those items as "chassis parts".

Q. Having reference now to the first page of Commission's Exhibit 1, and particular having reference to this item here, listed as "knee springs, helper springs, and spring parts," could that be considered a part of your leaf spring line?

A. That is a leaf spring.

Q That is leaf spring line; and in that connection you have used the term to include the helper springs?

A. Yes; as I mentioned to you before.

The witness was then asked to estimate the approximate percentage of sales in 1936 that would be attributable to the leaf spring line (Part 2, Page 124). The witness answered that he would have to guess and that could better be answered by Mr. Goetz; that he did not know how much. At that time we had two lines, piston rings and leaf springs. Sales in the leaf spring line predominated. Piston rings in 1936 did not amount to too big a volume. The witness was then asked would it be as much as 10%. The witness stated that he did not want to make an answer to that as he believed someone else could answer it better (Part 2, Page 125).

Q. Mr. Apple, is the market for motor parts divided between original equipment and replacement equipment? (Part 2, Page 126).

A. We say "equipment parts business" and we say "replacement business". Since 1936 a significant part of the company's production and sales have been in the replacement parts market.

Q. Does the company refer to many of the customers in that market as "distributors"?

A. The words "distributor" and "jobber" are synonymous in our industry in most cases.

The witness was asked if they referred to replacement parts customers as "distributors" or "jobbers", and the

witness again answered, "The words are synonymous in our case".

Q. Do these distributors or jobbers, who are customers of Moog, generally handle all of the Moog lines?

A. Definitely not. A customer may handle the leaf spring line but not the coil action line, or he may handle the piston rings but not the leaf springs (Part 2, Page 127).

The witness was asked to estimate approximately the number of customers they had for coil action parts at this time and answered that it would have to be an estimate; that he would estimate from 900 to 1,000 that they called distributors or jobbers. The witness was asked to make the same estimate of the spring line and answered "approximately 500 or 600"; that they had a total number of accounts of around 1400; that the total number of accounts included the spring line, the piston ring line, the coil action line, and the chassis parts line, and all the parts that he had mentioned; that the same figures would hold true during the period 1947 to 1949, approximately.

Q. Does Moog have a sales arrangement with Mid South distributors?

A. We have one contract for everyone. We have a contract with Mid South (Part 2, Page 128).

Q. Now when you say "one contract for everyone" are you making reference to a document similar to that known in the record as "Commission's Exhibit 1," and also to the version known as "Commission's Exhibit 6"; another version being "Commission's Exhibit 7", another version "Commission's Exhibit 8", and another one is "Commission's Exhibit 14."

A. This represents nothing more than our rules of standard practice, and this is what they mean.

Q. You are referring now to those various form contracts that I have—

A. The blue contracts?

Q. Is the single contract that you have made reference to similar to this contract which is now in the record as "Commission's Exhibit 1"?

The witness answered (indicating) "This is the agreement right here that is in effect I believe at this time."

Q. Is that the single contract to which you have reference?

A. As to what we used with all of our distributors? Yes; or, as I mentioned before, these are rules of standard practice rather than contracts.

Q. Now having reference to Commission's Exhibit 1, that is, to Exhibits 6, 7, 8, and 14, they represent earlier versions of that same type of contract, do they not?

A. Yes. They represent earlier versions (Part 2, Page 130).

The witness was asked when his company undertook a sales arrangement with Mid South Distributors. He answered he did not know the exact date, as until S. A. Moog died he handled Mid South. He was then asked "Could that be the year 1934," and the witness answered "On dates going back sixteen years" that he could not safely tell; that Mr. S. A. Moog handled the situation then. I didn't take part in the original negotiations with Mr. Mills. Mr. S. A. Moog handled it and I followed through when Mr. Moog passed on. The witness was pressed for an answer as to approximately when that arrangement was made, and again made the statement that he didn't recall; that he knew it was somewhere in the 1930's but he did not know as to what year (Part 2, Page 131).

The witness was then asked if he could ascertain the date that his company first began selling to Mid South Distributors and answered that he could get that through the bookkeeping department (Part 2, Page 132).

The witness was then asked if he knew the terms that were accorded to Mid South Distributors in the period between 1936 and 1940, and answered he did not have the data for that period. The witness was then handed a letter and asked if that refreshed his recollection and he stated he had never seen the letter, and when asked if it refreshed his recollection, he said that it did not (Part 2, Page 133). The witness stated he knew part of the terms; that he knew about the sales part of it as to various points that came up in selling procedure; and that that was about all. Asked what these various points in selling procedure were, if he could recall, the witness stated it was the taking care of the cataloguing, the contacting from the angle of sales and in

line with the way the industry operates arranging for field work from time to time.

Q. Did you know anything about a periodic payment from Moog to Mid South running to 5% of the net billing?

A. I was in the position in those years to say that I knew nothing about the deal.

Q. Did you deliberately put yourself in that position?

(Objection was made to this question and sustained.) (Part 2, Page 134.)

Asked what he knew about field work with reference to Mid South Distributors, the witness stated that it was standard practice in the entire automotive parts industry to give field work, and from time to time arrangements were made for that kind of help, but the application of that to Mid South Distributors was exactly the same as to every other distributor.

Asked about what he knew about cash discounts with reference to Mid South Distributors, the witness answered that it was the same as all distributors; that in those days it was different from what is to-day; that it was 1%.

Thereupon Commission's Exhibits 32A to 32S, inclusive, were marked.

The witness was shown a document and asked if he recognized the signature on it. It bore the date of October 30, 1939 (Part 2, Page 135). The witness stated that it was very faint but that his judgment told him it was "S. A. Moog." The witness was then handed Commission's Exhibit 32B and asked if he recognized that signature and stated that he came closer to recognizing it than the other one; that if you compared them you could see what he meant; that on this one he could say that he did not recognize the signature and on the other one "Yes". Pressed as to whether he recognized the signature, the witness answered that the name was not complete on one and on the other it was (Part 2, Page 136). The witness referred to the name on Commission's Exhibit 32B as not complete and the name on Commission's Exhibit 32A as being complete. Commission's Exhibit 32A through "S" were then offered in evidence. (Part 2, Page 137). Commission's Exhibit 32A to 32S, inclusive, excepting 32B were then received in evidence (Part 2, Page 141).

I am familiar with the arrangement on most matters currently existing between Moog and Mid South Distributors. A lot of it we leave up to our bookeeping and auditing departments. I first familiarized myself with the arrangement after the death of Mr. Moog I was not familiar with the arrangement during Mr. Moog's lifetime (Part 2, Page 141).

Moog Industries, Inc., has a sales arrangement with Ozburn, Crow & Yantis Company. I do not recollect the date when Moog first made a sales arrangement with them. My guess would be some time in the early 30's, probably 1935.

The witness was asked if he recalled that Mid South protested that the prices accorded to them were not equivalent to the prices accorded Ozburn, Crow & Yantis Company, and answered he did not. Commission's Exhibits 33A and "B" were then marked and handed to Mr. Apple and he was asked if it refreshed his recollection and answered that it did not.

Q. Did you or Moog have a conference with Mr. Mills relative to the fact that Ozburn, Crow & Yantis got a better price than Mid South Distributors, approximately in 1940?

A. No; I told you I didn't have anything to do with that until Mr. Moog's death, regarding terms and such as that. (Part 2, Page 143).

Commissioner's Exhibit 34A and B were then marked for identification, and the witness' attention was called to the last paragraph of the form letter and asked whether it refreshed his recollection. The witness read the letter and stated it did not refresh his recollection, and that he definitely did not recall any conference with Mr. Mills (Part 2, Page 144); that undoubtedly there was one according to the letter, but he did not recall it; that he had talked to Mr. Mills one hundred times; that he did not have anything to do with that account so far as the group was concerned until Mr. Moog died. The witness then gave the reason why but the answer was stricken by direction of the Examiner.

Moog currently had the sales arrangement with Cotton State, Inc. (Part 2, Page 145). "I do not remember whether

we have sold them as long as we have sold Mid South Distributors, or Ozburn, Crow & Yantis;" that he could not give a definite answer; that it was approximately about the same time.

Q. In the period between 1936 and 1940 did Moog offer generally to the trade anything in the way of rebates or merchandise bonuses or discounts, based on annual volume of sales?

A. Piston rings; yes. I am not sure when Coil Action started. Leaf Springs; no. That gives you the answer.

Q. During the period 1936 to 1940 there were no merchandise volume discounts or anything, based on volume of purchases with reference to the same lines; is that correct?

A. Volume—it started on spring action at least. Volume rebates first started with reference to sales of the leaf spring line sometime during 1949 and on the coil action line he would make a guess about 1940-1941 (Part 2, Page 146).

Moog has had a regular contract with Metropolitan Automotive Wholesalers Co-Operative, Inc., of New York City for years. I don't remember when they were started. I would have to guess. My guess would run from 1941 or 1942. That group at that time was known as Automotive Group Buyers, Inc., I think that it was first negotiated with Mr. Satchell. Mr. Lerch came in after Satchell. Mr Lerch did not ask for exclusive distribution of our products in the New York area (Part 2, Page 147), and definitely I did not promise to give it to him. We do not have exclusives anywhere.

The witness was asked if he recalled the principal terms of his arrangement with the New York crowd at the time of its inception, and answered "Not entirely". The witness was then asked if they had asked for exclusive distribution, with the exception of one or two accounts in the New York area and answered "No"; that the question of exclusive distribution was never brought up.

The witness was then asked if he recalled the rebate or merchandise bonus schedule that was used by Moog during the years 1940 through 1945 and answered that he did not remember without refreshing (Part 2, Page 148).

Commission's Exhibits 35A and "B" were then marked for identification.

The witness was then handed this exhibit and asked if it refreshed his recollection as to which discount schedule was effective in 1940-1945. The witness referring to the schedule on Commission's Exhibit 35B stated that it was somewhere in that period but he did not know how long it lasted (Part 2, Page 149). The witness stated that on Commission's Exhibit 35B that that was a photostatic copy of his signature, thereupon Commission's Exhibits 35A and "B" were offered and received in evidence (Part 2, Page 151).

The witness was then asked, having reference to the schedules set out in Commission's Exhibit 35B, did he know when that was an effective schedule with reference to coil action parts. Witness stated that he would just have to guess because he did not know how much interval there was between changes; that it was signed in 1943 and that is his guess (Part 2, Pages 152, 153). The witness stated he could not state definitely when that became an effective schedule because there were four or five of them, as the Attorney for the Commission knew.

Q. Mr. Apple, do you know when the schedule on the coil line that appears on this third page of Commission's Exhibit 1, was first made the effective schedule with respect to the merchandise bonus on those lines?

A. I can't give it to you definitely. This looks like it is our last from here (indicating).

Q. Do you know when the schedule appearing on Page 3, with reference to the coil action line, was made the effective schedule?

A. No; I do not.

Commission's Exhibits 36A and B, 37, 38, 39A and B, 40, 41A and B, and 42 were then marked for identification (Part 2, Page 153).

Tuesday, November 9, 1950, at Washington, D. C.

Mr. Apple resumed the stand.

The witness was shown Commission's Exhibits 36A and "B", purporting to be a letter of St. Louis Spring Com-

pany, of August 8, 1945, and was asked whether he recognized the signature on Commission's Exhibit 36B. The witness answered that it was a photostat of his signature (Part 2, Page 156). The witness was shown Commission's Exhibits 39A and 39B, purporting to be a photostatic copy of a letter of St. Louis Spring Company, of August 13, 1945, and was asked whether he recognized the signature on Commission's Exhibit 39A and stated it was a photostat of his signature.

The witness was then shown Commission's Exhibits 36A and "B", being a letter dated August 3, 1945, and was also shown Commission's Exhibit 37 and was asked whether or not his letter of August 3, 1945, was in reply to that letter (Part 2, Page 157) and the witness answered that it was.

Q. Now having reference to Commission's Exhibit 36A and "B" for identification, I would like to show you Exhibit 38 for identification, purporting to be a photostatic copy of a letter dated August 10, 1945, and ask you whether or not it is a copy in reply to your letter.

Witness: This letter, I, of course, would not remember. It is not signed, it is "President" and evidently it is from Mr. Mills, but there is no signature on it (Part 2, Page 158).

Q. Do you recognize the contents as responsive to the other letter, Commission's Exhibit 36A and "B", Mr Apple?

A. I don't remember this letter here (indicating); I don't remember it at all. It is five or six years ago. This (indicating) definitely is my letter here. (The witness was indicating Commission's Exhibit 36A and "B" as his letter). (Part 2, Page 159).

Commission's Exhibits 36A and "B", 37, 38, 39A and "B", and 40 were then offered and received in evidence (Part 2, Page 160).

Our regular contract was the arrangement in effect with Mid South Distributors from 1945 to the present time.

Q. When you say "regular contract" are you making reference to these contracts, to contracts similar to those now in the record as Commission's Exhibit 1, 6, 7, 8, and 14?

A. I can give you a definite answer of "Yes" on this last one here (indicating). I, of course, would have to check on the others. (The document indicated was Exhibit Number 1) and stated that it was a contract or statement of rules of practice for everybody (Part 2, Page 161). That contract represents a statement of policy with all our replacement accounts. That form of policy states our policy with respect to sales of Ozburn, Crow & Yantis (Part 2, Pages 162, 163).

Q. These form contracts, Mr. Apple, that we have made reference to, all being similar to though not identical to Exhibit 1, have been used for approximately how many years with your distributor accounts?

A. Oh, I would say approximately six or seven or eight years.

Q. Do all distributor accounts have contracts similar to the particular one that was effective at any given time?

A. The contract in itself has been practically the same —in possibly one or two cases it was written on letterheads.

As I recall it the only case that comes to my mind, written on letterhead, is Ozburn, Crow & Yantis. At this time I do not recall any other distributor on which it was written on a letterhead (Page 163).

The witness was asked whether he was sure that there were other distributors who also had the statement of policy or the contract on letterhead paper and answered that he was not sure; that he had mentioned there were possibly one or two, and as he remembered Ozburn, Crow & Yantis was on a letterhead.

Q. Now you have referred to this as a statement of policy.

A. Statement of rules; yes.

Q. And were the rules, or statement of policy, enforced?

A. Not entirely. I don't believe any contract, ever, or statement of rules * * * (Part 2, Page 164).

The witness then stated that "Not entirely" was his answer (Part 2, Page 164).

The witness then stated that with the exception of some of the letterhead statements of policy, the distributor of accounts regularly signed them, as exemplified by Commission's Exhibit 1.

Q. The enforcement of the provisions, then, of Exhibit 1, was a matter of discretion with Moog, or was it a matter of negotiations between Moog and the account?

A. The statement of rules in this Exhibit 1, I believe it is here (indicating) represents the way that policies, the written policy, or written standard practice—this represents them. Now, there are extenuating circumstances, such as obsolescence, etc., and other situations, that change the particular picture. I would say that maybe 90% of our accounts understand and know our standard rules here and work along those lines. You always will have somebody that tries to take advantage of you; or sometimes Moog possibly may make some error—who can tell? That would be my explanation of that (Part 2, Pages 165, 166).

Q. Then it is more or less a matter of Moog's discretion as to whether the terms of the document will be adhered to?

A. Only in the case of Moog errors.

Q. Does it represent the terms accorded on sales between Moog and its distributors, with the exceptions you have noted?

A. If you mean by that that we have one contract for everybody—"Yes". As far as I can remember, "Yes".

I am familiar with the actual start of arrangements made with the Metropolitan Group of New York in the early 1940's with Mr. Satchell. As to what the arrangements contemplated, that is a long time back, I would have to be refreshed on that.

With reference to arrangements with Automotive Group Buyers with respect to a bonus in 1945, my recollection is that the original deal with Mr. Satchell was carried on. I don't remember just when. That was during the time, I believe of the 10% rebate. The 10% rebate carried beyond the time that we established a new volume rebate on the coil action line for a certain time.

The witness was asked to refer to the documents which were understood to be typical of the agreements used with distributors. In a colloquy between Commission counsel and defendant's counsel it appeared that Commission counsel had reference to Exhibit. 1 which according to the testimony of Mr. Goetz was effective for part of the time, and to Exhibit 6 which was the prior effective agreement and to Exhibit 7, 8 and 14 which were also standard contracts used at various times (Page 167).

Making reference then only to Exhibit 1 the witness stated that contained all the terms of sale unless some new or special items were brought out, or lines, for example like tie rod ends, and so forth.

We first began to provide a merchandise bonus plan with respect to the leaf spring line sometime in 1949 and after referring to Commission Exhibit 5 the witness stated that it was July 1, 1949 (Pages 168, 169). Prior to that time we had offered to distributors a merchandise bonus on leaf spring purchases. The fact of the matter is in N.R.A. days there was a merchandise bonus (Part 2, Page 169). After the N.R.A. period there was no published merchandise bonus so far as I know on our leaf springs (Part 2, Page 170).

Q. During the period of time between the end of the N.R.A. days and July 1, 1949, your company did, however, give a merchandise bonus or allowance to certain accounts, based on volume of springs purchased, did it not? (Part 2, Page 171.)

A. Yes for functional purposes for services rendered (Part 2, Page 172). The Trial Examiner on objection struck out the portion of the answer referring to "functional purposes and services rendered" (Part 2, Page 173).

The names of accounts other than distributor accounts that Moog is now selling must be equipment accounts. Some that run through his mind are Keystone Trailer. There are so little of that. Then they are working on some Government orders. He don't know whether they are working for the Government on springs or what line, but stated there are so few such accounts that he could say that represents them (Part 2, Page 174).

In addition, there is Dutten Lainson Company, a trailer company. They make trailer springs and equipment, a specialized service. That is all that I can think of at this time. I could not classify our accounts otherwise than equipment accounts and distributor accounts. We classify group accounts as distributor accounts on one contract.

We have no chain organization customers to-day. The last time we sold to a chain organization was approximately the start of the Second World War (Part 2, Page 175). Prior to that we sold for a number of years to Western Auto stores. As I recall, we sold them leaf spring items.

Q. Were they sold to that outfit on a price per pound basis?

A. Mr. Corkey, I don't know the answer to that. S. A. Moog handled it.

Q. Do you generally protect your distributor accounts from price declines?

A. I don't recall that it has ever come up. The policy of Moog with respect to price declines is (reading from document) "Our orders will be billed at the prices effective at time of shipment" (Part 2, Pages 176 and 177).

With reference to policy with regard to price declines for distributor accounts, you will have to let me qualify it because of the export situation. You have certain things come up where it takes three to six months to get shipments. Circumstances like that come up (Part 2, Page 177). With reference to the domestic market, other than this, indicating Page 1 of Commission's Exhibit 1, there might be circumstances respecting the protection of distributor accounts on price declines. Distributors' orders are billed at Moog's net prices at the time of shipment, but there are circumstances, of course, as I mentioned (Part 2, Page 178). Prices in effect at time of shipment are those that are used in practically all circumstances.

Q. Mr. Apple, having billed them in accordance with the effective schedule prices, do you have a policy that when the general price goes down, do you have a policy of re-billing?

A. It would only be in some special case. I would say, no policy; or I would say a policy where the prices in ef-

fect at the time of shipment—unless there be some special circumstances.

Q. That is a firm and fixed price?

A. That is a firm and fixed price unless there are special circumstances.

Q. And there is no policy with respect to pricing down to protect distributor accounts in the event the general price structure went down?

A. Only in cases of special circumstances which would come up, Mr. Corkey, and I can't recall them.

The witness was asked to look at Commission's Exhibit 13, the A. R. J. contract (Part 2, Page 179). We printed that contract for our customers. A. R. J. means Associated Ring Jobbers. Moog prints Exhibit No. 12 for our distributors. Moog prints Exhibit No. 11 for our distributors as well as Commission's Exhiibit No. 10.

The initials "C. P." on Commission's Exhibit No. 10 signify chassis parts.

We keep one copy of these contracts when executed for our records (Part 2, Page 180). None of the people who sign these contracts obtain from Moog anything in the way of a merchandise bonus, nor any sort of credit or allowance, based on volume of purchases.

On our distributors' order occasionally shipments are made from Moog warehouses or factories to their accounts. If a distributor orders shipment made directly to a particular outlet, Moog will ship to that outlet, limited to one order a month.

Q. Is that true on all three of those contracts that I showed you, or would it vary between the C. P. wholesalers' agreement and the A. R. J. agreement, and the Moog Parts Jobber agreement?

A. We had one stock order a month on those, as I recall it. I am not too sure on that, but as I recall it, we had, we would ship one order a month, on our customer disitributors.

The A. R. J. jobber is piston rings.

Q. Now, will you make reference to Commission's Exhibit 15 and typical price lists which appear therein? Would Moog furnish to the A. R. Jobber the yellow price

sheets, the pink price sheets, the buff price sheets, and the white price sheets? (Part 2, Page 181.)

A. Moog would furnish only our distributor; our distributor in turn might or might not supply to them. It is my guess that he would.

It is my idea that our distributors request sufficient price sheets to furnish them to their A. R. J. Jobber accounts and their C. P. Wholesaler accounts (Part 2, Page 182). We supply distributors with these on their request. What they do with them I don't know.

Q. Does Moog publish those price sheets, Mr. Apple, or does it cause to be published those price sheets, typical ones of which appear on this Exhibit 15?

A. You mean the suggested price sheets?

Q. All the price sheets that appear in their order, suggeted or firm, or any other kind.

A. Our re-sale prices are suggested prices furnished by Moog to their distributors.

Q. Moog causes those to be published, does it not? (Part 2, Page 183.)

A. At the request of our distributors, "Yes".

Q. Does the distributor determine the prices that would appear on those sheets, or does Moog determine the prices?

A. That is more or less set by the car manufacturer; the re-sales are determined by that. That is how they are worked out.

On certain lines the purchaser assists in making up these prices. They have to have in their estimation certain re-sales. At this time it is more or less following in line with car manufacturers' sheets.

Q. Does the Distributing Company and Moog negotiate those prices to be set up?

A. They request them.

Q. Is it a negotiation, then, between Moog and certain distributors as to the prices that appear on those price sheets? (Part 2, Page 184.)

A. The answer to that question would be "No" to certain distributors. I cannot name any distributors who take part in making up the price sheets of Moog at this time.

Q. Do representatives of Moog call on any of the A. R. J. jobbers or the C. P. wholesalers or the so-called Moog jobbers?

A. Definitely yes, from the angle of follow through.

Q. As a regular part of their duties they contact those accounts?

A. Contact all accounts of all our distributors regardless of accounts, yes, as much as they can.

It is customary when our man calls for him to go in and inspect the stock of Moog parts held by that particular account and he draws up an order for submission to the Moog plant (Part 2, Page 185).

Q. The Moog representative always, whether or not the stock is incomplete, makes up an order for submission to the Moog plant?

A. Ordinarily they handle it.

Calling on accounts is our normal procedure, whether it is the smallest garage or the biggest account.

The witness was asked who determines the obsolescence policy on the C. P. wholesalers, the A. R. J. Jobbers and Moog Parts distributors and answered that there was no obsolescence policy for the C. P. wholesalers; that when they buy it they buy it. Protection on obsolescence, as I recall it, goes only as far as our distributor (Part 2, Page 186).

Asked whether the warehouses of Moog, located through out the country, were public warehouses, the witness answered he would not classify them as public warehouses. They are warehouses devoted to the warehousing of various lines. We pay the transportation charges from St. Louis to these various warehouses. The prices to our distributors of our stock are the same at the warehouses as they are at the factory at this time. It was different in the old days (Part 2, Page 187). That is essentially a warehouse storage situation dealing out our merchandise. We do not sell these products to these warehouses situated in the United States. We do in one case outside the United States. The zone system of pricing on some of our products was discontinued. I do not know on what date.

The witness was asked as to whether he could state why Ozburn, Crow & Yantis would not, during the period 1947 through 1949, sign a regular distributors' franchise, and answered that he guessed it was because that all through the years the rules of practice were set up and it was not because that company was accorded better terms (Part 2, Pages 188, 189).

The witness was directed to the Ozburn, Crow & Yantis agreement, signed in 1949, and asked to pay particular attention to the part about supplying a factory-trained salesman always to be with them, and requested the witness to find an equivalent in the regular distributors' agreement. The witness answered that it referred to "missionary men" entirely; that it referred to a factory-trained salesman to travel under the jurisdiction of the salesman; that Moog provides that for every one of their distributor franchise accounts (Part, 2, Page 189). We have now about forty factory-trained specialists.

Q. Is there a similar provision in your regular distributor contract in effect at the time this contract was entered into?

A. No; because it is regarded as standard practice.

Q. Can you give to every one of your distributor accounts a factory-trained specialist to work with it at all times?

A. Oh, no.

Q. Does this not provide for that in Exhibit 23Y?

A. Definitely not.

Q. It says that the manufacturer will supply a factory-trained specialist to travel under the jurisdiction of the salesman and work and help promote—

A. My answer to that is that this man did not spend all of his time there. Never has. Our records will prove it.

Q. I also want to call your attention to what would be the second paragraph of Commission's Exhibit 23Y and I will ask you whether or not that provision appears in the standard form of contract used by your distributor accounts during the same period of time? (Part 2, Page 191.)

A. Not exactly the same.

Q. Having reference to Commission's Exhibits 23Y and the last paragraph on that exhibit, does a similar provision, an identical provision, appear in any other distributor account?

A. Not similar but everything is not stated in those.

Q. Now also having reference to the paragraph which is the third paragraph of Exhibit 23Z-2, does an identical provision appear in your contract with any other distributor between 1945 and 1949?

A. I don't recall but I would say "not identical" (Part 2, Page 191). It did not appear identical to this in any of our formal contracts. I do not remember whether it might have appeared in any of the so-called letterhead contracts with distributors.

Q. Mr. Apple, making reference now as to what is the second paragraph of what is Commission's Exhibit 23Y, the second paragraph below the figures there, dealing with obsolescence, did an identical term appear in any of your other distributors contract during that period of time until 1949?

A. As far as I know, none just like that.

Q. Having reference now to Commission's Exhibit 23Z-1 and to the last paragraph of that exhibit, and the first paragraph of Commission's Exhibit 23Z-2, I ask you whether or not from the date of that agreement until it was superseded, was there any other distributors contract with you containing identical terms?

A. You make it very hard for me to answer the question.

Q. Were there identical terms in the contract with other distributors?

A. I would say none exactly identical (Part 2, Page 192).

Cross-examination of Mr. Apple was waived (Part 2, Page 193).

ANTHONY M. GOETZ resumed the stand and testified on behalf of the Commission:

The Moog line, for purposes of our accounting records, do not necessarily follow the Moog sales line. The accounting set-up of Moog lines at the present time is as follows: Originally we had one set of books and we only had the spring line, and all of the single corporations were carried under one set of books. In 1934, when we acquired piston ring business we set up another set of books. Then in 1939, when we started on a fairly large scale on coil action, we set up another set of books. Then after we acquired the chassis parts, and then the coil springs, because of the fact that they, in the main, were purchased parts, and we did not keep separate costs on those items, we threw them in our spring division books. So, for accounting purposes, the St. Louis operations are three sets of books as of to-day. As of to-day, springs, coil action, and piston rings, chassis parts and coil springs are thrown into the spring line.

The names of subsidiaries of Moog Industries, Inc., are as follows: There were the original ones in Colorado, Tennessee, and Texas. They were known as St. Louis Spring Company of Colorado, St. Louis Spring Company of Tennessee, St. Louis Spring Company of Texas. The names were changed in 1943 and St. Louis Spring Company of Texas was changed to St. Louis Spring Suspension Service Company of Texas. The Tennessee Company was changed to St. Louis Spring Suspension Service Company of Tennessee (Part 2, Pages 195, 196).

In 1944, the Colorado Company's name was changed to Moog Industries, Inc., of Colorado. In 1945 we changed the St. Louis Spring Suspension Service Company of Tennessee to Moog Industries, Inc., of Tennessee. In 1943, when we changed the name of St. Louis Spring Company of St. Louis, Inc., to Moog Industries, Inc., we formed another corporation with such a name—St. Louis Spring Company. For a short time it was an inactive company and then the service station operation at St. Louis and at Omaha were transferred to that corporation. The Omaha operation in 1943 was changed to St. Louis Spring Suspension Service Company. In 1948 we divested the Omaha

operation from the St. Louis Spring Suspension Company of Missouri, and formed the St. Louis Spring Suspension Company of Nebraska. The change in name from St. Louis Spring Company to Moog Industries, Inc., did not affect in any way the corporate set-up (Part 2, Page 197). At the present time, the accounting records of Moog Industries, Inc., are not integrated with the records of the subsidiary corporations (Part 2, Page 197). Each of the subsidiary corporations maintains its own accounting records, separate and apart from Moog Industries, Inc. None of these subsidiary corporations are engaged in production, however, other than emergency fabrication of parts, but they actively engage in the selling and distribution of our products.

Q. Does the customer list of Moog Industries, Inc., contain the names of the customers or purchasers from these subsidiary corporations?

A. There is a duplication in some cases but not in others.

The subsidiaries may have customers or purchasers who do not appear on the records of Moog Industries, Inc.

Moog first instituted a merchandise bonus or a periodic allowance, based on volume of purchases of coil action parts, almost immediately after they started the sale of those parts (Part 2, Page 198). Generally speaking, we tried to develop the line I think about 1937 but very little was done in that year. In 1938 we had our sources of supply pretty well lined up, and the sales of coil action really became important beginning with 1939, and about that time we got out a franchise agreement on coil action parts. I cannot give you the exact date when we began generally to give volume discounts in connection with customers' purchases of coil action parts, but it was in late 1939 or early 1940.

The witness was then shown Commission's Exhibit 35B, referring to merchandise bonus on the coil action line, and stated that from all indications it seemed to him that was the first one put into effect (Part 2, Page 199). That remained in effect until March of 1945 when we got out a new franchise agreement (Commission's Exhibit 14).

Q. Mr. Goetz, at that time the bonus or functional rebate on the coil action line was changed. It increased as it appears on Page 3 of the third page of Exhibit 14?

A. The printed portion of it, but not the typewritten portion of it.

The change, including the typewritten portion on the third page of Commission's Exhibit 14, was in 1945 about the first part of the year, but it was made retroactive for the full year of 1945 to most of our distributor account (the witness and counsel have been referring to the third page of Commission's Exhibit 14, and particularly to that part of the third page which has been typewritten).

Q. Mr. Goetz, again making reference to the third page of Exhibit 14, will you explain the various changes in the volume rebate of the coil action line having reference to the schedules set forth on the third page of Exhibit 14?

A. This schedule was made out, printed for the year 1945, but in the middle part of the year we decided to change the rates to the typewritten portion as appears in the schedules, making a maximum of 19% instead of 14% (Part 2, Page 201).

This first change as originally printed, which appears to be a high bracket of 14%, represented a change from the previous high of 10%. The schedule of the volume rebate on coil action parts has remained constant from that time until the present.

Q. Mr. Goetz, at some period between 1945 and 1949 a schedule was promulgated to the distributor trade in which the coil action line was included with the chassis parts and the coil springs. Was that schedule ever actually made operative?

A. It was in effect, but it had no value because that was an alternative schedule, and since we did not have accounts for chassis parts and coil springs, it did not have any effect. There was no occasion for any accounts to use it. (We have been making particular reference to the third page of Exhibit 7) (Part 2, Page 202).

During the period of 1945 through 1949, Moog did not offer a volume rebate in connection with the sale and distribution of chassis parts unconnected with the coil action line.

Q. I call your attention, Mr. Goetz, to the third page of Commission's Exhibit 6, wherein there is a schedule, chassis parts including coil springs, and I ask you whether or not you want to change your answer on that?

Witness: This is a combination here.

Mr. Corkey: It is a combination but unconnected with your coil action line.

Witness: All right, let us say "Yes, unconnected with the coil action line but connected with the coil spring sale" (Part 2, Page 203).

For purposes of volume rebate, chassis parts and coil springs were first grouped together with coil action, and then it was grouped with coil springs, and finally it was grouped with leaf springs. When chassis parts were grouped with the coil action line, there was nothing in connection for Moog to make any remittances under that schedule. Thereafter the chassis parts were grouped with the coil springs for purposes of volume rebate, about November, 1948. I don't believe Moog had occasion to use the schedule appearing on the third page of Commission's Exhibit 6 because the sales of those particular items to any one customer in that period did not come under the minimum requirement (Part 2, Page 204).

The chassis parts were first included with the leaf spring line for purposes of volume rebate in July, 1949, effective as of July 1. From 1940 until July of 1949, Moog did not offer to its distributor accounts a volume rebate, based on a volume of purchases of leaf springs, nor did they offer anything in the nature of a volume rebate during that period on purchases of the leaf spring line in conjunction with any other line. July 1, 1949, is the first day that Moog regularly offered to its distributor accounts a volume rebate or merchandise bonus in any fashion on the leaf spring line.

The Company first undertook a sales arrangement with Automotive Group Buyers, I believe, in 1940 (Part 2, Page 205).

Q. Do you know, generally, the terms of that arrangement as applied to the members of automotive group buyers, what they would pay for the product of Moog?

A. The price was the same as the price to all the distributors. The price did not include a rebate or allowance but was the same as all other prices.

Q. Was Automotive Group Buyers provided with any discount or allowance which would be applied to the net billing?

A. The answer will have to be "No" (Part 2, Page 206).

Q. Was Automotive Group Buyers accorded anything in the nature of a 10% discount to be applied to any of the billings made to the purchases of these members?

A. In making their remittances in the succeeding months, they deducted the maximum volume rebate, that is, to which we felt they would be entitled to—

Objection was made by Commission's counsel, and motion made to strike out as immaterial and the Trial Examiner sustained the motion (Part 2, Page 206).

In remitting to Moog it was the practice of Automotive Group Buyers to deduct 10% from the total billing of the members, less credit. I don't know how the cash discount was handled in this case. The witness was then shown a document to refresh his recollection and then stated "They deducted the cash discount after deducting the 10%". They deducted the 10% each month until we asked them to discontinue it sometime later in 1948 or 1949.

In the period between 1940 and 1945, the ordinary distributor account did not obtain a 10% off total billing less credit, each month. This was one of the exceptions and generally the 2% cash discount was not handled as in the case of Automotive Group Buyers (Part 2, Page 207). In the period from 1940 through 1945, this discount applied only to Coil Action parts.

Q. Having reference now to this period of 1940 to 1945, and having reference to Automotive Group Buyers and the 10% accorded them, did that include springs and spring parts or did that include all purchases, or just coil action line?

A. The only line which Automotive Group Buyers bought from us was coil action.

This method of billing Automotive Group Buyers continued until it was changed at the beginning of 1948. I am

a little confused as to the date, but I am reasonable sure that from 1940 until January of 1948, they continued to receive this 10% off on their billing.

Commission's Exhibit 43 was then marked and shown to the witness who stated that it represented a typical remittance statement from Automotive Group Buyers to Moog (Part 2, Page 208).

Commission's Exhibit 43 was then offered and received in evidence.

Q. Mr. Goetz, do you know what happened to the working papers or the other documents relating to the prices charged for purchases of Automotive Group Buyers during the year 1947?

A. The prices charged—They were the prices in effect at the time of the shipment.

Q. I am making reference, Mr. Goetz, to the fact that in response to the subpoena, heretofore issued, we have not had any information with respect to the prices charged Automotive Group Buyers during the year 1947 (Part 2, Page 209).

A. It is possible that the sales records for that period were not furnished but all other documents in existence in our files were furnished as requested by the Commission.

Beginning in 1948, the arrangement with Automotive Group Buyers was identical with that made with ordinary distributor accounts and since that time Moog has continued an arrangement with its successor, Metropolitan Automotive Wholesalers similar to that with every other distributor account.

I am familiar with the terms accorded Cotton States during the period 1940 to December, 1945. They were billed the same price as our other distributors (Part 2, Page 210).

Q. And in making payments on those billings, do you know the elements that entered into the payment as contrasted with the billing itself.

A. As to remittances, they deducted 5%. That deduction was from the total billing less credit.

I do not remember whether the 5% was deducted before the cash discount. The 5% applied both to purchases of

the leaf spring line and the coil action line. It applied to all purchases 1940 through 1945.

That kind of billing and payment with reference to Cotton States was changed in January of 1948, effective as of January 1, 1948 (Part 2, Page 211).

The 5% continued from the date we started in 1940 up until January, 1948. After January 1, 1948, they were the same as other accounts on coil action purchases. Between January, 1948, and the present time, Cotton States continued to take their 5% deduction from their remittance (Part 2, Page 212). During the year 1948, Cotton States was accorded on coil action purchases the terms set forth in the ordinary distributor contract. On purchases other than coil action, they obtained the 5% which was taken off when they remitted to Moog, except that an adjustment was made at the year-end to eliminate certain of the items that they had taken 5% on throughout the year. The final payment was reduced by the deductions made monthly (Part 2, Page 213). With reference to Cotton States during the year 1948 (the witness referred to Commission's Exhibit 28), throughout the year as they remitted to us in 1948, they deducted 5% from their remittances. At the end of the year we determined what their total coil action purchases, less returns and allowances, amounted to, reduced that by the cash discount and excise tax included in their billing price, ascertained the amount of net purchases subject to the merchandise bonus as a result of that calculation, which showed that they were entitled to a merchandise bonus at the rate of 10%. We applied our 10% on net coil action purchases, then deducted from that amount the 5% that they had deducted in error on their chassis parts and coil spring purchases for the year 1948 (Part 2, Page 214) then we remitted to them in accordance with those deductions for their annual volume. They obtained no volume rebate on their chassis parts and coil spring purchases because their volume was not sufficient, or those items were not included with the coil spring or coil action purchases in arriving at the coil action purchases subject to our merchandise bonus. That same type of billing and remitting continued throughout the year 1949, with respect

to the Cotton States Group. The Cotton States Group was accorded the benefit of the new spring schedule, effective July 1, 1949, and their remittances were changed to that extent (Part 2, Page 215). Our balance figures at the end of the calendar year 1949, reflected the change by the adoption of our leaf spring schedule. They still continued to take 5% off on each remittance during 1949. It is possible that we failed to keep working papers on Cotton States transactions for the year 1947. They may have been destroyed (Part 2, Page 216).

With reference to the Mid South Group during the period 1940 through 1945, when remitting to us on a monthly basis, they did not take a discount from the gross billing nor did they take a discount from the net billing less any credit that might be applied against the billing.

Q. Were they accorded periodically any sort of a rebate based upon the billings over a given period of time?

A. It was called a "commission".

That commission amounted to 5%. It was applied to all billings in the period from 1940 to 1945. It was sent to Mid South by check each six months period. I don't know whether that arrangement was in effect before 1940 because that was when I came to the Company. From my knowledge and inspection of the books of the Company, it seems to me that we started selling them in 1936 according to our records. The witness was then shown Commission's Exhibits 36A and B, 37, 38, 39 and 40 (Part 2, Page 218).

A change was made in 1945 when we allowed them a volume rebate on their coil action purchases on the same basis as our regular distributors.

Q. At the same time you provided them with a 5% rebate on all other products, did you not?

A. We made a few exceptions in our handling against or with respect to coil springs and chassis parts in the years 1946, 1947 and 1948.

Because in effect there was no volume rebate or merchandise bonus on the sale of those items.

Mid South did not obtain anything in the nature of a discount or rebate or allowance based on volume of their sales of those items until July 1, 1949 (Part 2, Page 219).

Between January 1, 1945 and July 1, 1949, we allowed them 5% on the purchase of the leaf spring line. We allowed them our regular merchandise bonus schedule on their purchases of coil action parts. We eliminated their purchases of chassis parts and coil springs and paid them no merchandise bonus or volume rebate on those purchases.

The witness was then handed Commission's Exhibit 21Z-10 and asked whether or not the information set forth therein would change his previous testimony, and the witness then reaffirmed his previous answer. During the period January 1, 1945 to July 1, 1949, Moog continued to remit the commissions semiannually (Part 2, Page 220). The semiannual payments made by us to the Mid South Group after July 1, 1949, were construed on the volume rebate schedule that we had in effect for our regular distributors. We have continued to make payments by check to Mid South since July 1, 1949, in accordance with the figures arrived at by the regular printed schedule but it seems to me the payment due to be made in July, 1950, was not made. We were not asked for it and since it was an arbitrary amount only, we felt there was no need for it (Part 2, Page 221). These payments since 1945, made in July of each year, were arbitrary amounts based on 5% of their total net purchases of all items. Asked to explain this, the witness stated: In the years prior to January 1, 1949, our July remittances were based on a total sale of all items less returns and allowances. We reduced the 5% and the net amount was made to them. Those amounts were adjusted later to the actual amounts due them in the annual remittances. The cash discount figured up to January 1, 1949, was deducted from the net purchases, the excise tax and the cash discount (Part 2, Page 222). By "net purchases" we mean purchases less returns and allowances and discounts. Then from that amount we deducted the excise tax and the cash discount. That gave us a net on which we based our 5% semiannual remittance to Mid South. Thereafter at the close of the calendar year we made a further remittance to Mid South, which remittances during the period January 1, 1940 to January, 1949, provided a balancing in figures with respect to the coil action items (Part 2, Page 223).

Q. That remittance would include, in the first instance, 5% on spring purchases, 5% on spring purchases for the remaining six months of the year, and then an item of 19% on the coil action, chassis parts and coil springs—

A. Not from 1940 to 1949.

Q. Well, will you explain then first what that year-end figure would include in 1945?

A. All right. Fiscal year 1945: The year-end figure would include 5% of the leaf spring line and the amount of the merchandise bonus that they would have been entitled to on the basis of their volume rebate at a discount rate or the rate called for by our regular franchise.

Q. Then in the calendar year ending in 1949 would that have been different?

A. In the calendar year 1949 they would have gotten the excess over 5% that was due them on the coil action purchases for the year 1949 and the regular merchandise bonus on leaf spring, as shown by our schedule for the year 1949 (Part 2, Page 224). We had a regular schedule for 1949. Our regular schedule on the leaf spring line discount was made effective on all purchases beginning with July 1, 1949. That was true in the case of Mid South distributors. We did not date it back to the first of the year 1949.

Asked as to whether the records of Moog showed about when an arrangement was first made with Ozburn, Crow & Yantis, the witness stated that the only information he had was the date they started selling them in 1936 (Part 2, Page 225). I do not know the terms accorded them between 1936 and 1940 with respect to discounts, allowances or commissions. I do not know whether they were periodically allowed anything in the nature of a rebate, discount, commission or other allowance because I saw no agreement dated prior to 1940. If there was one I saw no work sheet. Their billings were at the same prices as our regular distributors. Prior to 1940, when I joined the Company, I saw no remittance slips or any checks representing payments from Moog to Ozburn, Crow and Yantis (Part 2, Page 226). In the period between 1940 to January, 1945, Ozburn, Crow & Yantis deducted 8% on monthly remittances to us. I do not know whether that

8% deduction was made before the 2% cash discount was taken. That 8% covered all items purchased by Ozburn, Crow & Yantis between January, 1940 to 1945. In July of 1945 we allowed them 8% on their purchases of the leaf spring line, and 19% on their purchases of coil action parts. Prior to that date there was another schedule where the top on the coil action parts was 14% (Part 2, Page 227). Between January 1, 1940 and January 1, 1945, Ozburn, Crow & Yantis regularly deducted 8% from the billing in remitting to us.

Q. Thereafter you are certain of the terms as they appeared from July 1, 1945, but the period between January 1, 1945 and July 1, 1945, when the discount arrangements with Ozburn, Crow and Yantis was—

A. 14%.

Q. It was 14%?

A. On coil action parts.

Q. 8% on springs?

A. Yes.

The witness was then asked how the chassis parts and coil springs were treated in the period January 1, 1945 and July 1, 1945, and the witness stated they did not have them at that time.

A new agreement was made with Ozburn, Crow & Yantis in July of 1945. (Commission's Exhibit 23Z-1 and 23Z-2). (Part 2, Page 228). The terms of that agreement were not retroactive to January 1, 1945.

Q. Mr. Goetz, I would like to have you read what would be the third and fourth paragraphs on that page relating to cash discounts, so-called distributing commissions, and the other discounts, and tell us whether or not that expresses the manner of billing and payment of discounts that controlled the purchases of Ozburn, Crow & Yantis until that agreement was superseded.

A. Yes.

Q. The witness was then asked how were the Chassis parts and coil springs treated when they became a part of the line in 1945 until a new agreement superseded this agreement in the record as Commission's Exhibit 23Z-1 and 23Z-2?

A. In the years 1946, 1947, and 1948 the purchases of Chassis parts and coil springs, the deductions for purchases of those items were corrected by an elimination from the merchandise bonus due them on the coil action parts. No rebate or discount was accorded them on chassis and coil springs from July 1, 1945 until the agreement was superseded (Part 2, Page 229). From the period July 1, 1945 until that agreement was superseded, we sent them checks in payment of the commissions and rebates to which we may have made reference.

Q. In the first instance did Ozburn, Crow & Yantis take 8% from the remittances?

A. Again from what date?

Q. July 1, 1945 until that agreement to which we have made reference was superseded in 1949, or until it was superseded?

A. From January 1, 1945 to July 1, the remittance of July 10, 1949, they deducted the 8%. Thereafter they made no deductions in their remittances (Part 2, Page 230).

From January 1, 1945 to July 10, 1949, during that period when they remitted to us they deducted 8% from the remittances monthly. During July, 1945 we computed the purchases of the coil action parts in the first six months and figured the extra amount due them over and above the 8% deducted on their purchases of coil action parts.

Mr. Corkey: Which explains the balancing figures arrived at in 1945, which was just before the institution of a new volume rebate (Part 2, Page 231).

Mr. Goetz stated that the excess was 6% on their purchases of coil action parts in the first six months of that year. In January of 1946 we determined their coil action purchases for the last six months of 1945 and paid to them the difference between the 8% that they deducted and the 19%. The new schedule was not made retroactive to January 1, 1945 as far as Ozburn, Crow & Yantis was concerned.

For the years 1946 until July of 1949, during January, 1947, we computed the amount due them on their purchases for the last six months, purchases of coil action

parts for the last six months of 1946, and figured the extra amount due them, which was 11% on their purchases, and adjusted that amount by the 8% reduction on chassis parts and coil spring purchases. That is the 8% which they had theretofore taken out on the chassis parts and the coil springs, which was adjusted back in favor of us.

During 1949 our agreement with Ozburn, Crow & Yantis was changed from time to time. They were changed three times (Part 2, Page 233). This memorandum of June 14, 1949, was a tentative memorandum of a change that we intended to make in our agreement with Ozburn, Crow & Yantis relating to their purchases for the month of the leaf springs line. However, this was not effective. We made no change. In July of 1949 it was again changed; and later in August of 1949. When I say this July change I am not referring to Commission's Exhibit 23Z-4 and 23Z-5. That is the same as the letter of June 14th. On July 9th we got out a general bulletin to our trade in which the rates payable as a merchandise bonus are the same (Part 2, Page 234), but some of the provisions of the contract, or rather the general practice, are different in the agreement. I am now making reference to this bulletin of July 22nd. being Commission's Exhibit 5. I want to change my previous statement of July 9th. The date is July 22nd. On August 12th we again changed our rates with our customers in general and applied that also to Ozburn, Crow & Yantis in connection with the merchandise bonus payable on leaf springs. Then in December of 1949 we again changed our merchandise bonus to our trade in general and made that applicable to Ozburn, Crow & Yantis to all their purchases from July 1, 1949 (Part 2, Page 235). This Commission's Exhibit 23X, Y, and Z represents the contract with Ozburn, Crow & Yantis, effective from July 1, 1949, except for a change in schedule at the bottom of 23X and top of 23Y. There was no formal document covering that change. It was just understood that the schedule set forth on 23X and Y would be identical with the schedules set forth on the third page of Commission's Exhibit 1, indicating the schedule under the leaf spring line (Part 2, Page 236).

Washington, D. C., November 10, 1950.

ANTON M. GOETZ resumes the stand and testified further as follows:

Commission Exhibits 44 A to R, 45 A to U, 46 A to R, 47 A to Q, 48 A to T, 49 A to Q, 50 A to K, 51 A to M, 52 A to M, 53 A to J, 54 A to L, 55 A to K, 56 A to D were marked for identification.

Commission's Exhibit 23T is a letter that represents an amendment to the document known as Commission's Exhibit 23X, 23Y and 23Z. My recollection is that during the period 1940 to 1945 I know of no other accounts, other than Ozburn, Crow & Yantis, Mid South, and Cotton States that received anything in the nature of a rebate commission or allowance from the billings on leaf springs (Part 2, Page 238). My estimate of the number of distributors accounts in connection with coil action lines in the years 1947 to 1949 is approximately 1200. My estimate for the spring line is approximately 800, and my estimate for the piston ring line is approximately 400. There would not be too much variation. It could amount to as much as 10% but I would guess not as much as 15%. These figures do not include the people who hold Moog parts jobbers' agreeme ts or C. P. wholesalers' agreements because they are not our customers (Part 2, Page 239). On motion that part of the answer beginning with the word "because" was stricken as not responsive to the question (Part 2, Page 241). In arriving at the figure of 1200 it is possible that this total includes the members of Mid South and Cotton States Groups counted individually and added to the total because in this regard our calculations are taken from the catalogue requirements. That same thing would hold true for the springs as well as the coil action. I would say there is no general practice as to when Moog first instituted the practice of granting monthly volume rebates in connection with purchases of the spring line.

Q. Do you know approximately how many accounts during the year 1948 were granted a monthly volume rebate based on their total purchases of the leaf spring lines?

A. None which we consider volume rebates. By way of explanation there were three accounts that we con-

sidered commissions rather than volume rebates. They were Mid South, Cotton States, and Ozburn, Crow & Yantis.

Q. When you say "commission accounts" do you mean you were paying these accounts brokerage?

A. I wouldn't know how to answer that question. I would say that we call it "commissions" (Part 2, Page 242). To our mind the word "commissions" means a payment for certain services.

Q. A brokerage payment, Mr. Goetz?

A. A commission payment. I don't know what you mean by the term "brokerage".

Q. Was it a payment by Moog to a customer of Moog (Part 2, Page 243)?

A. Actually what I am referring to is the deductions made on remittances when sent by Ozburn, Crow & Yantis and Cotton States, and a payment made to Mid South.

Q. Mr. Goetz, what you term a "commission" in connection with the dealings with the Ozburn, Crow & Yantis and Cotton States, is it also called a commission when you deal with other accounts?

A. In regard to the other accounts, any allowances made them are termed as "volume rebates" or "merchandise bonuses" (Part 2, Page 245).

Q. But to Cotton States and to Ozburn, Crow & Yantis they are called commissions?

A. In the portion of the years between 1940 and 1945, they were in part charged to our commission accounts on our record and in part charged on merchandise bonuses and volume rebates.

What we term "commission is for warehousing and redistributing." The volume rebate or merchandise bonus is based on net purchases in a particular fiscal year (Part 2, Page 246).

In the period between 1940 and 1945 we were paying to Ozburn, Crow & Yantis and Mid South a commission on leaf springs.

Q. Was that commission paid in connection with goods the title to which had passed from your company?

On objection Commission's counsel withdrew the word "title" from the question.

A. Only in part was it a payment. The other part was deduction from remittances and it was paid on merchandise sold by us (Part 2, Pages 247, 248).

It is deducted in part and paid in part after the merchandise was sold to our customers (Part 2, Page 248).

Subsequent to 1945, Moog allowed many accounts the privilege of deducting 10% from the billings when making remittances in connection with spring purchases.

Subsequent to 1945 and before June, 1949, other than group accounts there was the Henderson Rim and Wheel Company on springs. That is the only one that I remember now. Subsequent to January 1, 1945 and prior to July 1, 1949 there were many accounts other than group accounts allowed a merchandise credit monthly based on volume of purchases. I could not estimate how many such accounts we had. I would not guess that there were more than fifty such accounts (Part 2, Page 249). I could ascertain the number of such accounts as of to-day. In 1947 there was possibly one account on springs. In 1948 there was one account on springs, and in 1949 there was only about one account. The period we are talking about is up to July 1, 1949. That one account is Henderson Rim and Wheel Company. During the period 1947 to 1949 there were other accounts that obtained volume rebates, either in form of a credit memorandum or deduction from the remittance, and other than group accounts, with reference to coil action (Part 2, Page 250). There weren't too many of them. I would make a guess and say not more than ten.

With reference to the first page of Commission's Exhibit 1 and to the words under the capitalized word "prices" the words "net prices" appeared. That means the prices appearing on the blue sheet in Commission's Exhibit 15 entitled "distributors' net prices". The blue price sheets in Commission's Exhibit 15 are in all cases the prices referred to by the term "net prices" in the distributor contract.

At one time the Company did employ the zone system of pricing in the sale of the leaf spring line (Part 2, Page

251). It does not now employ the zone system of pricing in the sale of its leaf spring line. It ceased to employ the zone system of pricing in approximately August, 1949. It has been the practice of the Company in selling to the ordinary distributor accounts to generally adhere to the merchandise bonus schedule set forth in the form contract, which is here in the record.

I heard some previous testimony with respect to letterhead contracts. Since 1940 I believe there actually were three. They were Mid South, Cotton States, and Ozburn, Crow & Yantis.

Q. Do all three currently operate under letterhead, so-called letterhead contracts?

A. Only one (Part 2, Page 252).

Mid South and Cotton States ceased to operate under so-called letterhead contracts effective as of July 1, 1949.

The leaf spring line in 1947, which includes chassis parts and coil spring sales, were somewhat less than 50% of the total sales for that year. As to the coil action line, it approximately comes to less than 50% for that year. As to the piston ring line, it was about 7½% of the total for the year 1947. My figures just given for the year 1947, with reference to the leaf spring line, include the chassis parts and coil springs (Part 2, Page 253). The leaf spring line and the coil action accounted for 46 or 47%, respectively. That is about right.

The witness was then shown a card and asked whether or not he was familiar with it. He stated it was a card used to accumulate sales statistics. They were prepared from accounting department data but are not used by our accounting department. They are used for our sales department. As to whether they are substantially accurate on the question of our sales, in many respect they are, with the exception that they had changes in the handling of these accounts with respect to customers' branch stores, in various years. The sales figures set forth on those cards are taken down to the nearest dollar figure (Part 2, Page 254). In my opinion the figures on these cards reflect with reasonable accuracy the sales of Moog products during the years 1947, 1948, and 1949, with the exception that I made to you in my answer to the previous question.

Explaining the changes that took place with respect to the branch store sales analysis, in one of the years the cards included shipments only to the customers' particular point or place of business shown on the card. In another year the cards showed all shipments not only to that point or to that place of business, but also to that particular customer's customer. In other cases, where the customers had branch stores in some years, even though the branch store sales were charged to that particular customer at that location, the card in one case would show total sales or shipments to that particular branch, I mean to that customer and its branches, and in other cases the card would show only the shipment to that particular point.

The witness was shown a branch sales card for 1948 and stated that that particular card shows the card of a member of Cotton States and shows the total of the sales to that member and its branches (Part 2, Page 255).

These sales cards are a part of a Wheeldex system. It is the practice of the Company to remove cards from the Wheeldex, so that the net sales for the years 1947, 1948 and 1949 that were turned over to the attorneys for the Commission at the first hearing in St. Louis may not have all the accounts to which the Company sold during the years 1947, 1948, and 1949 (Part 2, Page 256). When cards are removed from the Wheeldex System, for a limited number of years the active cards at the end of a given year are kept. The old cards, accounts that discontinued buying from us in a particular year, were not kept.

The document marked Commission's Exhibit 44 Series, A through R, is a summary of the merchandise bonus credit memorandum issued during the year 1947 in connection with the coil action division, and was prepared under my supervision. It represents a summarizing of all credit memorandums that were issued in that year on merchandise bonuses. This document, marked "Commission's Exhibit 45, Series, A through U" represents a summary of merchandise bonus and credit memorandum issued during the year 1948 in connection with coil action purchases (Part 2, Page 257). And Commission's Exhibit 46 represents the identical material for the year 1949.

Commission's Exhibits 50, 51, and 52 represent the identical material with respect to the piston ring division during the years 1947, 1948, and 1949. Commission's Exhibit 56 represents both payments to our customers, deductions from their remittances, and credit memorandum issued on leaf spring items for warehousing and redistributing commission (Part 2, Page 258).

The series of documents which have been marked as Commission's Exhibits 47, 48, 49, 53, 54, and 55 series, are a list of the customers who received credit memorandums from us on their purchases of coil action parts and piston rings during the year 1947 through 1949. Those exhibits bear a direct relationship to the documents marked as Commission's Exhibits 44, 45, 46, 50, 51 and 52 series. By way of explanation of relationship on the schedule on which the names are listed, we show the credit memorandum number or a key number which will also be shown on the summary, on the schedules Commission's Exhibits 50, 51, 52, 44, 45, and 46. On these series of exhibits there is a number in the left hand column which refers to a corresponding number in these series of exhibits, on which the names and addresses of the parties are set forth (Part 2, Page 259). To the right of the identifying number, there is a date which signifies the date on which the accounting department actually issued its credit memorandum. To the right of that there is a column of figures under the title of "Purchases". That signifies the amount on which our merchandise bonus or payment was based, and it represents the net purchases by the customer for the particular fiscal year, less, in a number of years, cash discounts and Federal excise tax. Immediately to the right of that there is a column headed "Rebate". That represents the actual amount of the credit memorandum that was issued. To the right of that there is a column headed with the word "Per Cent". That is the rate which the particular customer received on the basis of his purchases of specified parts during a particular fiscal year. To the right of that is a column headed "Contract Period" and then underneath that "M. V. R." The contract period is the fiscal year, M. V. R. is an abbreviation for Monthly Volume Rebate (Part 2, Page 260). As to the contract period, not all of our agreements for fiscal years ended

at the same time—it depends. The beginning date is usually to be considered the first of the month in which we make the first shipment to the customer, to a new customer. And where instead of a date the letters appear in these exhibits, they represent in the main the allowances given to customers for redistributing, for warehousing and redistributing commission, which, in part in one period was an advance, was considered as an advance payment of the merchandise bonus rebate and in another period was considered as an official bonus payment.

Q. And in what period was it considered as an official bonus payment?

A. Beginning with the year 1950; so it would not apply to this (indicating). In this period it was considered as being an advance payment of the merchandise bonus in most cases. I have made particular reference to Commission's Exhibit 51B. My comments hold true throughout the rest of these exhibits (Part 2, Page 261).

Commission's Exhibit 56 series differs from the other Exhibits that I have just referred to in that it represents in the main deductions made by Cotton States and Ozburn, Crow & Yantis from their monthly remittances; payments to Mid South and Credit memorandums issued to Henderson Rim & Wheel Company for warehousing and redistributing. The make-up of this series of exhibits differs from the exhibits to which we have previously made reference, in that we have a list of names and following we have the credit memorandum and payments of record that were listed for each year, together with the reference number on the remainder of Commission's Exhibit 56 series, being 56 B through "D".

Q. Referring back to the particular parties noted on Commission's Exhibit 56A, is that correct? (Part 2, Page 262.)

A. That is correct (Part 2, Page 263).

Thereupon Commission's Exhibits 44A to "R" inclusive, 45A to U, inclusive, 46A to "R" inclusive, 50A to "K" inclusive, 51A to M inclusive, 52A to "M" inclusive and 56A to "D" inclusive were offered and received in evidence (Part 2, Page 264).

Thereupon Commission's Exhibit 47A to "Q" inclusive, 48A to "T" inclusive, 49A to "Q" inclusive, 53A to "J" inclusive, 54A to "L" inclusive, 55A to "K" inclusive were offered and received in evidence, subject to being held by the Commission, in their confidential files, for inspection by the attorneys for the Commission, attorneys for respondent, the Trial Examiner, the Commission and any of its employes, and for certification to any appellate court in the event of any appeal taken in the proceeding (Part 2, Page 265).

In my testimony relevant to the number of accounts purchasing the coil action line, I was referring to accounts which buy in accordance with the terms set forth in Commission's Exhibit 1, or the particular document of like character that was effective at any given time, I did not include in that total figure any of the accounts on which we might hold agreements similar to the Moog Parts jobber agreement, being Commission's Exhibit 11 (Part 2, Pages 267, 268).

Q. Mr. Goetz, you had some testimony with reference to the outlets, the automotive parts outlets, that hold contracts similar to Commission's Exhibits 10, 11, and 12. Now I want to ask you with reference to the first order in the month which some of these outlets may send to Moog, is that your understanding of a permissible practice?

It does not apply to a C. B. wholesaler, which is Commission's Exhibit No. 10, nor does it apply to Commission's Exhibit No. 13. It applies only to Exhibit 11, and the previous agreement to 11, known as Exhibit 12 (Part 2, Page 268).

Q. Upon receipt of those orders and the shipment to the people who have given to Moog the orders, does the invoice go back with the order?

A. The order is received from the distributor and the invoices are sent to the distributor.

Q. I thought you testified they order directly from Moog.

A. No.

Q. I thought you just testified to that; that at least they made one direct order to Moog per month.

A. Didn't you talk about "shipment" instead of "order"? Will you clear up that first question, please?

People holding agreement similar to Commission's Exhibits 11 and 12 are not entitled to make one order a month directly to Moog. Under no circumstances can they order directly from Moog.

Exhibits 10 and 13 have no reference to any first order in any given month. With reference to Exhibits 11 and 12, the first shipment made to that account on the basis of an order received from the distributor is taken into consideration on their warehousing and redistributing commission. The order in all cases comes from the distributor but it is possible that a "Missionary Man" may have worked with this particular customer, meaning the customer holding contracts known as Exhibits 11 and 12. When a "Missionary Man" takes an order, he takes the order to the distributor (Part 2, Pages 270, 271).

The distributor then signs that particular order as being chargeable to him or gives us his purchase order.

On all shipments in reference to those orders the distributor is charged in accordance with the blue price sheet. The particular outlet receives nothing except a packing slip. The billing goes to the account holding the distributor contract (Page 271).

The significance of this program is that the distributor receives the warehousing and redistributing commission on the first order.

This is a limitation placed more on the distributing account than on the account holding the contract similar to Commission's Exhibits 11 and 12 as far as the warehousing and redistributing is concerned.

When talking about the warehousing and redistributing commission I am talking about the plan as set forth in Exhibit 2. There is no first order requirement in the plan of Commission's Exhibit 3 (Page 272). Exhibit 3 was changed by Exhibit 2 in respect of the first order, is superseded Commission's Exhibit 3. Exhibit 2 was first made effective April 30, 1950. The program was made effective in December, 1949. That is the program epitomized by Exhibit 2. That applies to all of our lines (Page 273)

Exhibit 3 was in effect from about December, 1949 to about April, 1950. In part there was a similar agreement in effect prior to that date and in part it had been in effect since 1940 to my knowledge. By that I mean that only certain accounts had operated under a program similar to that illustrated in Commission's Exhibit 3 (Page 274). There were about four such accounts from 1940 to about 1948 but that is just a guess of mine. In 1948 there were a greater number, but how much greater I don't know.

I had reference to Ozburn, Crow and Yantis, Mid South Cotton States and Henderson Rim & Wheel.

On Exhibit 56-B, under the percent column, there appears the entry of 5 and 10%. There was in this particular case a warehousing and redistributing commission of 5% allowed on certain car manufacturers' parts; and 10% allowed on other manufacturers' allowance. I don't know now the car manufacturers' parts that were entitled to the 5% and the 10% (Part 2, Page 275).

With reference to the first entry on Commission's Exhibit 44F, which bears the number 355, and then making reference to the corresponding entry on Commission's Exhibit 47E, with reference to a credit memorandum that was issued to a customer for the merchandise bonus that was due him on his purchases for the fiscal year ending December 31, 1936. The purchases listed, with reference to this No. 355, total $169.18. There was not at any time a general offer of 9% merchandise bonus for purchases as low as $169.18. By way of explanation that particular account who received this memorandum was a member of the affiliated group whose purchases were combined for the purpose of the volume rebate (Part 2, Page 276). This group does not appear in the list of groups that are in the record in Commission's Exhibit 30 series (Part 2, Page 276). When we first undertook an arrangement with that group of which that customer was a member, I don't know. We have been selling that concern for a considerable number of years. Actually it is a group of companies whose controlling stock is owned by one individual. I don't know who the affiliated companies are at this time but I know there are many of them. They are located in

several states, I believe North Carolina and South Carolina.

Q. Each one of the outlets obtains, or has obtained, from your company the merchandise bonus each year as a separate entity?

A. No; each one of the outlets, because that is one of the concerns, I believe, that has branches as well as affiliated companies so that the outlet—Possibly the main stores in several of these cases are the affiliates. Each of the affiliates would receive a merchandise bonus credit, but not the branches (Part 2, Page 277). As to the particular name associated with the group, in the main the names are Piedmont, but they are not Piedmont in all cases. The group as a unit has no particular name or designation. They exist for the most part in North and South Carolina.

Q. Having reference now to this outlet, Piedmont Auto Exchange, Charlotte, North Carolina, does the merchandise credit indicated here represent the shipments to that particular outlet of this group, represent the bonus on the shipment to that particular outlet of this group?

A. I would not be able to answer that question without referring to that particular credit memorandum; but on the basis of the amount of purchases, I would say "Yes".

These affiliates do not operate from a warehouse. The orders are received and the shipments are made to the individual affiliate.

Q. And the merchandise bonus is paid by your company to the individual affiliate based on the volume of the purchases of all of the affiliates? (Part 2, Page 278.)

I believe I originally made the statement "Yes" to the first point of your question. I do not know whether this is carried out through this entire period or not. It is possible that the merchandise bonus memorandum may all go to the principal store or principal company, which I believe is in Charlotte, North Carolina, but it is based on the combined purchases of the group of all of the affiliates.

The witness believed that the group of outlets involved in this series of questions were separate corporations as

well as branches involved (Part 2, Page 279). But the purchases of these separate corporations are aggregated for the purpose of determining the merchandise bonus to each of the companies involved.

In explanation of an apparent discrepancy between total purchases and the percentage rebate applied Commission's Exhibit 44K, and the entry opposite the number 1072, and a corresponding entry on Commission's Exhibit 47J, that is either a branch of another company or is owned by another company, or there is an affiliation with another company. I don't know exactly. That is an apparent as distinguished from a real discrepancy (Part 2, Page 280).

With reference to Commission's Exhibit 44J, and particularly item number 1076, and the corresponding entry on Commission's Exhibit 47J, by way of explaining the apparent discrepancy there, that is a company which is owned by another company. The name of the company that owns it is Borbein-Young & Company. Our company aggregates the purchases of Illinois Wheel & Brake Company with those of the Borbein-Young Company for the purpose of determining the merchandise bonus accorded; and has followed that practice from the beginning of our coil action merchandise bonus schedule. Borbein-Young & Company have several branch stores and these several branch stores combined their purchases so that the purchases reached the top point of the bracket. The bonus to those stores is treated as one bonus because all accounting records are at St. Louis (Part 2, Page 281). Over and above that merchandise bonus and entirely apart from it, the merchandise bonus is accorded to Illinois Brake & Wheel and is treated separately for the purpose of the merchandise bonus. The witness was then shown Commission's Exhibit 30C, for the purpose of refreshing his recollection, and asked if he recalled the manner in which the merchandise bonus was handled with respect to that group of jobbers from 1947 to 1949 (Part 2, Page 282). And the witness stated that with reference to the schedule for 1947, that the credit memorandums were made out to the individual members of the corporation. Why they were made out in that manner, I have no

recollection at this time, and the figures set forth on Exhibit 44K represent the purchases of the individual members rather than the total of the shipments to the group.

With reference to the policy of the company with respect to aggregating purchases by affiliating companies or by subsidiary companies for the period between 1947 to 1949, the purchases of such companies were consolidated in ascertaining the merchandise bonus by us to them, regardless of the fact that orders came directly from affiliates and shipments were made directly to affiliates (Part 2, Page 283). The basis for determining who might be accorded the right to aggregate purchases in this situation occurred wherever there was an individual or a company owning a controlling interest in other companies, or where there were subsidiaries involved.

Q. And provided they demanded an aggregate?

A. No; it was automatically made where it was known to us. A controlling stock interest was sufficient.

Q. Would it have been sufficient in the case of parcelling between more than one company with less than a controlling interest?

A. Well, if we could establish that there was control or if we had information to believe there was control, we would aggregate the purchases, or a common interest somewhat less than control (Part 2, Page 284).

The witness' attention was called to Commission's Exhibit 44K, and particularly the item numbered 1070, and the corresponding item on Commission's Exhibit 47J, and asked to explain the apparent deviation from the normal operation of their merchandise bonus policy. The witness stated that the particular item related to Number 1072, and that they aggregated the purchases of the two in accertaining the volume or the merchandise bonus; that it was the company's understanding there was some connection between the two.

The witness' attention was called to Commission Exhibit 45H and the item Number 2103 thereon, and the comparable item on Commission's Exhibit 48G, and asked to explain the apparent discrepancy with reference to the normal volume rebate schedules. The witness stated that the pur-

chases of that customer, he believed, were combined with the purchases of another customer and he believed there was a common interest between the two concerns. That it would not be attributable to the fact that this customer also purchased a volume of piston rings (Part 2, Page 285). The name of that company is Missouri Auto Supply Company, and the Columbia Auto Supply Company was at one time a branch of Missouri Auto Supply Company. I believe they now operate as separate and distinct entities, but we do not continue at this time to so combine them. At the time of this merchandise bonus in 1948 the Company aggregated their purchases (Part 2, Page 286). I believe at that time there was an affiliation between them.

The witness was referred to Commission's Exhibit 45J and the entry number 2227 and the equivalent entry on Commission's Exhibit 48-I, and asked to explain the apparent deviation from the normal operation of the bonus schedule. The witness answered by stating that his answer to one of the previous questions was wrong, and that this was the company that was owned in part by the other company. By "other company" he meant the Columbia Auto Parts Company, or there was an affiliation of some kind between this company and the Columbia Auto Parts Company.

Q. So that at this period of time this company is represented by the entry 2227 and the Columbia Auto Parts were treated for the purpose of a merchandise bonus as a single operating unit?

A. Yes; at one time all three were, as I mentioned, because there was a common ownership between all three of them (Part 2, Page 287).

The witness was shown Commission's Exhibit 45-O and the entry number 2991 and the corresponding entry on Commission's Exhibit 48N, and asked to explain the apparent discrepancy in that rebate. The witness answered he believed that the purchases of that particular company were also combined with the Borbein-Young Company and Illinois Wheel & Brake Company because he believed there was a common interest between the three companies; that he did not know the extent of that common interest,

and the company to which they are now making reference order directly from Moog.

Q. And shipments in response to such orders are directed to the company?

A. I don't know whether the Peoria Wheel & Rim is a branch or whether it is a separate, incorporated Company.

As to whether orders are received directly from the customer and shipment made directly to the customer, the witness stated he could not give the answer to that (Part 2, Page 288).

The witness was shown Commission's Exhibit 46R and the entry Number 5975 and the corresponding entry on Commission's Exhibit 49Q and asked to explain the apparent deviation from the normal operation of the bonus. The witness stated that that concern had a common interest with another concern he did not recall, and that the purchases of the two were combined as one purchase. The witness stated that he did not know whether that could have been a balancing figure to account for the period prior to the inception of the buying group known as Six States Associates. Asked whether it would be possible that might have been such a figure, the witness replied: "Yes; it could have been".

The witness' attention was directed, for the purpose of refreshing his memory, to Commission's Exhibit 30-O, and asked whether it made clear the number 5975 entry on Commission's Exhibit 46R. The witness stated that it represented a credit memorandum issued to that customer on its purchases for a period of part of the year (Part 2, Page 289). That was done to this particular company because they stopped buying from us and thereafter we received purchase orders from Six States Associates (Part 2, Page 290). We continued to ship the products to the various addresses on the basis of the purchase orders received from Six States Associates. During the years 1947 to 1949, when our company undertook to sell to a group-buying organization it was customary for us to balance out the purchases previously made by the individual members. We would take the purchases of that particular customer for the portion of the year that he had bought

from us and would determine the number of months that that represented and arrive at their estimated annual purchases on the basis of their actual purchases for that short period. We would then apply to the actual purchases for the short period the rate that we determined by the total of their aggregate, estimated, annual purchases (Part 2, Page 290).

The witness was then asked with reference to the return on the subpoena duces tecum with respect to Automotive Group Buyers was there anything further available in respect to prices and terms accorded on sales that inadvertently had not been returned at the first hearing (Part 2, Pages 290, 291). The witness answered that the only things he knew of that might have been found were some sales stub cards that Mr. Steele and he had worked with; that nothing else other than that has turned up (Part 2, Page 292). The witness further stated that when he referred to sales statistics he had reference to the green sales statistical cards over there (indicating) and did not refer to any of the work sheets that he had returned in response to the subpoena (Part 2, Page 293).

Cross-Examination was waived (Part 2, Page 294).

March 23, 1951 at New Orleans, Louisiana

(Part 2, Page 296).

JOSEPH N. GREINER testified as a witness on behalf of the Commission.

Direct Examination.

My name is Joseph N. Greiner, Greiner Auto Parts Company, Inc., 2929 Magazine Street, New Orleans, Louisiana. I am Vice-President and have held that position approximately three years. The general area in which we offer our products for sale is the City of New Orleans, proper, and a hundred mile radius (Part 2, Page 297). We travel four salesmen that cover the general trade area we have described. I am here in response to a subpoena. The

products we sell are purchased primarily from manufacturers. Some lines I have to buy through other jobbers here in town. We sell automobile parts manufactured by Moog Industries. We purchase these parts from them.

Our products are offered for sale to the independent garage men, service stations, fleet owners, and I offer them to the car dealer but the only time I can sell him is when he can't get it from his original source. We buy our lines from approximately seventy-five manufacturers (Part 2, Page 298). The number of parts that would entail is approximately 10,000. We have competition in our trade area. We compete primarily with original equipment car manufacturers and their agents, the oil companies and the tire companies; theoretically, we are in competition with the other jobbers, but it doesn't amount to much. I do not know if any car dealer in the New Orleans area offers parts for sale manufactured by Moog Industries. We purchase the front end suspension line and springs from Moog Industries. We belong to a buying group named Cotton States, Inc. It is located at Greenwood, Mississippi (Part 2, Page 299). We purchase parts from Moog Industries through Cotton States, Incorporated.

Q. Mr. Greiner, would you tell us the terms of purchase on the items which you purchased from Moog Industries, Inc., during the year 1949?

A. If I remember correctly, we bought off the blue sheet, and then off the rebate schedule, according to volume purchases. I cannot recall what that rebate amounted to. I could ascertain it. I know approximately what it is. I have ascertained that the gross amount of purchases of our company from Moog Industries for 1949 was approximately $3,000.00 (Part 2, Page 300).

The rebate received by the Greiner Auto Parts Company on those purchases was approximately $250.00.

Our approximate gross sales in the year 1949 were approximately $400,000.00. As to the percentage of those sales that were made to the car dealers in our trade area, I do not know, but the percentage is mighty mighty small. The large bulk of our sales in 1949 were made to garages and repair shops. Other jobbers in the New Orleans area

compete with us for the trade of the garage men. We bought from other jobbers in the New Orleans area in 1949, approximately $25,000.00 (Part 2, Page 301).

We purchase all Moog parts direct from the Moog factory. Moog Industries offer a cash discount based upon prompt payment of their bills. During 1947, 1948 and 1949, we availed ourselves of that cash discount, which, to the best of my knowledge was 2% (Part 2, Page 302). We do not sell Moog products to any other jobbers in the New Orleans area.

There was no cross-examination.

ALMON G. BARDIN testified as a witness on behalf of the Commission.

Direct Examination.

My name is Almon G. Bardin of Auto Shock Absorber Sales, 1020 Richards Street, New Orleans, Louisiana. I am proprietor and am here this morning under subpoena. We offer our products for sale in the Metropolitan New Orleans area. We do not travel full time salesmen (Part 2, Page 303). We have a part time salesman and part of the time I solicit business myself. We buy part of our products direct from the manufacturers and part we buy as a subjobber through other jobbers, locally. About 50% of our total purchases are made through other jobbers in this area. We purchase products from Moog Industries, Inc. and did so in 1949, to the best of my knowledge, as well as in 1950. We offer our products for sale to the independent repair man and I do some retail business also. I do not actively solicit business from any other jobbers. Occasionally, however, they pick up from me when I have it and they don't. It is more or less of an emergency nature for them. I do not belong to any buying group (Part 2, Page 304).

We offer for sale approximately seven manufacturers' lines. As to how many individual parts there are in the coil action line, all the nuts, all the bolts, I could not answer that question. I don't know how many different

parts there are, because there are about 200 different items in the coil action part alone for different makes of different cars and different models of different cars. I do not think it would run into the thousands. I would say that my answer applies to all of the lines I carry and is not restricted to the coil action line alone. We purchase from Moog Industries coil suspension parts, coil springs, some leaf springs, some king bolt sets and tie rod ends (Part 2, Page 305).

Our gross sales in 1949 were approximately $50,000.00. As to the total amount of purchases we made from Moog Industries in 1949, I do not have that information readily available. I am a small operator and I have an accounting service that keeps my books and they have all of the papers. The information could be secured for you if it is required. I received a rebate from Moog Industries on my purchases for 1949. We have competition in the New Orleans area in the sale of our products. We compete with other automotive jobbers but my biggest competition is the original equipment parts manufacturer (Part 2, Page 306). I know of no car dealer or original equipment manufacturer that offers Moog parts for sale in the New Orleans area. Moog Industries offered a cash discount for prompt payment of its bills in 1949. That was 2%. Insofar as possible we took advantage of the cash discount for prompt payment offered by Moog in 1949 (Part 2, Page 307). I take advantage of the 2% cash discount from a selfish reason because 2% is just two cents less on each dollar's worth of bills I have to pay, and it enables me to break even, because I allow a 2% cash discount to my customers for prompt payment.

Cross Examination.

As to how much of my business is retail percentagewise in relation to Moog business is a rather difficult question to answer, because when we sell the parts retail they are installed on the car and when you do that it is usually quite expensive. It would be merely a guess, but I would say that about 10% of the parts of the Moog line are sold at retail (Part 2, Page 308). My customers do not always take advantage of the 2%. Many of them do not. There

are many times when I do not find myself in a position to take advantage of the 2% discount.

LEE JOSEPH PICOU testified as a witness on behalf of the Commission.

Direct Examination.

My name is Lee Joseph Picou, Auto Springs and Brake Service Company, 1035 Carondelet Street, New Orleans. I am half owner (Part 2, Page 309). I have been connected with the business since February 1, 1948, and am here in response to a subpoena. We offer our products for sale in all of Louisiana and part of Mississippi. We travel three salesmen. At the present time I have only one out of town man. He covers everything except New Orleans. We offer our products to the general garages, jobbers, service stations and fleets. We have competition in the sale of our goods, in our trade area. We compete with other jobbers but our greatest competition is the car manufacturer. Chrysler and General Motors would be the biggest. We purchase our products from about fifteen different factories. We are warehouse distributors for about fifteen different factories. We offer quite a few general lines for sale (Part 2, Page 310). It would be hard to tell you exactly how many, but there are approximately about thirty.

Q. Could you approximate the number of individual parts, that is, the parts that you sell as individual parts, that would be?

A. It would run way up. The Midland, manufacturers of power brakes, they alone have about 2,000 component parts that we handle. All the little springs and washers and valves and things like that. There is a tremendous amount of them. We do not belong to any buying group.

In 1949 we did not purchase any merchandise from Moog Industries. In 1948, we did purchase from Moog Industries (Part 2, Page 311). Our total sales in 1948 were approximately $250,000.00. In that year we purchased from Moog Industries $6,192.69 (referring to a file

brought with him). No car dealer in New Orleans, or r general trade area, offered Moog products for sale in 48, to my knowledge. In 1948 we received a rebate on r purchases from Moog Industries of $303.44. That figres in percentage 7½%. In 1948 we purchased from oog Industries front end suspension parts, coil action nd springs. In response to a question as to whether Ioog Industries in 1948 offered a cash discount for prompt ayment, the witness answered "That was offered in 947" (Part 2, Page 312). The witness was referring to letter from Moog Industries, which was marked "Commission's Exhibit No. 57". We took advantage of the cash iscount offered to us. As to why we take advantage of he cash discount, we pass it on to our accounts receivable nd it gives them an incentive to pay their bills by the 0th of the month (Part 2, Page 313). The cost of acquisiion of goods of the Moog line is important to us (Part 2, ages 313, 314).

Q. The 2% cash discount, which is offered by Moog, elates to your cost of the Moog line, does it not?

A. My volume discount means more to me than the 2% does. That is the only way I can meet competition n town, as we have these dealers, like I told you, to buck up against that are very rough. Anything they handle, they can undersell us. That is why we look for any discounts that we can get. It is all needed in order to help us come out (Part 2, Pages 314, 315). I imagine that if we take the 2% cash discount it means we pay 2% less for our goods to Moog. Commission's Exhibit 57 was taken from our files. It was received in 1947 by John P. Otis, who was the owner of the company at that time. I wasn't there then. As to the meaning of the handwriting on it that is Miss Potter's and Mr. Harvey's. Miss Potter was the secretary and Harvey was the bookkeeper (Part 2, Page 315). Thereupon, Commission's Exhibit 57 was offered and received in evidence (A form letter) (Part 2, Page 316).

Q. Do I understand from your testimony a moment ago that all discounts, whether they are trade discounts or cash discounts, are important to you in determining your overall profit or loss situation?

A. That is right (Part 2, Page 317).

Cross Examination.

We always take the 2% cash discount from Moog (referring to his file). Approximately 10% of our sales are retail business.

Q. The rebates which you receive on the Moog purchases are comparable to the rebates you receive on the other purchases, all the other manufacturers' lines?

A. I'd say "Yes", that isn't on all lines, though, because all lines do not give volume rebates. We have a few that give you a volume discount, but all of our manufacturers do not. It is based on a manufacturers' price to us as a warehouse distributor and it carries nothing but a 2% on the 10th of the month (Part 2, Pages 318, 319).

We no longer are a warehouse distributor for Moog. We were a warehouse distributor for Moog at the time these rebates were received up to the end of 1948. Moog paid us nothing in addition to these rebates for being a warehouse distributor.

Q. Some manufacturers gave you a warehouse distributors' rebate; Moog gave you a volume rebate; is that correct?

A. No; I didn't say that they gave us a warehouse distributors' rebate. I said, "Some give a rebate." That is a volume rebate. Some don't give us anything at all.

Q. For being a warehouse distributor?

A. You take Midland, for instance. We are a warehouse distributor for them. We are the sole distributor of Midland; we buy strictly on a flat rate basis. They make a price to the distributor and that is it. There is no discount, no freight paid, or nothing, and we are a warehouse distributor for Midland.

The price we pay to Midland is not the same price that the jobber pays to Midland. We sell the jobber. Midland does not sell the jobber.

Q. Is the price that Moog gives you on the volume rebate, is that the same price that he sells to the jobber?

A. I don't know (Part 2, Page 320).

CLEM J. SPORL testified as a witness on behalf of the Commission.

Direct Examination.

My name is Clem J. Sporl. I am the owner of Auto Chassis and Spring Company, 429 Esplanade, New Orleans. I have been owner about two years. We offer our products for sale in Orleans Parish (Part 2, Page 321). Our general line of business is springs, front end parts, chassis parts. We do not travel salesmen. I am here under a subpoena.

We offer our products for sale to the garage, service station and fleet owner. We carry approximately five lines of parts. As to how many individual parts there are approximately, it would be in the thousands. We purchase products from Moog Industries and offer them for resale in this general area. We have competition in this area. We compete with local jobbers and dealers (Part 2, Page 322). I do not think, to my knowledge, that any car dealer offers Moog parts for sale. We do not resell Moog parts to any other jobber in this area. We purchase from Moog Industries leaf springs, chassis and coil action parts. We receive a rebate from Moog Industries on our purchases. In 1949 we received a 5% rebate. We do not belong to a buying group. Moog offers a cash discount for prompt payment of bills amounting to 2%. We take advantage of the cash discount because we pass it on to our customers. They take advantage of the same thing to us (Part 2, Page 323).

Q. Does whether or not you take your 2% for cash from Moog relate to the cost which you pay Moog for your products?

A. I would say "yes".

Our gross sales in 1949 were between Twenty-five and Thirty Thousand Dollars.

Cross Examination.

Our competitors, the car dealers, sell leaf springs, chassis and coil action parts in Orleans Parish in competition with us (Part 2, Pages 324, 325).

Q. In competition with Moog parts?

A. No; we have a few dealers we are in competition with but it is all equal. We don't have no heavy competition on it (Part 2, Page 325).

Q. Does the car dealer sell a leaf spring which can be used in the place of a Moog spring?

A. Yes; they can.

And the same is true for the chassis and coil action parts.

The car dealers are our heaviest competition.

I don't know what our gross purchases with Moog were last year. In 1949 from Moog it was $1,687.68, which is a net purchase figure (Part 2, Page 327). I don't know what that figure would be in gross sales as related to Moog parts. Our average mark-up on Moog parts is about 30%. That is, a 30% mark-up from the blue sheet. We got a 5% discount from the blue sheet and we also took a 2% cash discount; so our total mark-up would be about 37% (Part 2, Page 328).

Q. Your rebate and your cash discount are relatively unimportant compared with the 30% mark-up?

A. It is important. The rebate is important.

The rebate is not more important than our mark-up nor is the cash discount more important than our mark-up (Part 2, Page 329). About 10% of our business is retail. As to the mark-up on the retail business, I could hardly say. We rebuild springs. We use very little merchandise in it. I never did figure up the mark-up. However, we do not sell the spring at retail for the same price as we sell it to the jobber.

Q. What would be the difference in price between the jobber price and the retail price?

A. We have different sheets Moog sent us. We go by the pink sheet, jobber sheet.

Q. You don't know how much more that is?

A. No; I didn't figure it out.

March 27, 1951, at Memphis, Tennessee.

ROBERT R. MEADOWS testified as a witness on behalf of the Commission.

Direct Examination.

My name is Robert R. Meadows (Part 2, Page 333). I am Vice-President and General Manager of Mills-Morris Company, 173 South Dudley, Memphis, Tennessee, wholesalers in automotive parts, and am here under a subpoena.

We handle about 500 general lines of manufacturers' equipment, large and small. The number of individual items or parts that we sell I would say is in the vicinity of 50,000 or more (Part 2, Pages 334 and 335). We purchase our products from manufacturers. They are our sole source of supply for automotive parts with a very few exceptions. The exceptions would be from some other wholesaler—distributor—or warehouse, distributor.

Q. Would you purchase from the distributor you mention, and as a jobber of those parts yourself? (Part 2, Page 335.)

A. The jobber; yes.

We offer our products throughout the State of Mississippi except the extreme southern part of the State. In eastern Arkansas, middle Tennessee, and western Tennessee; two counties in southeast Missouri and about two counties in Western Kentucky. Memphis, Tennessee, is included in West Tennessee. We operate and maintain eight stores. They are located in Memphis, Nashville, Union City, Tennessee, Milan, Tennessee, Jonesboro, Arkansas, Tupelo, Mississippi, Greenville, Mississippi and Jackson, Mississippi. We travel thirty-two salesmen at present and they cover the general trade area I have outlined (Part 2, Page 336). We offer our products to service stations, garages, car dealers, and small jobbers. In offering our products to small jobbers, we act as a distributor. We have competition in the sale of our product in our trade area. We compete with car manufacturers, through the car dealers, and other jobbers throughout the area.

We purchase from Moog Industries and did so in 1949. In that year we purchased flat springs, leaf springs, coil

action parts and piston rings (Part 2, Page 337). We purchased through Mid South Distributors.

As to the discount or rebate we received from Moog Industries on our purchases in 1949, I do not know the exact figure. That information would be found with Mid South Distributors. I don't know the different brackets (Part 2, Pages 338, 339). Our total purchases from Moog in 1949, were in the vicinity of $12,000.00. Our total purchases in 1949 of automotive parts were in the vicinity of $2,000,000.00.

As to whether any car dealer in our trade area offers replacement parts of the Moog line, for sale, I would not be in a position to know definitely whether the same dealers offered the Moog line or not, but they do offer items the same as Moog's perhaps by a different manufacturer (Part 2, Pages 339, 340). I would not know that any better than I would know whether or not they handle the Moog line. There might be some exceptions that we would not know about. So far as I know, no tire or oil company offers replacement parts of the Moog line for sale. Other than jobbers, no one else, to my knowledge, offers any replacement parts of the Moog line for sale.

Mills-Morris Company is a member of the Mid South buying group (Part 2, Page 340) and we have purchased the Moog line through that group.

Cross Examination.

Q. Mr. Meadows, name the automotive parts (?) that you distribute and sell.

A. Car manufacturers and car dealers.

At this point Commission's Exhibit 58A and "B", 59, and 60 were marked for identification.

THEODORE N. HAGGEL testified as a witness on behalf of the Commission.

Direct Examination.

My name is Theodore Norbert Haggel; I am President of Mid South Distributors, 1307 Sterick Building, Mem-

phis, Tennessee. I have been President about five years and am here under a subpoena.

Mid South Distributors is in the automotive replacement parts business. Approximately 75 manufacturers' lines are purchased by us (Part 2, Page 342).

Q. How many individual parts, sold as individual parts, Mr. Haggel, would that number, approximately?

A. That calls for a variable answer; perhaps in the neighborhood of 18 to 20 or 22. We purchase the products which the members of Mid South offer for sale from manufacturers who are supplying material towards the market that we are attempting to cover (Part 2, Page 343).

The general area that the members of Mid South offer their products for sale is from Savannah, Georgia, on the eastern coast as far as Corpus Christi on the west. That doesn't mean we are covering all of that area but merely means that we have members within that boundary that I have just described; but we certainly don't plan to cover 100% of that territory by any means. There are 17 members of Mid South Distributors. The number of individual stores that the individual members have would run, I would say, approximately 70 at this time, saying nothing about sub-jobbers that they might serve.

The names and locations of Mid South members are as follows:

Mills-Morris Company,	Memphis, Tennessee
Keith-Simpson Company,	Nashville, Tennessee
Fulton-Conway Company,	Louisville, Kentucky
Southern Automotive Supply Co.,	Chattanooga, Tennessee
A. S. Hatcher Company,	Macon, Georgia
The Motor Supply Company,	Savannah, Georgia
Tennessee Mill & Mine Supply Co.,	Knoxville, Tennessee
Motor Supply Company,	Meridian, Mississippi
Central Electric Company,	Hattiesburg, Mississippi
Borden-Acklen Company,	New Orleans, Louisiana
Crasford & Company,	Shreveport, Louisiana
Motor Supply Company,	Monroe, Louisiana
Corpus Christi Hardware Company,	Corpus Christi, Texas
Wadell-Connally Company,	Tyler, Texas
Voss-Hutton Company,	Little Rock, Arkansas
Williams Hardware Company,	Fort Smith, Arkansas.

All these members or companies mentioned are engaged in the resale of automotive parts. They would be termed jobbers of automotive parts (Part 2, Page 346).

Mid South Distributors was incorporated approximately in 1937. I am the President. Mr. K. P. Allen of Motor Supply Company, Meridian, Mississippi is Vice-President. Miss U. B. Bonden is Secretary and Treasurer. I do not own any stock in Mid South Distributors (Part 2, Page 347). There is no outstanding stock. Mid South is a co-operative. The directors of Mid South are the top management of each of the 17 members. In 1949 Mid South Distributors entered into a contract with Moog Industries (Part 2, Page 348). It contained the terms of purchase with members of Mid South Distributors. The contract provided for a cash discount. It provided for a volume discount. It provides for a volume rebate. Mid South as an organization and its members took advantage of all the offers of discount in the contract for the year 1949. The witness was asked if he had the records of those with him and answered that the Federal Trade Commission had most of those records, but that he had some copies of records. The total amount of purchases by members of Mid South Industries for 1949 was approximately $90,000.00 (Part 2, Page 349). The amount of discount earned for 1949 was approximately $9,000.00.

Referring to Moog Industries, Inc. as to the method of purchase, billing, shipment and remittance, the orders are mailed in the field by our member who, naturally, is the recipient of the merchandise. The order blank is mailed in triplicate, the original being sent to the manufacturer, the second copy comes to our office with instructions to bill Mid South in triplicate with Mid South receiving the original invoice, the participating member receiving the Number 2 invoice, and Mid South being responsible for financial handling of the account. As a general rule orders to Moog Industries do not originate from Mid South headquarters here in Memphis, Tennessee (Part 2, Page 350). To my knowledge Moog Industries has never shipped an order direct to Mid South in Memphis, Tennessee. The total amount of purchases of Mills-Morris Company from Moog Industries in 1949 is in the

vicinity of between $10,000.00 and $12,000.00 (Part 2, Page 351).

In 1949 there were three different rebate schedules applying to different lines offered by Moog Industries.

Q. Mr. Haggel, do you have an overall percentage, not particularly to any line, but the lines as a whole, overall percentage of rebates which was earned by Mid South in 1949?

A. If I had an overall, it would be strictly one of my own conclusion and my own calculation.

It would have nothing to do with our related connection with Moog and I would say in the vicinity of about 11%.

The witness was asked to refresh his memory from a document handed him by counsel for the Commission (Part 2, Page 352). Witness was told that he was being asked what were the total purchases from Moog Industries by Mills-Morris through Mid South. The witness answered that the figure that you have there is a gross figure. It takes into account no returns or vice versa when we break it down. It does not show our cash discounts, Federal Excise Tax, and many other things that come in there, so when I testify the way I do we break these figures down on both sides and it wouldn't be $2500.00 or $3,000.00 over what is presented there.

Q. What was the gross figure of Moog, Inc., from Mills-Morris in the year 1949?

A. I have previously testified that they were in the vicinity of $90,000 in 1949.

Q. Gross purchases of Mills-Morris?

A. No, I thought you said Mid-South.

Q. No, I am limiting it to Mid-South (Mills-Morris?)?

A. Limiting it to Mid-South (Mills-Morris?) from Moog Industries, Inc., I would say the gross purchases were within the vicinity I have previously testified to, $10,000 to $12,000. You have it—according to the records you have there, it shows up $19,000.

Trial Examiner Kolb: How do you account for the difference between $19,000 and $10,000 or $12,000?

The Witness: The difference between the $10,000 and the $19,000 is, as I have testified to there, was for some

summing up billing procedure as outlined there (Pages 353, 354).

The witness was shown a document marked Exhibits 58A and 58B and was asked to tell what the document was without regard to its contents. The witness answered that the document referred to was marked "Strictly Confidential" and that it was a "brainchild" of his own to the membership relative to confidential relaying of the information covered by the subject. The witness was asked if he signed that bulletin and answered that he didn't particularly sign it. It is under my signature by my secretary which was authorized. It is their bulletin. Commission's Exhibit No. 59 is a bulletin covering Moog coil action purchases, under date of April 20, 1950, and in it I discussed the possibility of our existing contract with the members (Part 2, Page 356).

Commission's Exhibit 60 is a letter relative to the subject of Moog Springs, under date of August 10, 1949, in which a change in policy took place, and which was made retroactive to July 1, of that year, and this was an announcement covering that situation (Part 2, Page 357).

Thereupon Commission's Exhibits 58-"A", "B", 59, and 60 were offered and received in evidence (Part 2, Page 358).

Cross Examination.

Q. Mr. Haggel, Mid South Distributors is now a respondent in a complaint similar to what Moog is under at the present time, is it not?

Counsel for the Commission objected to the question as immaterial and not covered by direct examination, and the objection was sustained.

The Federal Trade Commission has not offered us any promise of immunity or other consideration in respect to my testifying here on behalf of the Government.

The witness was asked if he expected to receive consideration in the matter in which he was a respondent as a result of his testimony here (Part 2, Page 359). Counsel for the Commission expressly denied that they had made a deal with the witness. The witness answered the question saying "I can't say that I expected any consideration.

I thought probably I might be the apple-cheek boy and thought that the Federal Trade Commission might try to grant me a certain amount of justice, but other than that, no.

The terms under which Mid South buys their Moog Industries products are very similar to those under which we buy from other manufacturers, comparably equal rebates, and so forth, and we buy from 75 manufacturers" (Part 2, Page 360).

DUNBAR ABSTON testified as a witness on behalf of the Commission, as follows:

Direct Examination.

My name is Dunbar Abston, business address 600 Monroe Avenue, Memphis, Tennessee.

I am an executive in the firm of Ozburn & Alston, who are in the business of wholesale automotive parts, supplies, and equipment. We offer for sale in the neighborhood of 300 general manufacturers' lines; I have made an accurate count of it. As to individual items that we buy and sell, that would run from 18,000 to 25,000. It varies (Part 2, Page 361). We purchase the products we offer for sale from several sources; largely from Ozburn, Crow & Yantis Company. That is a corporation engaged in the purchasing and distributing of automotive parts and supplies. I am Vice-President of that corporation. I think I have been an officer of that corporation since 1938. Other than from Ozburn, Crow & Yantis, we purchase products for re-sale from various sources (Part 2, Page 362). Occasionally we make emergency purchases from local distributors. I believe that is what they all do. Ozburn & Abston Company offers its products for sale in west Tennessee, southeast Missouri, central and eastern Arkansas, the north two-thirds of Mississippi, northwest Alabama and part of Louisiana. We operate 40 stores. They are located in the general area that I have just described. We travel salesmen, I think there are 64 of them and they cover the general trade area I have just described (Part 2, Page 363). We offer our goods through the usual auto-

motive channels—service stations, independent repair men, fleet owners, garages, car dealers, implement dealers, and tractor dealers. In an isolated case we offer our products for sale to other jobbers located in the area. We have quite a lot of competition in the sale of our products in our area. Our principal competition is from two sources —the jobbers or distributors who operate businesses— and one of our principal sources of competition is the car manufacturer who sells through the car dealers. We offer Moog products for sale. In 1949 we offered their front end parts and springs (Part 2, Page 364). The gross amount of purchases of Moog products by Osburn & Abston Company in 1949 was $52,000.00. We received the usual discounts, I believe; they are different on the two different products that they deliver. I do not have the segregated figures on purchases of those two different lines for 1949. I gave you the total but I don't know the amount of either line (Part 2, Page 365). The amount of rebate earned by Ozburn-Abston Company on its Moog purchases in 1949, as I recall it, on all of the parts was 19%. On springs and leafs I think it was 15%, or it may have been 10%. I have the papers with me but there seems to be a discrepancy. I looked at them before I got on the stand and on one it says 10% and the other 15%, and I think it was 15%, although I cannot be sure, although it can be verified. The witness was asked what were his gross purchases of all lines of automotive parts for 1949 (Part 2, Page 366). The witness answered that he could give the sales very exactly but he was not sure about the net purchases; that he would say they were a little less than $400,000.00 (The witness corrected this figure to $4,000,000.00, at Page 380).

Q. Mr. Abston, in 1948 did you purchase Moog's products according to the terms of a written contract?

A. I think it was a printed agreement; I think it is in our files, sir. I can't answer that honestly; I think we did, but I cannot be sure (Part 2, Page 367).

Q. Mr. Abston, do you recall who were the contracting parties under that agreement?

A. Well, I should think it would be a percentage account; Mr. Scates and probably Mr. Apple of the Moog Company.

Mr. Scates is Vice-President of Ozburn & Abston Company. To my knowledge no car dealer offers any replacement parts of the Moog lines for sale in our area in competition with our product.

Cross Examination.

We sold front end parts, leafs and springs (Part 2, Page 368) and I believe we sold them to car dealers, and one car dealer sells to the ones we sell. They sell in competition to us. We do sell the car dealer under these circumstances whenever those parts are unavailable to them from their ordinary sources. I wouldn't know the percentage of volume or our total sales made to car dealers of Moog products.

Q. Is it true, Mr. Abston, that the car dealers and car manufacturers, through car dealers, control the majority of the automotive parts industry?

This was objected to and the objection was sustained.

I have been in the automotive business since 1917, and have devoted all of my time to it since that time (Part 2, Page 369). I happen to be a farmer but that requires only a small portion of my time (Part 2, Page 369). I have operated competitively in the automotive parts business since 1917.

Q. Do you know what the competition situation is in automotive parts in the area in which you operate?

This was objected to by counsel for the Commission and objection sustained (Part 2, Pages 370, 371).

From my past thirty-four years' experience in automotive parts I know what the competition is, based upon my experience. From my knowledge of the competition situation I believe that there are two major competitors—jobbers like our own organization and car manufacturers who distribute their parts through car dealers (Part 2, Page 371).

Q. Would you say that your competition is very severe from the car manufacturer?

A. Of course we do have a pretty fair knowledge of our direct competitors, that is, the jobbers and distributors who function in the same way we do. I don't know ex-

actly what the distribution of parts, total distribution of parts is through the car manufacturers' channel, but I do know it is very great, and the competition is very keen.

Q. And by "very great" do you mean in relation to other jobbers in your area?

A. In relation to all, sir (Part 2, Page 372).

Re-Direct Examination.

To my knowledge I do not know that car dealers in our trade area offer blue Moog replacement parts for sale (Part 2, Page 373).

B. C. McKee testified as a witness for the Commission as follows:

Direct Examination.

My name is B. C. McKee and I am owner of McKee-Moog Spring Company, 699 Monroe Extended, Memphis, Tennessee. I am a jobber (Part 2, Page 373). I am here in response to a subpoena. I am engaged in automotive replacement parts. I offer for sale about 25 manufacturers' lines and we handle individually about 600 parts. We purchase our products from manufacturers. At times we purchase products for re-sale from other sources, but it would not be a substantial amount. We offer our products for sale mostly in Memphis, Tennessee, some in Arkansas, and Mississippi (Part 2, Page 374). I have just the one store. I travel two salesmen who cover the general area I have described. We offer our products to fleet accounts, independent garages, service stations, wheel alignment shops, and car dealers. We occasionally make sales to jobbers in our area. I definitely have competition in the sale of our products in our trade area. I compete with other jobbers and other automobile dealers.

The connection between McKee-Moog Company of Memphis, and Moog Industries of St. Louis is that I maintain warehouse stock for emergency pick up throughout this area for the jobber. Moog Industries, Inc., do not own any part of my business and have never owned any part of it.

The warehouse stock of parts that I maintain is owned by Moog Industries of St. Louis. I do not insure those parts. I purchased front end parts, coil springs, U-bolts, and steel from Moog Industries in 1949. They were purchased according to an agreement between Moog Industries, Inc., and my company. The witness was asked to relate the terms of that agreement as they particularly provide for cash discounts or rebates (Part 2, Page 376).

The witness stated that he did not have the agreement with him but that he purchased in accordance with the terms that they have; that they have a rebate in a certain volume contract and that it is listed in the terms of the contract. My total purchases from Moog in 1949 were approximately $36,000.00. As to the total amount of rebates earned on those purchases, I don't have that with me, but I would say somewhere between approximately $2,500.00 and $3,000.00. My gross purchases of all automotive parts for resale in 1949, were about $90,000.00. The car dealer definitely offers replacement parts of the Moog lines for sale. The ones that do so are those that cannot get the parts from manufacturers. It may be either the manufacturers' back order of a knuckle, or whatever it is, and they buy not only from Moog but will buy any kind of a replacement stock they can buy to put in their stock. The car dealers don't advertise it but lots of them have replacement parts of the Moog line. They purchase these Moog replacement parts from anybody. They offer them for sale when in rare cases they can't get the parts from the car factory. They will go out and buy replacement parts whether it is Moog's or anyone else whoever calls on them that has the merchandise in stock. I spent some years with the car dealers and I know. I do not know whether these car dealers purchase these parts from Moog Industries. I sell them all I can sell them and I don't know who else they buy from (Part 2, Page 378). I do not belong to any buying group. In my warehouse I warehouse a certain amount of Moog products for resale to jobbers in the area. Such sales to these jobbers are not included in our annual volume in computing my rebate as I don't bill such parts on my invoice.

Cross Examination.

The sales from the Moog Warehouse stock are made to jobbers. I just deliver them on Moog billing. I do not price them and I do not make sales. I have nothing to do with sales solicitation. It is merely an emergency set up for jobbers (Part 2, Page 379).

EUGENE H. SURLES testified as a witness on behalf of the Commission as follows:

Direct Examination.

My name is Eugene H. Surles. I am Vice-President of J. B. Cook Company, 278 Washington Avenue, Memphis, Tennessee. I have held that position since 1938 or 1939, and am here in response to a subpoena (Part 2, Page 381). We are engaged in the distribution of automobile parts, supplies, machine shop operators, and various major component parts like blocks and crank shafts. We offer for sale approximately 40 or 50 different manufacturers' lines. These entail approximately 25,000 individual items. We purchase these products from manufacturers. In cases of emergencies when we run out of something, we pick up from another jobber or truck dealer or car dealer or someone like that. We offer our products for sale in Tennessee, Mississippi, and part of Arkansas, and a little part of Missouri and Kentucky (Part 2, Page 382). We maintain a total of 17 stores. They are located in Memphis and Nashville, Tennessee; Little Rock, Arkansas; McGee, Arkansas; north Little Rock, Arkansas; Columbus, Mississippi; Dyersburg, Tennessee; Mayfield, Kentucky; Hopkinsville, Kentucky; Clarksville, Tennessee; McMinnville, Tennessee; Columbia, Tennessee; Murfreesboro, Tennessee; and East Nashville, Tennessee.

Out of this unit here in Memphis, we travel eight salesmen. We travel one salesman out of Dyersburg and one out of Columbus, Mississippi. As to whether this is the entire number of salesmen that we travel, I do not have these records. We have member stores such as Columbus, Mississippi, and Dyersburg, Tennessee. The salesmen who

work out of Memphis cover a radius of from 100 to 150 miles (Part 2, Page 383). We sell our products to the independent repair shops, service stations, fleet owners, car dealers and tractor and truck dealers. Occasionally we sometimes act as a distributor in selling parts to other jobbers in the area. We have competition in the sale of our products in our area. We compete with car dealers, the truck dealers, the tractor dealers, the chains, the other jobbers, the major oil companies, and several oil manufacturing and rubber manufacturing companies. We purchase products from Moog Industries of St. Louis and did so in 1949. In that year we purchased mainly coil action parts. We do not stock springs or spring leafs at the Memphis store. We purchase according to a contract with Moog in 1949 (Part 2, Page 384). That agreement provided for various discounts or rebates which could be earned by us on our purchases. In 1949, our purchases from Moog Industries from the Memphis store, which includes Dyersburg and Columbus, were about $5,300.00. As to the total amount of rebates which we earned in that year, I do not have those records with me, but I would estimate about $400.00 or something like that. Our gross purchases overall of automotive parts for the member stores in 1949, just as an estimate, would be around $300,000.00 or $400,000.00. I cannot tell you the gross amount of purchases of the entire J. B. Cook & Company from Moog Industries in 1949. I do not know.

Q. Mr. Surles, does any car dealer, to your knowledge, offer any replacement parts of the Moog line for sale?

A. Well, they offer parts comparable to Moog's. They might not be Moog's in some instances but picked up around from other companies (Part 2, Page 385).

To my knowledge no car dealers in our area purchase Moog lines from Moog Industries. I know of no car dealer or Oil Company who purchased any Moog lines and offered them for replacement parts for resale. I do not belong to any buying group. As to the gross purchases of the entire J. B. Cook Company, of automotive parts, in 1949, I don't have the records with me.

We have three major operations at Nashville, Memphis, and Little Rock. The Little Rock operation has three

branch stores under it; we have two under the Memphis set-up; and Nashville has nine under their set-up, and also the books. We have three separate bookkeepers and purchasing agents, and so forth.

There was no cross examination (Part 2, Page 386).

LOUIS POST testified as a witness on behalf of the Commission as follows:

Direct Examination.

My name is Louis Post. I am an executive of D & N Auto Parts Company, Inc., 420 Howard Street, Greenwood, Mississippi. I have been an executive for approximately twelve years and have been associated with the company since 1918 (Part 2, Page 387). I have been actively engaged in the automotive parts field since 1917 and 1918. We are in the business of wholesale distribution of automotive parts and equipment, and we offer for sale approximately 65 or 70 manufacturers' lines. We bill approximately 22,000 to 22,500 individual items. We purchase the products that we offer for sale from the manufacturers. In extreme cases of emergency we may make a pick-up purchase from another jobber or distributor or from the car manufacturer or car dealer (Part 2, Page 388).

The general area in which we operate is principally the north half of Mississippi. We operate and maintain six stores at Greenwood, Grenada, Tupelo, Clarksdale, Cleveland, and Indianola, all in Mississippi. We travel eight salesmen who cover the above general area. We offer our products to fleet owners, tractor and truck dealers, independent garages, and to some car dealers. We never act as a distributor of parts to other jobbers (Part 2, Page 389). We have plenty of competition with other jobbers in the trade area, national chain operators, and have more car dealer competition. I would say car manufacturing companies, through the car dealers would be the principal competitor in our trading area. We purchase products from Moog Industries, Inc., and purchased from them in 1949. In that year we purchased from them springs;

mainly leaves, tie bolts, and front end repair parts. We purchased from them according to a contract or an agreement. As to the terms of that agreement, regarding discounts and rebates which might have been offered, I cannot answer that intelligently because I don't have a copy of the contract with me, but it was based upon a rebate schedule pro rated to the various businesses (Part 2, Page 390). As to our total purchases from Moog Industries, in 1949, not having my figures with me I could not answer that question. As to the total discounts or rebates earned on those purchases, the answer is the same. I would be guessing.

To my knowledge a car dealer does not offer any replacement parts of the Moog line for sale, which the car dealer has purchased from Moog Industries (Part 2, Pages 391, 392). To my knowledge, no tire or oil company offers replacement parts of the Moog line for sale, which they have purchased from Moog Industries. We belong to a buying group and purchased Moog products in 1949, through that group. We have been associated with that group for the past twelve years. Its name is Cotton States, Inc., (Part 2, Page 392). It is located at Greenwood, Mississippi. I was the principal organizer of that group. I have been an executive of Cotton States, holding the position as President and have held that position twelve years. There are nine members of Cotton States, Inc., (Part 2, Page 393). These members operate 23 different stores. Their names are Greiner Auto Parts, New Orleans; Barnes Motor Supply, Baton Rouge; Hart Motor Supply, Columbia, Mississippi; Christenson Auto Supply, Laurel, Mississippi; Milton Auto Supply Company, Meridian, Mississippi; Davis Auto Supply Company, Mobile, Alabama; Taylor Auto Supply Company, Andalusia, Alabama; and our own firm. The individual members of Cotton States travel salesmen (Part 2, Page 394).

Cotton States, Inc., does not maintain or operate a warehouse. Members of Cotton States, Inc., purchase products from Moog Industries, Inc., and purchased products from them in 1949 (Part 2, Page 395). I would say that approximately twelve years ago, at the origin of Cotton States, it first entered into an agreement with Moog Industries.

I participated in the negotiations preceding the contract, which was entered into between Moog Industries and Cotton States, Inc. (Part 2, Page 396). As to who represented Moog Industries in those negotiations, I think, if I recall correctly, it was Mr. S. A. Moog and Mr. A. Apple.

A typical purchase transaction between one of our members and Moog Industries is as follows: Each one of our association's members has a Cotton States Purchase Order Form. He mails his order direct to the manufacturer, the source of supply, and the source of supply in turn invoices and sends Cotton States the original and a duplicate copy, and Cotton States remits for the purchase. The shipment is shipped direct from the manufacturer to the individual member.

Q. Mr. Post, trading as the D & N Auto Parts Company, do you carry a particular, or any particular line, manufacturers' line, after the group purchasing arrangement with that manufacturer has expired?

A. Yes, sir.

Q. Does that mean a difference to you in the purchasing price?

A. In some cases, yes; and in some cases, no (Part 2, Page 397).

Some automotive parts manufacturers offer cash discounts to Cotton States, Inc., for prompt payment of bills and we avail ourselves of that offer. The reason we do that is obvious, because it is a part of the profit structure (Part 2, Page 398). The taking of the cash discount by Cotton States does not materially affect its profit structure (Part 2, Page 399). As to the taking of cash discounts by D & N Auto Parts Company, they do materially affect its profit structure. Moog offers the 2% cash discount the same as other manufacturers. That cash discount relates to the cost of acquisition of goods from Moog Industries. This cost of acquisition of goods is important to us (Part 2, Page 400): You have got to be competitive in the field if you are going to stay in business, and your cost basis is one principal item that you must be competitive on (Part 2, Page 401). We take advantage of the cash discount and the annual volume discounts or rebates offered

by Moog Industries. I consider all these discounts important (Part 2, Page 401).

Cross Examination.

The 2% cash discount that we receive from Moog relates solely to purchases that we individually purchase as D & N Auto Parts Company. We purchase from approximately 75 manufacturers and Moog is one of them. Not having my records with me I cannot answer the question intelligently as to what percentage of that cash discount for prompt payment of bills that we take from Moog to the cash discounts that we take from the 75 manufacturers. We do not in all cases give a 2% tenth prox discount to our customers. We do not in all cases give it to them if they pay promptly. We do not in all cases get this discount from the manufacturer (Part 2, Page 402). In the majority of cases we do get it from the manufacturer. As to the cash discount being a general practice in American industry, it varies from one, to two, to 5%. In the automotive supply business, that is a percentage given for the prompt payment of bills, and, to my knowledge, is a general practice in American industry (Part 2, Page 403).

October 8, 1951, at Washington, D. C.

Commission's Exhibits 61 to 69, inclusive, were marked for identification.

M. C. STEELE testified on behalf of the Commission as follows:

Direct Examination.

My name is M. C. Steele and I am an accountant with the Federal Trade Commission since 1929 (Part 2, Page 407), and since that time I have been engaged in personally examining records and accounts and preparing data to be used in hearings before examiners of the Federal Trade Commission.

As to my educational background, in accounting I was two years at the University of Idaho, School of Business

Administration, and am a graduate of the Ben Franklin University, Washington, D. C. I am familiar with the record of proceedings in Docket No. 5723, in re Moog Industries, Inc. I examined the ledgers, accounts receivable, the invoices, summary of sales, work sheets prepared by the accounting department of Moog Industries, Inc., contracts with various customers, and exhibits introduced in the record by Commission's witnesses. Those exhibits were introduced by Mr. Goetz, who was an officer of respondent (Part 2, Page 408), and the contracts which I mention and which I examined were contracts between Moog and their customers. Mr. Goetz, the Treasurer of the Respondent, made these papers available to me. He was the person who actually presented the documents to me prior to my examination, and I examined all these documents at the office of Moog Industries, Inc.

I, personally, prepared Commission's Exhibits Numbers 61 through 69. I checked them personally for errors and also had a check made by one of my assistants. Prior to the preparation of these exhibits, I, personally, examined the records of Moog Industries, Inc. These exhibits, 61 through 69 are based upon my personal examination of Moog Industries' records (Part 2, Page 409).

Commission's Exhibit No. 61, which is headed "Coil action sales and rebates to jobbers in Memphis, Tennessee," shows the sales to all jobbers located in Memphis, Tennessee, during each of the years 1947, 1948, and 1949. It shows the name of the jobber, the contract year, when the contracts were ended; the credit memorandum number and its date; the net sales which represent gross sales after deduction of returns and allowances; the cash discount which the company was entitled to receive; the excise tax of 5% which was included in the sales price; the net amount upon which the rebate was figured which represented the net sales after deducting the allowable cash discount and the amount of excise tax. It includes the amount and the percent of rebate and net payment receivable by Moog Industries, Inc., together with the percent of the net payment received of the net rebatable amount (Part 2, Page 410).

Commission's Exhibit 61 is limited to coil action sales and rebates of Moog Industries to jobbers in Memphis.

Tennessee. With reference to the column headed "Jobber", I examined Moog Industries' statistical summary to determine whom they sold to in Memphis, during the year, and these records disclosed the jobbers indicated on this chart to be the only jobbers receiving shipments of coil action parts in 1947, 1948, and 1949. As to the second column, "Contract Year" the date 3-31-47, opposite the entry J. B. Cook Auto & Machine Company, represents the end of the contract year. In other words, in that particular case the contract year ran from April 1, 1946 to March 31, 1947 (Part 2, Page 411). As to the column headed "Credit Memorandum" with sub-headings "Number" and "Date", the entry opposite J. B. Cook Auto & Machine Company for 1947, which is Number 776 and dated 4-28-47, indicates that following the end of each contract year the company issued a credit memorandum for the amount of the rebate to which the customer was entitled for that preceding contract year, and represents the credit memorandum number and the date of such credit memorandum.

In 1947, two of the entries, Ozburn-Abston and Mills-Morris Company, the entry reading "Check" and "1-14-48," indicate that in these two instances, instead of issuing a credit memorandum to the customer, Moog Industries issued a check in payment of the amount of the rebate. The same explanation of these items that I gave for 1947 also applies to 1948 and 1949.

Moving to the column headed "Net Sales" that represents the gross billings less returns and allowances such as for obsolete material or defective material. The figure of $1,884.99 opposite J. B. Cook Auto & Machine Company for 1947 represents the figure before any discount had been allowed (Part 2, Page 412).

The cash discounts column, headed "2%", represents 2% of the net sales and is the amount to which the customer is entitled as a cash discount and was deducted by the company in computing the rebatable amount. The figures $37.20 opposite those figures were actually on the Moog Industries' work sheet for the calculation of the amount of rebate. That same statement applies to all the entries appearing on this chart under these discounts.

The excise tax represents the Federal Tax imposed on automobile parts and represents 5% of the net sales less

the 2% cash discount and was included on the work sheets of Moog Industries in calculating the amount of the rebate. The figures appearing in the excise tax column opposite all the entries for 1947, 1948, and 1949 were actually taken from the records of Moog Industries, Inc. (Part 2, Page 413).

The figures in the column headed "Net Amount" represents the net sales less the cash discount, less the amount of excise tax, and is the base upon which the rebate is computed. These figures appearing in that column were taken from the records of Moog Industries, Inc., including those in the Commission's exhibits in the record in this case, brought in by Mr. Goetz.

The column headed "Rebate" represents the amount of the rebate which the company paid or credited the customer based on its volume from the preceding contract year. The percentage in the case of J. B. Cook was 10% of the net amount in the preceding column (Part 2, Page 414). The percentage column shows different percentages and results from the varying annual volumes upon which the rebate was computed. The entry opposite J. B. Cook Auto & Machine Company for 1947, in the rebate column, is $175.49, and that was the figure shown on the credit memorandum Number 776, dated 4-28-47.

Referring to the entries for 1947 opposite the Ozburn-Abston Company and to the $4,199.25 and 19% shown in the rebate column, those figures were obtained from the exhibit in the record brought in by Mr. Goetz, and are included in Commission's Exhibit 23-Z-15, and that is true of all the entries opposite the Ozburn-Abston Company in the rebate column for 1947, 1948, and 1949 in similar exhibits, but not the same number. These exhibits are already part of this record and were introduced through Mr. Goetz (Part 2, Page 415).

The "Net Payment Received" column represents the net sales less cash discount, less the excise tax, and less the amount of the rebate for each customer. These figures were obtained from the work sheets of Moog Industries or from the exhibits brought into the record by Mr. Goetz. And the exhibits that are in the record refer to Ozburn-Abston Company and Mills-Morris Company for 1947, 1948 and 1949.

The last column "Percentage of Net Amount" represents the percentage of the net payment received of the net amount upon which the rebate was computed (Part 2, Page 416). The varying percentages, as shown in this column vary in inverse order with the percentage of rebates received by each of these customers for each year; or, in other words, the greater the percentage of rebate, the lesser percentage is disclosed in the percentage of net amount column (Part 2, Page 417).

Commission's Exhibit 62 represents the summary of the coil action sales and rebates to jobbers in New Orleans, Louisiana, by Moog Industries during each of the years 1947, 1948, and 1949. It represents all the various customers as far as shipments were concerned to New Orleans, Louisiana, as I found them on Moog Industries records. The same explanation for the various columns as they appear on this exhibit would be explained similarly, as I have done on Commission's Exhibit 61. In this exhibit the material is identical in the same column and came from the same sources, with the exception of the amount opposite Auto Chassis & Spring Company for the year 1949. Their purchases did not amount to enough to entitle them to a rebate, so the company made no computation of the amount of the cash discount or the excise tax applicable, so that the amount shown on these columns opposite Auto Chassis & Spring Company were computed by me in order that the net amount would be on a comparable basis with what the company had computed the rebatable amount to be for the other customers listed at this location (Part 2, Pages 418, 419). In computing such amounts, I follow the regular procedure that Moog uses in computing rebatable amounts and rebates upon purchases which were entitled to rebates. The figures appearing in "Cash Discount" column, opposite Auto Chassis & Spring Company, for 1949, namely $6.37, and $15.59 in the excise tax column, are figures computed by me. Explaining the footnote appearing on Commission's Exhibit 62 in the computation of the rebate to Auto Shock Absorber Sales, in 1949, the company did not follow its usual method and computed the amount of the rebate on the net sales before deducting any cash discount or excise tax (Part 2, Page 419), referring to the Auto Shock Absorber Sales Account

for 1949, the figures that appear opposite that entry are figures and calculations made by Moog Industries.

Referring to the entries in the Rebate Column in Commission's Exhibit 62 opposite the Greiner Auto Parts Company for 1948 and 1949, the basis for these figures were taken from the exhibits introduced in the record through Mr. Goetz and represented an allocation of the rebate to the members of Cotton States, Inc. This allocation was made by Moog Industries in preparing the work sheets which are in the record in this instance as Commission's Exhibits 23 and 22.

Commission's Exhibit 63 represents a summary of the coil action sales and rebates to jobbers in New Brunswick, New Jersey, by Moog Industries during each of the years 1947, 1948, and 1949 (Part 2, Page 420). It shows the jobbers to whom shipments were made by them in those years in New Brunswick, New Jersey, as disclosed from my examination of the sales statistical summary furnished by respondent. The entries on Exhibit 63 are identical with entries under the column on Commission's Exhibit 61, with one exception. In 1947, the amount opposite Clinton Square Auto Parts Corporation was on a different basis. In that year Moog allowed Metropolitan Automotive Wholesalers, of which Clinton Square Auto Parts Corporation is a member, to deduct 10% from its monthly remittance to Moog. The deduction of 10% was in lieu of an annual volume rebate and effect to it has been given in the figures in this exhibit (Part 2, Page 421). However, in 1947, 1948, and 1949, this particular account, Clinton Square was similar to any other account which appears on this chart. In the credit memorandum column opposite the entry in 1947 for Clinton Square, the capital letters "MVR" stand for "Monthly Volume Rebate". The footnote appearing on Commission's Exhibit 63 shows that the amount of rebate was computed before deducting any cash discount or excise tax, which was different than the usual procedure of Moog Industries. This procedure was indicated on their records when I examined them.

Commission's Exhibit 64 represents a summary of coil action sales and rebates to Jobbers in Newark, New Jersey, by Moog during each of the years 1947, 1948, and 1949

(Part 2, Page 422). It represents all the jobber customers receiving shipments in Newark for 1947, 1948, and 1949, as shown by the sales summary cards furnished to me by respondent, and the columns as appearing on this exhibit correspond to the columns as indicated on Commission's Exhibit 61, and the same explanations for the columns and the factual material disclosed is as applicable to this exhibit as was given for Commission's Exhibit 61, with the exception that I have stated in connection with Commission's Exhibit 63. There is an exception in Commission's Exhibit 64 in that the amount opposite American Motor Specialties Company and the amount for Clinton Square Auto Parts Corporation for 1947 were handled on a different basis by Moog than the other computations of the annual volume rebate (Part 2, Page 423). Moog allowed the Metropolitan Automotive Wholesalers, of which group Motor Specialties Company and Clinton Square are members, to deduct 10% of the monthly remittance in payment for purchases, and effect to that deduction has been given in the calculations of this exhibit. The footnote appearing on Commission's Exhibit 64 shows the 10% rebate given to the American Motor Specialties Company and Clinton Square on their purchases during 1947 was computed on net sales before deducting any cash discount or excise tax. That was applicable only to the entries opposite those two companies for the year 1947.

Commission's Exhibit 65 represents the summary of the coil action sales and rebates to jobbers in Des Moines, Iowa by Moog during each of the years 1947, 1948 and 1949 (Part 2, Page 424). The columns of this exhibit are identical to those in Commission's Exhibit 61, and the same explanation as to each applies with two exceptions. The first exception is in 1947, opposite City Automotive Supply Company. This customer did not purchase sufficient coil action parts in 1947 to entitle him to an annual volume rebate, so that no computation was made by the company and these computations were made by me in order to put the net amount on the same comparable basis as the net amount computed by the company for other customers at this location. This computation was made in a similar manner as would have been made by Moog had the cus-

tomer been eligible for rebate. The explanation for footnote 1, appearing on Commission's Exhibit No. 65, is the same as the explanation appearing for the footnote on Commission's Exhibit 62 (Part 2, Pages 425, 426).

Commission's Exhibit 66 is a summary of the coil action sales and rebates to jobbers in Denver, Colorado by Moog during each of the years 1947, 1948, and 1949, and these columns are identical with the column appearing on Commission's Exhibit 61, and the same explanations for those columns and the figures thereunder apply to the explanation and the figures in the identical column on Commission's Exhibit 61 with certain exceptions similar to the explanation on Commission's Exhibit 62, and the explanation for the column on Commission's Exhibit 61 applies similarly to Commission's Exhibit 66 (Part 2, Page 426).

Commission's Exhibit 67 represents a summary of the coil action sales and rebates to jobbers in Birmingham, Alabama, by Moog during each of the years, 1947, 1948, and 1949, and the columns appearing in this exhibit are identical with the columns appearing on Commission's Exhibit 61 with the same explanation for the corresponding columns on Commission's Exhibit 61, with one exception, that is that opposite the name Ensley Auto Parts Company for 1949, for cash discount and excise tax, that amount was computed by me as the company made no computation since the customer was not entitled to an annual volume rebate for that year (Part 2, Page 427).

Commission's Exhibit 68 represents a summary of coil action sales and rebates to jobbers in Brooklyn, New York, during each of the years 1947, 1948, and 1949, by Moog; and the headings of the column on this exhibit are identical to those in Commission's Exhibit 61, and the explanations for those columns are the same as for Commission's Exhibit 61 with one exception: That opposite the name Leonard Auto Supply Company during 1949, the cash discount and excise tax and net amount was computed by me since the company's record did not include such computation as this customer was not entitled to a rebate during the year 1949.

Under the year 1947, in the jobber column there are two entries for the K. and G. Auto Parts Company and the A.

Jacoby & Sons, Inc. accounts (Part 2, Page 428). Both of these companies became members of Metropolitan Automotive Wholesalers, Inc., as of December 1, 1947. Their regular contract year expired in the case of K. & G. on June 30, 1947, and in the case of A. Jacoby on April 30, 1947. Accordingly, to make the contract year coincide with that of the group purchaser, their purchases during the period between the end of their regular year and the period when they became members of that group were computed for the purpose of calculating the annual volume rebate due them for that period. Consequently, the account shows the amount of annual volume rebate due for a full contract year and the amount of annual volume rebate due for the portion of the contract year between their regular, annual volume rebate and the contract year beginning when they became members of the group. These computations were taken from the records of Moog Industries.

Commission's Exhibit Number 69 represents a summary by discount brackets of the number of customers and the average annual coil action purchases by these customers during each of the years 1947, 1948 and 1949, from Moog Industries (Part 2, Pages 429, 430). These were taken from exhibits introduced in this record through Mr. Goetz, Comptroller of Moog Industries. As to this exhibit, column by column, what the figures mean, and the basis for the figures, I explain as follows: On the net purchases this follows the discount brackets set up by Moog Industries in its contracts with its coil action customers. Under "Rebate" is the percent of rebate applicable to each of those discount brackets, and under each of the years appears the number of the customer and the average annual purchases opposite each of the discount brackets and the percentage is the number of customers which received that percentage of rebate on the net purchases in that discount bracket; and it also shows the average annual purchases of those customers in that discount bracket (Part 2, Page 430). This applies to each of the years 1947, 1948, and 1949. The figure "369" appearing in the number of customers column for 1947, opposite the entry "$1,000.00 to $4,999.99" means that 369 of Moog's coil action customers

purchased between $1,000.00 and $4,999.00 during that contract year.

Referring to the entry in the "Net Purchases" column, "27,500 and over" and the rebate of 19%, and in 1947, to the column "Number of Customers" appearing on Commission's Exhibit 69 as "7", there were two group customers included in the 7 figure for 1947, and these two group customers had 20 members purchasing from Moog Industries during that contract year.

Referring to the figure "11" in the "Number of Customers" column in 1948, opposite the entry $27,500.00 showing the figure "11", there were included in this figure 4 group buyers which had a total of 44 members purchasing from Moog Industries during that contract year (Part 2, Page 431).

Referring to the figure "5" in the "Number of Customers" column for 1949, opposite the entry $27,500.00, on Commission's Exhibit 69, there were four groups considered as single purchasers, which included 65 members in those four groups purchasing from Moog Industries during that contract year.

At this point, Commission's Exhibits 61 through 69, inclusive, were offered in evidence, but admission was deferred by the Examiner until close of cross examination.

Cross Examination.

Q. Mr. Steele, in the expression "Percentage Of Net Payment Received of Net Rebatable Amount" I would like to have an explanation of what you mean by that statement, referring to Column "12." of Exhibit 61 (Part 2, Page 432).

A. If you are numbering the columns, that would be the percentage of Column "11" of Column "8".

Q. Oh, you disregard that column showing the credit memorandum numbers and checks, if you number the columns that way. In other words, there are two columns under "Credit Memorandum". You have two columns and one gives the number of the credit memorandum and the word "check" is in that column, and the other is the date column.

Commission's Counsel: That would be treated as one column?

The Witness: No; two columns.

On Exhibit 61 there is a column which has a group of names entitled "Jobber"; another column, Number 2, entitled "Contract Year"; another column, Number 3, with certain numbers and words; and Column Number 4, with "Dates". Column 5 is "Net Sales"; Column 6 is "Cash Discounts"; 7 is "Excise Tax"; 8 is the "Net Amount"; Column 9 is the "Rebate Amount"; Number 10 is the "Percentage"; Number 11 is the "Net Payment Received"; and Number 12 "Percentage Net Amount". Referring to column 12, "Percentage of Net Amount Received Of Net Rebatable Amount" that is the percentage of Column 11 of the Net Amount, which is Column 8 (Part 2, Page 433). That figure is not actually money received by the company, but is a computation either by the company, as I explained, or in certain cases by myself, of the net payments which were due on those sales.

Q. In other words, "Net Payment Received" that column could be restated, to be more accurate, as "Net Payments Which Would Have Been Received According To The Computations Made By Mr. Goetz and the computations Made By Yourself," synthesized?

A. Well, Mr. Goetz's was a complicated procedure—probably a little more—. Another explanation, would be the "Net Amount Receivable".

As to Column 6, "Cash Discount", whether that would be more correct as "Cash Discounts Receivable" under certain circumstances, the company used "Cash Discounts", so I followed their same procedure in that in computing the net amount upon which the rebate was computed. That cash discount is 2% of the net sales (Part 2, Page 434); that is, if paid by the 10th of the month following billing. As to whether that is a credit device, yes, it would be a credit. In other words, the company would receive credit on its account, or usually, actually, they would deduct the 2% in their remittance. No, that is not considered a marketing device.

In regard to Commission's Exhibit 61, I would give the same answers to the same question as to Exhibits 62 to 68, inclusive (Part 2, Page 435). These exhibits refer to computations of the sales of coil action parts by Moog Industries to jobbers in the respective Cities of Memphis, New Orleans, Brooklyn, Newark, Des Moines, Denver, and Birmingham. As to whether I made any study of the total coil action parts sales in those cities, I referred to sales statistical summaries prepared by the company in the usual course of business, in which were all sales or shipments to these particular cities and my exhibits are based on those sales cards. I made no study of the coil action parts market in those particular cities. I have no opinion as to what percentage of these sales of coil action parts by Moog was to the total sales of coil action parts in those cities. I do not know of any such study. To my knowledge, the Federal Trade Commission has made no such study (Part 2, Page 436). In preparation of this material, I spent approximately one week at the general office of Moog Industries.

I am an accountant by profession. My duties with the Federal Trade Commission since 1929 have been primarily on the accounting questions. Under the Federal Trade Commission I have also been employed in statistical research on marketing as such in petroleum, phosphate rock, and bread—the wholesale breadmaking industry. I had charge of marketing research in those studies, together with a corps of assistants (Part 2, Page 437). I have never done any marketing studies in private industry. I do not have a degree in business administration from the University of Idaho. My degree from Benjamin Franklin University was in accounting. I have done no graduate work in statistics. In my duties, as to whether I employed a series of statistics in my work, it depends upon my duties as they vary depending upon the particular type of study that I am making. I have done no work in the preparation of correlation charts. I know in a general way what a correlation chart is. I have done no work in qualitative analysis in mathematics or in quantitative analysis (Part 2, Page 438). I have never taken a course in calculus (Part 2, Page 439).

At this point, counsel for Respondent renewed the basic jurisdictional objections made to all the other exhibits that have been introduced in the case by the Commission (Part 2, Page 439), which was overruled on Page 440.

Thereupon Commission's exhibits, numbers 61 to 69, inclusive, were received in evidence (Part 2, Page 442).

March 4, 1952, at Washington, D. C.

Thereupon the following documents were marked as Commission's Exhibits numbers 70 through 79:

Commission's Exhibit 70A and B, marked for identification, a two-page tabulation entitled:

"Commissions and Bonuses paid to Mid-South Distributors, Inc., on sales to its Members during the years ending June 30, 1949, and December 31, 1950."

And marked as Commission's Exhibit for identification 71-A, B, and C, a three-page tabulation entitled:

"Commissions and Bonuses paid to Ozburn, Crow & Yantis Company on sales to its Members during the years ending June 30, 1949, and December 31, 1950."

And marked for Commission's Exhibit 72, for identification, a one-page document entitled (Part 2, Page 446):

"Commissions and Bonuses paid to Cotton States, Inc., on sales to its Members during the years ending June 30, 1949, and December 31, 1950."

And marked as Commission's Exhibit for identification number 73, a one-page document entitled:

"Commissions and Bonuses paid to Ark-La-Tex Warehouse Distributors, Inc., on sales to its Members during the years ending June 30, 1949, and December 31, 1950."

And marked as Commission's Exhibit for identification number 74, a one-page document entitled:

"Commissions and Bonuses paid to Automotive Southwest, Inc., on sales to its members during the years ending June 30, 1949, and December 31, 1950."

And marked as Commission's Exhibit for identification number 75, a one-page document entitled:

"Bonuses paid to Automotive Parts Distributors, Inc., on sales to its Members during the years ending June 30, 1949, and December 31, 1950."

And marked as Commission's Exhibit for identification number 76, a one-page document entitled:

"Bonuses paid to Southwestern Warehouse Distributors on sales to its Members during the years ending June 30, 1949, and December 31, 1950" (Part 2, Page 447).

As Commission's Exhibit for identification number 77, a one-page document entitled:

"Bonuses paid to Warehouse Distributors, Inc., on sales to its Members during the years ending June 30, 1949, and December 31, 1950."

And Commission's Exhibit for identification number 78, a one-page document entitled:

"Bonuses paid on sales to certain customers owning multiple stores during the years ending June 30, 1949, and 1950."

On Commission's Exhibit for identification 78, it applies during the years ending June 30, 1949, and 1950.

Marked as Commission's Exhibit for identification number 79-A, B, C, D, E, F, and G, a seven-page document entitled:

"Comparison of Sales and Commission and Bonus to Customers in Specified Localities during year ending June 30, 1949, and Fiscal Years ending during 1950" (Part 2, Page 448).

SETH M. MACDONALD testified as a witness on behalf of the Commission as follows:

Direct Examination.

I am employed as an accountant by the Federal Trade Commission and have been with them since 1935, except for the duration of the War. My duties are to conduct and supervise investigations and compilation of data. That data is often summarized in documents similar to the ones which have been marked for identification (Part 2, Page 449).

As to my educational background in accounting, I am self taught, and also at Syracuse Extension University and International Accounting Society.

In the preparation of Commission's Exhibits 70-A through 79-G, I examined the ledger accounts of Moog Industries at the physical location of those records.

As to Exhibit 70-A and B, I gathered the information appearing in Columns 1, 2, and 3 from Accounts Receivable Ledger Sheets in the office of Moog Industries. Those cards represent sales from Moog to various buyers. As to how I arrived at the amount appearing in Column 4 of this exhibit, the total of $3,884.69 was determined from data contained in Commission's Exhibits 21-Z-11 and 21-Z-12, which were compilations and computations made by Respondent (Part 2, Pages 450, 451).

The amounts in Column 4 are distributed on the ratio by $3,884.69 divided by $83,452.02, which was 4.65%., the basis of the various amounts in Column 3. The figures in Column 5 of this exhibit were arrived at by dividing Column 4 amounts by Column 3 amounts.

Data from Column 6 is assembled from Accounts Receivable Ledger Cards.

The total of Column 7, $9,978.71, was taken from Respondent's credit memorandum 8248S, dated January 15, 1951, and the amounts in Column 7 are distributed on the ratio that $9,978.71 divided by $66,719.77 is to the various item amounts in Column 6.

With reference to Commission's Exhibit 71-A, B, and C, the information in Columns 1, 2, and 3 was obtained from

Accounts Receivable Ledger Cards in the office of Respondent (Part 2, Pages 451, 452).

Q. Now, would you explain to us Columns 4 and 5 and how the figures appearing in those columns were arrived at?

A. The total of Column 4, $12,936.90.

That figure appears on Commission's Exhibit 71-C. It was determined from data contained in Commission's Exhibit 56-A, B, C, and D, which is a compilation of data of the respondent (Part 2, Page 452).

I, personally, examined Commission's Exhibits A, B, C, and D of Number 56, in determining the amount of $12,936.90 as it appears on Commission's Exhibit 71-C. Column 5 of that exhibit is the percentage arrived at by dividing the amounts in Column 4 by the amounts of Column 3. The amounts in Column 6 of this exhibit were assembled and compiled from Accounts Receivable Ledger Cards in Respondent's office.

The total of Column 7 is the amount of merchandise bonus allowed Ozburn, Crow & Yantis Company during the year 1950 as determined from examination of Cash Receipts records, memorandums as spelled out in footnote 2 on Commission's Exhibit 71-C (Part 2, Page 453).

Column 8 was arrived at by dividing the amounts in Column 7 by the amounts in Column 6. The percent figure "8" appearing in Column 5 of this record was arrived at by the dividing of amounts in Column 4 by the amounts in Column 3. I mean dividing the total amounts $12,936.90 by the amount in Column 3 of $161,711.19 arriving at the 8%. As to how the amounts were distributed in Column 4, they were arrived at by applying that 8% to the various items and amounts in Column 3 to determine the amounts to go in Column 4. As to how I arrived at the figure of 14.99% of column 8 of Commission's Exhibit 71-A, B, and C, I did that by dividing $19,627.65, total merchandise bonus allowed during the year 1950, by $130,914.92 (Part 2, Page 454).

I arrived at the figures appearing in Column 7 of this exhibit by applying the 14.99% to each of the amounts in Column 6.

Referring to Commission's Exhibit 72, I gathered the information appearing in Columns 1, 2, and 3 from Accounts Receivable Ledger Cards of Moog Industries. As to how the figures in Columns 4 and 5 were arrived at during the year 1948, it was determined from data contained in Commission's Exhibit 56A, B, C, and D that the rate of warehousing redistributing was 5% of net sales. For the first six months of 1949, it was determined from data contained in Commission's Exhibit 20-Q that warehousing distribution was allowed Cotton States at the rate of 5% net sales after deducting 2% cash discount and 5% Federal excise tax (Part 2, Page 455). The amounts in Column 4 for each of the members listed in Column One was determined by dividing the amounts in Column 3 between the last six months of 1948, and the first six months of 1949 and applying the rates previously described to those amounts and adding them, to arrive at the amounts in Column 4, after having first determined that the amount of $1,629.42 was the correct amount of warehousing redistributing commission allowed Cotton States for the year ending June 30, 1949. The fact that the warehousing redistributing commission allowed to Cotton States on sales to its members during the year ending June 30, 1949 on the different bases, accounts for the fact that the percentages in Column 5 vary somewhat because of the weight. If the purchase were heavy in the last six months of 1948, the rate would approach 5%; if they were heavy in the first six months of 1949, they would approach approximately 4.65%.

The data for Column 6 was obtained from Accounts Receivable Ledger Cards (Part 2, Page 456).

The data in Column 7, $4,605.83, merchandise bonus allowed during the year 1950, was obtained from examination of monthly remittances and data submitted on Respondent's credit memo 8246-S, dated January 12, 1951. This data is shown in foot note 3 of Commission's Exhibit 72.

The data in Column 7, opposite each of the companies listed in Column one, was spread on the basis of 14% of each of the amounts shown in Column 6.

The 14% shown in Column 8 is the result of dividing items in Column 7 by items in Column 6, totalled first, and then spreading over the various items listed in Column One. The 14% appearing in Column 8 was arrived at by dividing $4,605.83 by $32,898.81. For example, as to the second item on Commission's Exhibit 72 in Column 6, opposite Alabama Auto Parts Co., $417.52, the 14% then applied to that amount in arriving at $58.45 as it appears in Column 7 (Part 2, Page 457).

Referring to Commission's Exhibit 73, the data in Columns One, two, three and four are compiled on a symbol from Accounts Receivable Ledger Cards of Moog Industries. The data in Columns 3 and 4 represent net sales.

Column 3 is net sales of leaf springs during the year ending June 30, 1949.

Column 4 is the net sales of leaf springs, coil springs, and chassis parts during the calendar year 1950.

Column 5 is the amount of merchandise bonus allowed during the year 1950 in the amount of $1,940.66, and was obtained from Respondent's credit memorandum 8249-S. That amount was divided by $16,172.20, the amount of net sales of those items during 1950, producing a merchandise bonus rate of 12% (Part 2, Page 458). This 12% was applied to each of the amounts of Column 4 to arrive at each of the amounts in Column 5, and the amounts in Column 6 are arrived at by dividing the amounts in Column 5 by Column 4.

Column 7, headed "Warehousing and Redistributing Commissions": This data was obtained from an examination of Ledger Cards shown in Respondent's credit memo 8212-S, dated December 30, 1950, and contained a credit of $43.69 for warehousing and redistributing commission on leaf springs and coil springs in the amount of $43.69, on sales made by Tyler Service Parts Company to one of its customers, on which he was entitled to a 10% warehousing redistributing commission for services rendered.

The items in Column 8 are the sum of items in Columns 5 and 7, and the percentages in Column 9 are the amounts in Column 8 divided by the amounts in Column 4.

The entries appearing in Columns 4, 5, 6, 7, 8, and 9 apply to all transactions pertaining to leaf springs, coil

springs and chassis parts between these various customers and Moog during the calendar year 1950. With reference to foot note 2 of this exhibit, the credit memorandum, $43.69 was directed to the member, Tyler Parts Service Company, Tyler, Texas, with no mention of the group Ark-La-Tex (Part 2, Pages 459, 460).

With reference to Commission's Exhibit 74, I gathered the information in Columns 1, 2, 3, and 4 from ledger cards in the office of Moog Industries.

Column 3 contains data on sales of leaf springs to members of Automotive Southwest, Inc. during the year ending June 30, 1949.

The data in Column 4 shows the net sales of leaf springs, coil springs, and chassis parts to the members of Automotive Southwest, Inc., in the year 1950.

The total of $4,640.22, merchandise bonus, shown as a total of Column 5, was obtained from Respondent's credit memo 8261-S, dated January, 1951. The amounts above that in Column 5 were distributed on the ratio that it is to $34,447.63, total net sales (Part 2, Page 460).

The amounts in Column 6 are determined by dividing the amounts in Column 5 by the amounts in Column 4. In the case of this group, three of its members during the course of 1950 were allowed $516.92, warehousing and redistributing commission, as shown by the credit memos and foot notes 2, 3, and 4 of this exhibit.

The amounts in Column 8 are the total of Columns 5 and 7 amounts, and the percentages in Column 9 are determined by dividing the amounts in Column 8 by the amounts in Column 4. The fact that certain of these group members received warehousing and redistributing commissions accounts for the varying percentages as they appear in Column 9.

With reference to foot note 2 of this exhibit, the letter "S" indicates leaf springs; "C. S." indicates coil springs; "C.P." chassis parts.

With reference to Exhibits 70A through 74, the columns headed "Net Sales" mean gross sales less returns and allowances (Part 2, Pages 461, 462), and that is a constant definition of net sales throughout these exhibits.

Referring to Commission's Exhibit 75, the data in Columns 1, 2, 3, and 4, were compiled and assembled from Accounts Receivable Ledger Cards in Respondent's office.

Column 3 represents net sales of leaf springs only during the year ending June 30, 1949.

Column 4 represents net sales of leaf springs, coil springs, and chassis parts during the calendar year 1950. In both instances, net sales are gross sales less returns and allowances.

The total of Column 5, $4,383.71, represents merchandise bonus allowed Automotive Parts Distributors, Inc., as shown by respondent's credit memo Number 8254-S, dated January 17, 1951. The distribution of the amount in Column 5 was arrived at by dividing $4,383.71 by $31,312.23, a total of Column 4, producing a percentage of 14%, which, when applied to each of the items in Column 4, produces each of the items in Column 5 (Part 2, Pages 462, 463).

Column 6 is the 14%.

With reference to Commission's Exhibits 76 and 77, with the exception that Exhibit 76 applies to Southwestern Warehouse Distributors, and Number 77 applies to Warehouse Distributors, Inc., and with the exception for the difference in credit memorandums as they appear in footnote 2 on each exhibit, my explanations are the same for the columns on those exhibits as they were for the columns and information appearing on Commission's Exhibit 75.

With reference to Commission's Exhibit Number 78: In Column 1 are the names of the owners, except in the case where the name is indented. That is reported to be owned by the company immediately preceding it. The names are different but they are under sole ownership, so it was reported (Part 2, Page 463).

Column 2 is the location of the various stores.

Column 3 is constant; the year ending June 30, 1949, was selected for everybody in this examination.

Column 4 is the compilation of net sales of leaf springs only for the year ending June 30, 1949, for each of the companies in the various localities listed in Columns 1 and 2.

Column 5 applies to the contract year ending date.

Column 6 are net sales determined from an examination of Accounts Receivable Ledger Cards showing sales of leaf

springs, coil springs and chassis parts to the various customers at the various localities shown in Columns 1 and 2.

Column 7 indicates the credit memo number on which the merchandise bonus was credited for the year ending date as shown in Column 5.

Column 8, being each of the main customers shown in Column 1, is determined by the division of the total, for instance, in the first one $224.64 divided by total net sales $3,209.10, or 7% which we applied to the two preceding items, produces the amount shown in Column 8 (Part 2, Pages 464 and 465).

That is true with all of the rest of the items of this exhibit.

The amounts in Column 9 are the results of the division of the amounts in Column 8 by the amounts in Column 6. That is the first indication of the total amount in Column 8. For example, the total amounts opposite Oursler Auto Parts Company, $224.64 being divided by the total amount in column 6 of $3,209.10. We then arrived at 7% and taking 7% of the two figures appearing in the net sales column of Column 6 of $1,828.47, we arrive at $127.99 (Part 2, Page 465).

With reference to Commission's Exhibit 79-A through G, column 1 shows the locations covered. There are 83 of them. In the second column are the customers located in the various locations who bought leaf springs for the year ending June 30, 1949, or leaf springs, coil springs and chassis parts during the years ending, as shown in Column 7.

Column 3 designates the group-buying organizations in which a customer in Column 2 is a member.

Column 4 shows net sales of leaf springs during the year ending June 30, 1949, to a customer shown in Column 2 (Part 2, Page 466).

Column 5 shows the amount of warehousing and redistributing commissions allocated to the customers in Column 2 in the case of groups, from data previously presented in any one of the exhibits 70-A through 77. As to non-group members, that data was assembled from the accounts Receivable Cards of Moog Industries in the same manner as described for Exhibits 70-A through 77. In the

case of customers in Column 2 with footnote 1 preceding them, that data is taken from data presented in Exhibit 78.

Column 6 is the percentage of the amount in Column 5 to the amount in Column 4.

Column 7 indicates the contract year ending for the year 1950 in the case of groups; and it is December 31st in every instance. In the case of non-groups, in most instances it is not December 31, 1950, but from some date ending June 30, 1950, through November. In those cases where the December 31st ending is shown, there were no contracts, so the year 1950 was chosen to compare or be comparable with the group-ending date (Part 2, Page 467).

Items in Column 8 are net sales of leaf springs, coil springs and chassis parts, as previously developed in data shown on Commission's Exhibit 70-A, for groups and customers owning multiple stores. For the non-group members, the data was assembled from Accounts Receivable Ledger Cards.

Column 9 shows the amount of merchandise bonus and warehousing and redistributing commission applicable to each of the customers listed in Column 2 and they are shown on Commission's Exhibits 70-A through 78; and as to non-group members, the data was assembled from credit memorandums issued by Respondent. The percentage in Column 10 is the percentage of the amounts in Column 9 with the amounts in Column 8.

Approximately 51% of information contained in Commission's Exhibit 79-A through G is contained in the preceding exhibit described and explained and contained in Commission's Exhibit 70-A through 77. There is information on this Exhibit 79-A through G that does not appear on the preceding exhibits, which are customers who are not members of any of the groups previously presented or are not members of an organization which owns multiple stores (Part 2, Pages 468, 469). That information was gathered from Ledger Cards and credit memorandums issued by Moog to those various customers.

At this point Commission's Exhibits 70-A through and including 79-A through G were offered in evidence, and the Examiner reserved his ruling until after Cross-Examination.

Cross Examination.

With reference to Commission's Exhibit 70-A, sheet 1, line 1, the figure in Column 4, $49.70, represents an allocation to Auto Bearings and Parts Company of Nashville, Tennessee, that I made (Part 2, Page 469). I did not verify whether or not that company had received that amount, as there was no way to verify it. It probably could be verified by an examination of the records of Mid-South Distributors.

Q. And Mid-South Distributors is under complaint by the Commission at the present time, is it not?

Commission's counsel objected to the question and was sustained.

As an amendment to my above answer, it would be more accurate to say that I did not attempt to verify the figure of $49.70.

The first total in Column 4 on Exhibit 70-A, $309.60, is the parent figure from which I made these derivative figures appearing just above it. Those figures are mathematical calculations made by me (Part 2, Page 470). It could very well be that these mathematical calculations made by me were not in fact so distributed by Mid-South Distributors as I have distributed them.

Q. The figures immediately preceding the total of $309.60 are mathematical computations which you assume represent amounts which were distributed; is that not so?

A. Well, the mathematical computations are the total of $3,089.69.

Q. In other words, the figure immediately following on the same line, the figure $309.60, being 4.65 is a computation made not from dividing $309.60 by $3,360.58 but by dividing the figure appearing on 70-B, dividing the figure $3,884.69 by—

A. (Interposing) and multiply it by the $6,650.88.

Q. Columns 4 and 5 of the Exhibit 70-A and 70-B contain approximately one hundred and two figures, all of which were, or are, with the exception of two figures, mathematical computations made by you; is that correct?

A. All except the $3,884.69 are mathematical computations.

Q. That also applies to the same number of figures in Columns 6 and 7, does it not?

A. Well, column six are correct; that data in Column six are taken from the ledger cards, Mr. Butterfield (Part 2, Page 471). The figures in Columns 7 and 8 are computations made by me, approximately one hundred and two computations, with the exception of the total figure of Column 7, $9,978.71, being the figure taken from the records.

As to Auto Bearings and Parts Company, line 1, Column 1, if Nashville, Tennessee, is one of of the locations used. you will find it appearing on Commission's Exhibit 79-F. Line 1 of Exhibit 70-A is identical with Line 8 of Exhibit 79-F.

With reference to Exhibit 73, Column 7, the figure $43.69 under the heading "Commissions and Bonuses Paid to Ark-La-Tex Warehouse Distributors, Inc.": That was paid to Tyler Service Parts, which is a member of Ark-La-Tex (Part 2, Page 472).

As to whether the $43.69 was a commission or a bonus paid to Ark-La-Tex Warehouse Distributors on sales to Tyler Service Parts during the year ending December 31, 1950, the credit memo is not made out to Ark-La-Tex but is made out to the customer. I don't think you would be correct in suggesting that the figure $43.69 does not belong on this exhibit because it went to Tyler Service Parts Company, or rather the credit memo is made in the name of Tyler Service Parts Company, and Tyler Service Parts Company is on this schedule. So to show the whole story, I must show it all to you.

Q. Well, would you, then, care to amend your exhibit, to add to your footnote "This commission was not paid to Ark-La-Tex"?

A. The footnote could be changed "Per credit memo so and so, dated so and so, in the name of Tyler Service Parts Company, if that would satisfy you" (Part 2, Page 473).

As to whether it was paid to Ark-La-Tex or not, I found it during the course of my investigation of Ark-La-Tex Warehouse Distributors, Inc. It appeared on the ledger card as a credit to their account. In spite of the fact the

credit memo is made in the name of Tyler Service Parts, it was credited to the account of Ark-La-Tex Distributors, but the credit account shows it was remitted to Tyler Service Parts.

Q. What is the difference in crediting it to the account of Ark-La-Tex and paying a commission to Ark-La-Tex?

A. Well, they don't pay. The way they pay is by credit memo. There is no check issued in the case of this redistributing Commission (Part 2, Page 474).

As to whether the heading "Commission and Bonus credited to the account of Ark-La-Tex", instead of "Paid", it is all right to change the credit. The same result ends; —they don't pay for it.

I had no occasion to examine Commission's Exhibits 61 to 69, inclusive. I did not include on this Exhibit 70-A coil actions or piston rings (Part 2, Page 475).

I have examined all of the other Commission's exhibits as to leaf springs, coil springs, and chassis parts, and wherever piston rings appeared on the cards I examined, I eliminated that from the preparation of this exhibit.

Q. For instance, calling your attention to Exhibit 76, line 17, the Smyth Auto Supply Company of Amarillo, Texas, where you show no leaf spring sales for the year ending June 30, 1949. That exhibit would be consonant, would it not, with the fact that Smyth Auto Supply Company purchased eleven or twelve thousand dollars worth of piston rings, would it not?

A. I would not know whether they purchased any piston rings or not.

I had the records before me on these cards and they did not have separate cards for leaf springs and separate cards for chassis parts (Part 2, Page 476). They were all on the same card and where they showed up piston rings, I disregarded them.

Referring to Exhibit 76, Column 3, in reference to leaf springs, and Columns 4, 5, and 6 referring to leaf springs, coil springs and chassis parts, these were grouped together because the leaf spring line contains leaf springs, coil springs, and chassis parts for merchandise bonus purposes. In the catalog I do not know how many items there are in

the leaf springs, coil springs, and chassis parts line. I do not know how many items there are in leaf springs (Part 2, Page 477).

I was one month at the Moog plant in the preparation of these exhibits. I examined other things besides the Accounts Receivable Ledger. I examined a few invoices and selected copies of invoices and brought them back with me. I have not counted how many, but it might be a few off 289.

Q. I call your attention, Mr. MacDonald to Lines 6 and 7 of Exhibit 79-A.

A. Are you referring to Arkadelphia, Arkansas?

Q. That is correct (Part 2, Page 478).

Q. Now in Column 8, you show a sale to Crowe-Burlingame of $21.92. Immediately below that you show another sale to Auto Parts Supply Company of $19.76. Your Columns 9 and 10 contain the figures which you have computed. Do you have any idea what those items represent?

A. Which items?

Q. Items $21.92 and $19.76.

A. The sum of leaf springs, coil springs and chassis parts bought by those two customers in Arkadelphia, Arkansas, during the year 1950.

Counsel for Moog then presented the witness with certain invoices to verify the above two figures (Part 2, Page 479).

Q. I show you these documents and ask you whether these documents, plus this one (indicating) represents what it says? I would like to have you compute them.

A. Show me what is on here. That is coil action; this on coil action, what the dickens is that doing in here?

Counsel for Respondent: There is no amount in there is there?

A. Did you bring those work sheets I gave you a copy of? We could have checked them. Yes, sir; they total all of the amounts shown here.

Q. That is, all that I have shown you?

A. All that you have shown me (Part 2, Page 480).

Q. Now, take line 7, Auto Parts and Supply Company. Auto Parts and Supply Company, there are one, two, three, four, five, invoices and a credit memo. Those five invoices and the credit memo total $19.76?

A. That is correct.

Q. The credit memo being $174.96?

A. Correct.

Q. Now the first invoice number 7939 Ab and BB. Now BB is $38.17, and on there are the various items listed. Item number 1, U-410, $1.48. Do you know what U-410 is?

A. No, sir.

Q. Do you know whether that is a Chassis part, a Leaf Spring, a Coil spring, or a piston ring?

Mr. Schrup: I object. He has answered the question once. He said he didn't know.

Trial Examiner Kolb: Objection sustained.

By Mr. Butterfield:

Q. I show you Commission's Exhibit 15, Mississippi Spring Parts, resell net price list, U-410, net 0.55¢, dealer's net cost U-410, 0.45¢.

A. Where do you see U-410?

Q. U-410.

And I show you a picture too, on the Spring Part exhibit and call your attention to the lower right-hand and also the lower left-hand. Do you know what those things are? (Part 2, Page 481.)

A. They are U-bolts.

Q. Well, would you say that U-410 on that invoice would be a U-bolt?

Mr. Schrup: The exhibit speaks for itself.

The Witness: The exhibit calls for a U-bolt.

By Mr. Butterfield:

Q. Now, Mr. MacDonald, will you look on these invoices which I just gave you. Auto Parts and Supply Company, and see if any of these invoices other than Auto Parts and Supply Company have a U-bolt, that number U-bolt on them, or any U-bolts?

A. I see the only one—I see it only on this one invoice, Mr. Butterfield.

Q. But that figure of $1.48 entered into your computation of these figures could be that?

A. I suppose so. I didn't take any information from the invoices. I took it from the ledger posting.

Q. Now will you take a look on this and see if on these invoices which I show you—

Mr. Schrup: Excuse me. Go ahead and finish your question.

By Mr. Butterfield:

Q. (Continuing) —and see if Ozburn-Abston & Company, shown on line 1, and Crow-Burlingame Company at Arkadelphia, Arkansas, shown on line 6, in the year 1950, bought any item (Part 2, Page 482) of merchandise, the net sales of which are purported to be shown in column 8, which was comparable, identical, or of like quality, as the Auto Parts and Supply Company in the figure represented by $19.76?

Mr. Mayer: I object to that question. The witness testified that the figures were taken from Moog Industries in and of themselves. He did not testify he examined the various invoices behind or which were posted on the cards.

Now if Moog made a mistake in reflecting his invoices of this Company, this could not reflect on this witness. The proper thing would be to produce the ledger card.

Mr. Butterfield: Mr. Examiner, I think we are beyond the Ledger card point.

Mr. MacDonald said he took a figure off the ledger card. Mr. MacDonald testified that the figure he took off the ledger card is identical with the figure that appears on these invoices.

Mr. Schrup: Not so, Mr. Examiner. The figures were taken from the Ledger card. Now the witness didn't examine the invoice other than to take a sampling of invoices to bring back to check.

Mr. Butterfield: Mr. Examiner, I brought in and showed the witness the total invoices represented by the net sales figure that he found on the ledger card.

Trial Examiner Kolb: And they checked? (Part 2, Page 483.)

Mr. Butterfield: And they checked.

Trial Examiner Kolb: All right.

Mr. Butterfield: Now what I want to ask the witness, is, whether he finds any item on the Crow-Burlingame sales that is comparable with any other item on the Auto Parts and Supply Company sales.

Trial Examiner Kolb: Is it your position there has got to be a comparison between U-bolts and screws and everything else in order to arrive at the facts shown on these exhibits?

Mr. Butterfield: I think, if your Honor please, that in showing comparison of sales, that a U-bolt and a main Leaf are two entirely different things.

Trial Examiner Kolb: Are the discounts the same on them?

Mr. Butterfield: Well, on the exhibits—

Trial Examiner Kolb: No, no. Are the discounts material—in other words, they don't have different discounts between bolts and springs. The auto parts ar all bulked together and the total purchases are used as a basis for the discount; is that correct?

Mr. Butterfield: Well that, if your Honor please, I am not prepared to answer that right now, because I don't want to bind my client on making an answer of that kind.

I don't want to make that kind of a stipulation or (Part 2, Page 484) admission until I get at the facts.

What I had done was to confine myself to this one competitive community, Arkadelphia, Arkansas, as selected by the witness.

Trial Examiner Kolb: Well, we would be here for ten years if you are going to try to compare bolts and nuts and everything else.

The thing is, whether or not the discount that is allowed is based differently upon those items, or whether they are bought together and the discounts based upon the auto parts which are purchased.

Mr. Butterfield: Well, I was under the impression, Mr. Examiner, that the injury, if there was to be one, or the foundation for an injury must be based upon the sale of competitive products at different prices.

Under the Robinson-Patman Act—

Trial Examiner Kolb (Interposing): It being auto parts.

Mr. Butterfield: I wish to suggest, if the Examiner please, that an auto part made for a Ford will not fit in a G. M. C. truck, and to that extent they are not comparable.

In the auto parts industry, of course, the big thing is the service rendered by the independent garageman, and when he calls and orders an auto part he can't make substitutes. If he orders a U-bolt, you can't send him a Main Leaf (Part 2, Page 485) to substitute for a U-bolt, nor can you send him a Tie Rod End in place of a shackle.

Trial Examiner Kolb: You are getting into what might possibly be a defense rather than a cross-examination of the witness on the basis of this exhibit.

Is it your position that different discounts—or different items purchased by different customers, that is your position, then I think that will have to be taken up by defense and not by cross examination here.

All of these exhibits are confined to dollars and cents and not to profit, and the only attempt made in this exhibit applies just to categories, for instance, leaf springs.

Q. Now you considered in making these comparisons on Exhibit 79-A to G, and in making up the underlying exhibits 70-A through 78, that as far as leaf springs are concerned, they are all one and the same item?

A. No, No, No.

All the figures on all the tables pertaining to the year ending June 30, 1949, are limited to springs as described and shown on the Ledger Card under the code "S".

I don't know a thing about Commission's Exhibit 15. The code in the invoices as posted to the ledger card with the letter "S", are leaf springs. The code before a coil spring, which did not come in until the year 1950, shows "C. S." These are all classified and identified by Moog. Chassis parts are identified by the suffix "C. P." to the invoice.

Now whether they are Ford springs, Cadillac springs, or anything else, under leaf springs I have no way of knowing. That goes also for coil springs and chassis parts. Had I examined the invoices, the same results would have been presented as I have presented here, because the leaf spring line, as identified on Commission's Exhibit Number 1, takes into consideration leaf springs, coil springs and chassis parts (Part 2, Page 488). For this I am referring to Commission's Exhibit 1, which is a four-page document called "Distributors' franchise". I am not referring to leaf springs, helper springs, and spring parts, nor coil springs, nor chassis parts; I am referring (pointing) to leaf springs including coil springs and chassis parts, and I treated in making up these exhibits, leaf springs, coil springs and chassis parts as just like so many cans of beans (Part 2, Page 489). I did not take into consideration that each automobile has its own peculiar characteristic. I did not take into consideration that trucks, busses, passenger cars, and the various makes of passenger cars all use different leaf springs, different chassis parts, and different coil springs. I treated them so because they have all got the rebate depending upon the purchases. The only thing I was interested in was the amount of warehouse and distribution commission, the amount of merchandise bonus. All that I took into consideration was the rate but not the item at all (Part 2, Page 490).

Q. And in making that assumption you assumed, you say, that a U-bolt and an overload spring were interchangeable—

A. I didn't so testify.

Q. When I asked you if you treated them as if they were so many cans of beans, you understood by that question, did you not, that beans are beans, and it doesn't make any difference which can you get them out of; isn't that right?

Mr. Schrup: The gentleman is testifying as an accountant here, and if there is any question about the figures being wrong, I suggest that is proper cross examination (Part 2, Page 490).

But this gentleman's opinions on what is beans is not material.

Trial Examiner Kolb: The objection will be sustained.

Mr. Butterfield: Well, Mr. Examiner, I have about 300 documents here to go through on these exhibits, and I offer to prove in my cross examination of this witness that no effect was given to whether or not the goods were of like grade and quality, other than the fact that they are used in the automotive industry, and that a U-bolt has been treated on the same basis as a spring for the purpose of these computations.

Any chassis part, any coil spring, has been treated on the same basis as a wholly unrelated part of the various automobiles for which they are designed.

Trial Examiner Kolb: Is that your objection to this exhibit?

Mr. Butterfield: That is one of the objections to the exhibit.

Trial Examiner Kolb: Well, I would suggest you make all of your objections and I will rule on it then, will rule on the admissibility of the exhibit (Part 2, Page 491).

Q. In preparing 70-A to 79-G, both inclusive, did you take into consideration the price paid by the customers purported to be represented on there, Mr. MacDonald, as distinguished from the gross sales?

A. The price paid for individual items?

Q. No, the price paid for the billings, the gross sales billings and the net sales billings that you showed on here, Mr. MacDonald.

A. I didn't check to see if they were paid for.

Q. You didn't check to see whether they had taken advantage of any cash discount for prompt payment of bills, or any of the commercial—

A. No (Part 2, Page 493).

Q. —or any of the commercial devices by which credit is manipulated?

A. No.

Mr. Butterfield: If your Honor please, I am prepared to examine the witness rather extensively on the preparation of these documents.

But before going into such an examination, I would like to make a motion at this time for the refusal of these charts into evidence, on the following grounds:

The first ground is the jurisdictional ground which is set up in the amended answer to the complaint, and as has been heretofore argued in regard to all the other exhibits that have been offered herein.

Specific objections are made to the exhibits in this extent:

To Exhibit 70-A and B, there is no testimony by the witness that the amounts set forth on said exhibits are the actual prices paid by the purported purchaser for the products purported to be represented by the items of net sales.

The figures as to the amount of warehousing and redistribution commission set forth therein are computations made by the witness that have not been verified by the ascertainment of any fact regarding the actual allocation of the amounts to either of the respective companies set forth on the exhibit. (Part 2, Page 494).

The amounts set forth as being net sales for the year ending June 30, 1949, and for the year ending 1950, cannot be ascertained from this exhibit and has not been investigated by the witness and is not known whether or not these sales represent the sales of commodities of like grade and quality in interstate commerce.

The classifications employed by the witness in fabricating the charts, such as the classification "Leaf Springs" and the leaf springs, coil springs and chassis parts classification is not shown to be a proper classification of interchangeable and equally competitive products of like grade and quality as contemplated in Section 2(a) of the Robinson-Patman Act.

I make the same objection to Exhibit 71-A and 71-B. and 71-C.

In addition to the specific objections to 70-A and B, specifically made heretofore, and 71-A, B and C, I wish to

make to Exhibit 72 the following additional specific objection:

There is no indication on the chart as to what the facts and figures are regarding the weight accorded by the witness to sales in different periods which result in the varying percentages set forth in column 5 of said exhibit.

In addition to the foregoing objections made to the Exhibit 70-A to 72, both numbers inclusive, I wish to make an additional objection to exhibit 72; in the amount (Part 2, Page 496), appearing thereon in column 7, $49.69—$43.69 is not consonant with the general designation of the exhibit as being commissions and bonuses paid to Ark-La-Tex warehouse distributors.

I wish to also note the following additional objection to all of the aforementioned exhibits as to the classification "Leaf Springs" for the year 1949, and the classification as "Leaf Springs, Coil Springs and Chassis Parts" as a single designation or category as shown in all the said exhibits.

As to Exhibit 74, I wish to note the same objections as has heretofore been made to the Exhibits 70-A to 73, both numbers inclusive, and call particular attention to the figures set forth in column 7 of said exhibit, as not being consonant with the headings of said exhibit.

I wish to make an additional objection to the foregoing exhibits and including Exhibit Number 75, in that said Exhibit does not purport to show total net sales, or the prices paid for commodities bought from Moog Industries, Inc., by the parties whose names are set forth thereon (Part 2, Page 496).

I wish to extend that last named objection to all exhibits including Exhibit 76.

As to Exhibit 79-A through G, seven pages, both inclusive, covering 214 items in twelve States and 83 communities, I wish to voice all of the objections that have heretofore been made to all of the underlying exhibits, Number 70-A to 78, which as the witness stated or reflected in the majority of cases on this exhibit, and on the following ground:

That the witness has examined at least one item of said exhibit and the examination did not disclose that any item sold by the two competitive or presumably competitive

purchasers in, for instance, the town of Arkadelphia, Arkansas, was identical, competitive with, or of as good or like grade or quality.

I brought with me for examination by the witness originals of some 289 credit memos and invoices of which the witness has copies, for his examination, to show me one instance in any of those documents which he selected where the two customers of Moog Industries, Inc., in a single town, had purchased the same item within a reasonable period of time, so as to be in any way competitive, in fact.

In addition to those objections that have been heretofore made, I wish to also add as to all the exhibits that these documents are for the most part compilations of the witness made on unwarranted assumptions or hearsay, not supported by expert testimony, and that the witness is not qualified by training, education, or of that set forth in the amended answer set forth thereto, to state the opinions implied in the charge as compiled.

The witness has testified that he has disregarded for the purpose of these exhibits competition, product (Part 2, Page 497) competition and has treated billings as being competitive with itemized accounts of the other items, regardless of the price shown on the invoice; treated each and every product in the classification selected as being competitive and interchangeable with every other product manufactured by Moog Industries, Inc., in the classification.

The terms used and the language implied in the description of the various exhibits, as shown in the headings, are highly prejudicial to the respondent and assume as facts —ultimate facts which can be determined only by the Commission, and used throughout these exhibits the terms, price and comparison, and sales in comparison, when as a matter of fact no prices are shown on any of these exhibits.

No comparisons are made that are proper and relevant to this proceeding.

Nothing is shown in regard to the marketing conditions for the competition of the products of Moog Industries, Inc., with any other competitor or with the customers of any of them.

No attempt has been made in these exhibits purporting to show the conditions and selected markets as to what the markets for competitive products are in those markets.

No attempt has been made to properly evaluate market conditions, the condition of trade, commerce, interstate commerce, commercial status, in which this proceeding is (Part 2, Page 498) purported to be set.

I also wish to submit to the Examiner serious consideration as to whether or not admission of documents such as these into evidence may not be highly prejudicial—in the premises under the law as to deny due process, violation of the Bill of Rights of the United States Constitution, of the Constitution itself; and a violation of the Constitution, Bill of Rights, State of Missouri,, and of each and every other State of the Union of which this company does business.

I wish to further state the submission of these documents is tantamount to, and from the way they have been prepared and in the light of the testimony which has been given by the witness, is tantamount to the denial of due process and places an unconscionable and almost insurmountable burden and task on the respondent in defense of this case, under the defenses available under the Act, and under the law, and the Constitutional rights and guaranties which are enjoyed by all respondents in the American market.

I cannot too fully emphasize the importance of selecting bare figures and presenting them in the form of these charts and exhibits for the purpose of attempting to raise an assumption that they are based on the sales of goods of like grade and quality, and from that attempting to raise an assumption or possibility of injury (Part 2, Page 499).

Our complaint is brought on price difference. Price discrimination is what the respondent is charged with.

These exhibits do no more than cloud the waters.

The attempt here seems to be not an attack on price discrimination but an attack on other things from which there may be some assumptions, unwarranted I feel, that should be made subject of proof, to which the respondent can properly direct the defenses available to him.

It is true that the Commission needs make only a prima facie case. Yet that prima facie case must be of such a nature and of such a definitiveness that the respondent has a reasonable opportunity to meet the direct proof without the necessity of having to cover as many items as are set forth here.

The burden has been placed on this respondent, I feel, by these exhibits, if they are introduced in evidence, which would be—as I repeat—unconscionable.

Trial Examiner Kolb: Do you want to answer that?

Mr. Mayer: Just a moment, please, Mr. Examiner.

Trial Examiner Kolb: All right, you may proceed.

Mr. Mayer: We feel that largely the objections raised by counsel to the introduction of the exhibits which have been identified this morning are largely the minimus and is a great portion toward the weight to be given to the exhibit rather than to its admissibility (Part 2, Page 500).

We feel that the exhibits are to be properly admitted into evidence and form an essential part of the prima facie case of the counsel in support of the complaint.

Some of the objections perhaps could be answered on the basis that if leaf springs and coil springs and chassis parts are an improper classification, then it seems to me that should be laid in the Moog Industries, because this is a reflection of the books and records of Moog Industries, Inc., and it is based upon that general classification.

Naturally the exhibits don't show total purchases.

The very exhibit in an individual case itself limits itself to leaf springs, or coil springs, and chassis parts.

The state of the competition or competitive prices is without the scope of this complaint, such as it is not industry-wide but directed at prices and products of Moog Industries, Inc.

Trial Examiner Kolb: Did you have something else?

Mr. Mayer: For the most part we feel that the objections are largely frivolous, and that there is no basic objection to the admission of these documents into evidence, if the Examiner please.

Trial Examiner Kolb: The objection will be overruled.

They will be received as Commission's Exhibits number 74-A through 79-G.

Mr. Mayer: That should be 70-A, Mr. Examiner.

Trial Examiner Kolb: 70-A. Thank you.

Mr. Butterfield: Due to the extent to which these charts go, I move that in order to prevent doing undue injury to the respondents, the documents be placed under seal for the use only of the government attorneys and the Respondent, until such time as a final order has been issued in this case.

Thereupon Commission's Exhibits 70-A through 79-G were received in evidence (Part 2, Page 502).

At this point counsel for the Commission closed their case. Counsel for Respondent then made a motion to dismiss the Complaint and the Trial Examiner stated that he would hear his argument thereon.

Mr. Butterfield: Without intending in any way or meaning to waive any defenses fortified by the Act, by the administrative procedure act, but solely in the interest of making a test of the sufficiency of the evidence and on the issues raised by the complaint and answer, I move at this time for dismissal of the complaint on the ground that no injury has been shown to exist; or more specifically, no single instance of a specific case or a single fact which would show the business practice of the respondent tends to create a monopoly in any line of competition to substantially lessen competition or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or were the customers of either one of them.

The burden on the trial attorneys under the complaint, as I see it, is to show that type of discrimination in price which is treated under Section 2(a) of the Robinson-Patman Amendment to the Clayton Act.

This the proponent has failed to do.

The catalogue prices have been introduced; a paucity of testimony by wholesalers in regard to credit practices, and exhibits, have been introduced showing sales without relating the sales to any specific product, without de-

lineating any particular line of commerce purported to be injured or destroyed or in any in which there was any tendency to create a monopoly that will lesson competition, has been shown (Part 2, Page 503).

No attempt has been made to show the extent of or proportion of the market in any single line or classification of lines which the respondent purported to serve or did serve in comparison with any other competitor in the same field dealing in products of like grade and quality.

Respondent submits that no prima facie case has been made by the Government under this complaint.

But should the Trial Examiner see fit to overrule the motion to dismiss, the respondent is ready, willing and able to proceed to avail itself of whatever defenses are available under the Act, particularly the competition and justification, and such other and further defenses as are available.

Mr. Mayer: Mr. Examiner, we feel that the record shows in detail the price and practices of Moog Industries, Inc.; that it clearly shows the existence of competition, the value placed upon the various discounts by the buyers.

It shows different discounts to competing buyers, and it shows sales to group buyers based upon an amalgamation of purchases.

We feel that in the above steps we have gone further than that required by the Supreme Court under the Morton Salt decision, and that we have shown injury to both lines of commence in which Moog is engaged (Part 2, Page 504).

We respectfully ask for a rule denying the respondent's motion, therefore, and setting a date for the beginning of the respondent's defense.

Trial Examiner Kolb: The motion to dismiss the complaint is denied (Part 2, Page 505).

Respondent Moog Industries' Evidence.

St. Louis, Missouri, June 2, 1952.

The hearing was held for the purpose of receiving evidence in opposition to the allegations of the complaint.

Mr. Butterfield: If your Honor please, the motion to strike exhibits in evidence and dismiss the complaint is in the form of a written motion. At the conclusion of the case for the Complainant, at the last hearing there was an oral motion made similar to this upon which your Honor ruled, and I offer this written motion at this time, at the commencement of the respondent's side of the case, in order to keep the record straight on the position of the respondent in this matter.

Trial Examiner Kolb: As I recall, this motion was argued at the close of the Commission's case, is that right?

Mr. Butterfield: Yes, it was argued at the close of the Commission's case, but it wasn't put into a written form and this motion is put into a written form, and I ask that your Honor file this with the Secretary of the Commission to become the initial step in the Respondent's case (Part 2, Page 509).

Trial Examiner Kolb: The motion will be filed, and as it has been previously ruled upon on the record, in order to keep the record straight, I will at this time deny the motion. This refers to motion to strike exhibits in evidence and dismiss the claim.

Mr. Butterfield: Now, the second motion I have, if your Honor please, is a motion for a bill of particulars.

Trial Examiner Kolb: It is admitted that the suggestions in support of the motion for the bill of particulars, a previous motion, was denied. Since the Commission's case has now been completed and closed, I don't see that a motion of this nature would be proper at this time. I will deny the motion (Part 2, Page 510).

ANTON M. GOETZ testified as a witness on behalf of Moog Industries as follows:

Direct Examination.

My name is Anton M. Goetz (Part 2, Page 518). I am Secretary-Treasurer of Moog Industries. I have been with them since June 17, 1940.

I have examined Commission's Exhibit 79-A. The witness' attention was then called to Line 3 of that exhibit, Arkadelphia, Arkansas, and the two names, Crowe Burlingame Company and Auto Parts and Supply Company. The witness' attention was then called to the columns entitled "Leaf Springs, Coil Springs, and Chassis Parts", "Merchandise Bonuses," and "Distribution Commission" and the item immediately below that, $19.76, and the witness stated that he had brought with him the original invoices covering those items. Respondent's Exhibits 1-A to 1-K, inclusive, were then marked for identification (Part 2, Page 514). Respondent's Exhibit 1-A is a dittoed copy of the original invoice. The original invoice is in the hands of the customer, Auto Parts and Supply Company of Arkadelphia, Arkansas. These exhibits were taken from the files of Moog Industries and were made available to the investigators for the Federal Trade Commission prior to the commencement of this complaint (Part 2, Page 515). These exhibits were also made available to the attorneys for the Commission after the commencement of this complaint and to the accountant, Mr. Steele (Part 2, Page 516).

Thereupon Respondent's Exhibits 1-A to 1-K were offered and received in evidence.

With reference to Respondent's Exhibit 1-A, chassis parts are included in that exhibit, being Six ES-142's (Part 2, Page 517).

Comparing the invoices reflecting sales to Crow-Burlingame Company for the period ending December 31, 1950, with the invoices of the Auto Parts and Supply Company for the same period, there is no item reflected in the Crow-Burlingame invoices that is also reflected in the Auto Parts and Supply Company invoices (Part 2, Page 518).

Thereupon Respondent's Exhibits 2-A through 2-J were marked for identification.

Thereupon Respondent's Exhibits 3-A through 3-H were marked for identification.

The invoices, Respondent's Exhibits 2-A through 2-J, are the invoices reflected in Commission's Exhibit 79-B, the fourth item, Searcy, Arkansas, sales to Crow-Burlingame Company and W and R Motor Supply Company. There are no items on these invoices purchased by Crow-Burlingame Company that are reflected on the invoices of purchases by W and R Motor Supply Company. There are no purchases made by the one that were made by the other (Part 2, Pages 519, 521).

Referring to Respondent's Exhibits 3-A to 3-H, inclusive, and reflecting sales, as appears on Commission's Exhibit 79-G, the third item to Crow-Burlingame Company and the Motor Supply Company at Marshall, Texas, these invoices correctly reflect figures appearing under the heading "Leaf Springs, Coil Springs and Chassis" Parts on that exhibit, for the year ending 12-31-50 (Part 2, Pages 521-522). There are no items on these invoices purchases by Crow-Burlingame Company, Marshall, Texas, that were also purchased by the Motor Supply Company.

With reference to Respondent's Exhibit 3-A, that shipment was not made to Marshall, Texas, but was made to Atlanta, Texas. Commission's Exhibit 79-G having included it in sales to Marshall, Texas.

Thereupon Respondent's Exhibits 2-A through J, and Respondent's Exhibits 3-A to H were offered in evidence (Part 2, Page 522).

In response to a question by the Trial Examiner, the witness stated that Crow-Burlingame and Auto Parts Supply are both jobbers, engaged in selling automotive parts; that Crow-Burlingame purchase spring parts and main leaf and Auto Parts Supply purchase overloads, overload kits, spring parts, leaf springs, main leaves, and some chassis parts; that these purchases by Crow-Burlingame and Auto Parts Supply came within the line that Moog carries as leaf springs, coil springs, and chassis parts. The witness also said that was true with reference to the

other two items, referring to the comparison between Crow-Burlingame and W and R Motors.

The Trial Examiner then announced that in view of these statements he would now entertain a motion to strike, and counsel for the Commission made a motion to strike from the records Respondent's Exhibits 1-A through 1-K, Respondent's Exhibits 2-A through 2-J, and Respondent's Exhibits 3-A through 3-H (Part 2, Page 523).

Counsel for Moog Industries, arguing against the Motion To Strike, stated that the invoices do not reflect that Crow-Burlingame or Auto Parts and Supply Company purchased the same items that the other company purchased; that the parts so sold are not interchangeable parts, that is, if a part is bought by one company, in order for it to compete with another company, the other company must have bought the same part, because if you go to Crow-Burlingame to get a part for a Pontiac or a Chevrolet, or an International Harvester, and Crow-Burlingame has not bought any of those parts but Auto Parts and Supply has, then there was no competition between the two companies at all; that these auto parts are not like salt; that salt is a necessity and is interchangable; that in the Morton Salt case the customers were given certain discounts and other discounts to another class of customers on the same item. That in the Staley case it was corn syrup (Part 2, Page 524). But that in this particular field of industry if one customer buys nothing but piston rings and another customer buys nothing but leaf springs, the two are not competitive, and that the prices made to one have no effect on the prices made to the other. The Trial Examiner then advised Moog's counsel that there were no piston rings in this line. Counsel for Moog then stated that he was explaining to the Trial Examiner what these automotive parts were; that not all piston rings will fit in the same car; that one kind of a piston ring goes in one car and another kind goes in another car; that some companies service certain cars, and therefore are not competitive in the line.

Trial Examiner Kolb: Your position is then that one customer purchasing "Hayes" piston rings and another purchasing a competitive brand are not in competition with each other?

Mr. Butterfield: No, if one purchases piston rings and another purchases leaf springs, they are not in competition.

Trial Examiner Kolb: We have no case where one purchaser buys piston rings and one purchases leaf springs.

Mr. Butterfield: Well, if one purchases overload springs for a G.M. truck and the other purchases passenger car leaf springs, they are not in competition with each other. Now, both of those are springs but they are not in competition (Part 2, Page 525).

Trial Examiner Kolb: Well, as I understand it, the leaf spring, coil spring and chassis part is one line which is sold to jobbers who are engaged in reselling to fleet owners, automobile repair places, filling stations, etc., where any of these parts might be used. The discounts which have been set by the Respondent on this line apply equally to any item within the line. Under the circumstances, I do not believe it is necessary or material to this case that the Commission show that the identical part has been purchased by two competitive jobbers in order to maintain this proceeding, and I think it is immaterial whether or not one purchased leaf springs and another purchased heavy duty springs or something of that sort, and for that reason I am going to sustain the motion to strike the exhibits, Respondent's Exhibits 1 to 3 inclusive, and also the testimony of Mr. Goetz with reference to the difference in the articles purchased by the various customers.

Mr. Butterfield: Mr. Examiner, I'd like to ask on the record whether it is the theory in this proceeding—now, I have asked for a bill of particulars, is it the theory on this record that there does not have to be any injury shown to any competitor or the customers of either of them, that it doesn't have to be shown any tendency to create a monopoly (Part 2, Page 526), any substantial lessening of competition or any prevention, injury or destruction of competition, but the mere showing of an offering without a purchase of different prices to different customers is sufficient to make a prima facie case, irrebutable, of which the Commission will take official notice and will find a

per se illegal price discrimination. Now, if that is the case that I have to meet, then I will have to—

Trial Examiner Kolb: That sounds like when do I stop beating my wife.

Mr. Butterfield: No, but I have offered these exhibits which the Examiner has stricken, showing the purchases and sales for the period selected by the Government in its Exhibit 79, and the invoices do not reflect that the so-called competitor and I am being, by this motion, precluded from showing what it is that these customers bought. Now, the exhibits here, so far as the Government's case is concerned, do not show a single item, it takes a category, two categories out of three categories the Moog Industries, Inc., uses for internal purposes and for marketing purposes and has taken figures without showing the items sold, and on the basis of that, attempting to establish a prima facie case of price discrimination without allowing the respondent to show what these figures consist of, what the items were that were purchased, to show that these were non-interchangeable items (Part 2, Page 527).

Trial Examiner Kolb: As long as they come within the line of leaf springs, coil springs and chassis parts on which the discounts are based and which are normally sold to jobbers in that business, I see no occasion for going into whether it was a leaf spring, heavy duty, light duty or anything else. I might go along with you if you were talking about one man that was in the grocery business and another man that was in the hardware business, discount with reference to that, but you can't carry that into the one line which is being handled and sold to customers usually all of them buying—I mean, the customers buying the entire line or so much as they need in connection with their business. If we carry this down to the nth degree on your argument, the Commission would have to show that, for instance, Crow-Burlingame bought nuts and the other bought bolts and, therefore, they were not in competition with each other because one had bought nuts and one had bought bolts.

Now, if you are going to have to show one bought one-half inch bolts and another bought 1½ inch bolts, I think it is carrying it to absurdity, and I think you have gone as

far as you can go here when you show the purchases were made in a particular line which is customarily sold to the customers which are purchasing and on which the discounts are allowed on the entire line regardless of whether it is one item in the line or another item in the line (Part 2, Page 528).

Mr. Butterfield: Now, all of these lines are within the automotive parts field. I mean, there is piston rings, and there is springs and there is coil springs and there is chassis parts. Now, all of those—now, in making its case, I can't tell whether the Government is claiming about the piston ring pricing practices of Moog or not.

Trial Examiner Kolb: The charts do not cover piston rings, so I don't know how you can raise a question as to whether or not piston rings are involved. The charts which have been introduced are limited to leaf springs, coil springs and chassis parts which is one line; piston rings are a separate and distinct line.

Mr. Butterfield: Would the Commission—I mean, if the respondent fails to negative injury, would the Commission enter an order covering piston rings in the absence of the inclusion of piston rings in the evidence?

Mr. Schrup: The evidence is not restricted to the charts in evidence; there is other evidence on it.

Mr. Butterfield: Piston Rings are contemplated in this proceeding?

Mr. Schrup: Yes.

Mr. Butterfield: They are?

Mr. Schrup: Piston rings—I direct your attention, Mr. Butterfield, to Exhibit 1—are subject to the same retroactive discount as the coil action line and leaf line. I mean as (Part 2, Page 529) I gather, the segregation of these three lines is merely for the convenience of your company; there is discrimination in all three.

Mr. Butterfield: Now, in so far as piston rings are concerned—

Mr. Schrup: Do you want all this argument on the record or—

Trial Examiner Kolb: Do you want it on the record?

Mr. Butterfield: I'd like to have this portion of it on the record, if your Honor please, because it goes to what I am trying to make my defense here. Now, the piston rings are not included in the charts but the piston rings are included in an exhibit showing the offering of a discount to piston ring customer, is that not true?

Mr. Schrup: Are we arguing on this motion to strike or is this the final argument before the Commission? We put our case in, our prima facie case is in.

Trial Examiner Kolb: Mr. Butterfield asked a question as to whether or not if the case showed price discrimination on coil spring parts, whether or not an order would be entered on piston rings. I might very quickly and briefly answer that by saying if a price discrimination is found on any line in which you are operating, the order would prohibit you from entering into price discriminations—period, which would cover all your lines. In other words, the Commission would not enter (Part 2, Page 531) an order on price discrimination on coil springs and then have to try the case again on piston rings or something else. In other words, once having found the practice has existed, the order is to stop the practice. The Commission wouldn't care if it was piston rings, chassis parts, coil springs or what it might be, if the respondent was selling those at the time under the same basis.

Mr. Butterfield: Well, my preliminary evidence here, Mr. Examiner, is directed to the question of injury and I had supposed this foundation would be laid by showing what it was that the various customers bought.

Trial Examiner Kolb: Well, I think you are unduly encumbering the record with immaterial and irrelevant testimony. That is the reason I have stricken the testimony up to date. I permitted you to put it in to find out what it was all about, whether there was some basis for your contention, but as I see it, there is no basis for any contention in view of the fact that the purchases by the several customers were from the same particular line and certainly I am not going to go into whether or not the individual item was purchased by two customers before you can show a price discrimination where it is in the same line and the discount applies to both the same.

Mr. Butterfield: Well, I don't believe it is necessary but I will take exception to the striking of these exhibits from the evidence (Part 2, Page 531).

Trial Examiner Kolb: Let the record show exception by attorney for respondent.

Mr. Butterfield: And I would like to reserve that question for an appeal to the full Commission, and I have other evidence here that I'd like to make an offer of proof on, and I have documents that I'd like to have marked to make an offer of proof on, going directly to this question of competition and injury (Part 2, Page 5 2). * * *

Mr. Butterfield: If your Honor please, referring to FTC Exhibit 79-A, item No. 1, Birmingham, Alabama—

Trial Examiner Kolb: 79?

Mr. Butterfield: Yes, 79A, Birmingham, Alabama; and Exhibit No. 67 also—Exhibits 67 and 79-A. Exhibit 67 covers Alabama; Exhibit 79 covers quite a few places. Well (Part 2, Page 532), the whole exhibit; 79-A to 79-F covers 83 communities in Alabama, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, and Texas. And also this has reference to another exhibit, Exhibit 72—Exhibits 67, 72 and 79-A.

Now, I have prepared a series of exhibits consisting of 38 pages of exhibits, supported by 429 documents, being the original invoices covering sales in Birmingham, Alabama for the period set forth in Exhibits 67, 72 and 79-A. In view of the fact that exhibits 1, 2 and 3 series relating to Exhibit 79-A, 79-B and 79-G, being the original invoices from which the figures were taken for those exhibits, were stricken from the record this morning, I will offer these analyses and invoices to show how these sales to the various customers break down, directed to this problem of injury and competition or to destroy competition with the customers of any of these purchasers.

I can have these documents identified and marked and offer them in evidence and then make my offer of proof in the event the Commissioner strikes these documents. Now, I don't know whether to make my offer of proof now or offer the original documents on this work that's been

done. There has been about 60 man days of work put in on these things (Part 2, Page 533).

Respondent's Exhibits 4-A to 4-Z-22, inclusive, and Respondent's Exhibits 5-1 to 5-502, inclusive, were marked for identification.

Mr. Goetz then resumed testifying.

Respondent's Exhibits 4-A to 4-Z-22 were either prepared by me with another person or were checked by me after another person had worked on them. We obtained the information shown on these charts from bookkeeping copies of invoices in our files, bookkeeping copies of the original invoices, and they are marked for identification "Exhibits 5-1 through 5-502." All of these invoices refer to the City of Birmingham, Alabama, for the period covered in Commission's Exhibits 67, 72, and 79-A (Part 2, Page 534). One set of these exhibits show purchases by only one of the companies in Birmingham, Alabama, another shows purchases of parts by two of the three companies that purchase leaf springs, coil springs and coil action parts, and another shows purchases by companies of parts where all three companies purchased the same parts. There are 27 pages of the singles; there are 9 pages of the doubles; and 12 pages of the triples. There are 369 items covered altogether in these exhibits, none of them being interchangeable items. (Part 2, Page 535).

Thereupon Mr. Butterfield offered Respondent's Exhibits 4-A to 4-Z-22, as well as Respondent's Exhibits 5-1 through 5-502 in evidence.

Mr. Schrup: With the Examiner's permission, I would like to ask a few questions before making my objection. Permission was granted by the Trial Examiner.

In response to questions from Commission's counsel, Mr. Goetz stated that the exhibits which he had just identified embraced the leaf spring line, including coil springs and chassis parts, and the coil action line; that they do not embrace any piston ring line except some of the five hundred numbers; that C. E. Davis Company, a customer, was embraced in the piston ring line (Part 2, Page 536); that all these distributors are not necessarily furnished with the various catalogs of the various parts, from which they can

order, as it depends on what they buy; that the witness had never counted how many items were embraced in the leaf spring line, including coil springs and chassis parts; that he could not say how many part numbers there would be; that it would be several thousands, because there are a lot of items listed that are not sold.

Counsel for the Commission then asked the witness with reference to the leaf spring line, including coil springs and chassis parts, how much would it cost a distributor to stock all of those items and sizes (Part 2, Page 537). The witness answered that they have what they term "Opening Stock Orders" that have the amount; that he didn't know what the amount would be, as each six months or so they get up a new list; that an approximation would be from $300 to $500 for chassis parts for each. The witness stated that he hadn't the slightest idea how much it would cost a distributor to stock every item and size that was offered for sale, embraced by the leaf spring line, including coil springs and chassis parts, if a distributor desired to stock all the items and sizes; that no distributor actually did that because there were lots of unpopular items that are non-stocking items, and when they get a call for that item they order directly from us (Part 2, Page 538); that the amount of annual purchases that each distributor makes from Moog of the leaf spring line, including coil springs and chassis parts, varies from year to year, depending upon the line that he purchases; that it will vary in the amount as to annual dollars, as to the different items purchased, and as to the line within the line that he purchases.

Mr. Schrup: Well, if your Honor please, I will renew the objections heretofore made to series 1, 2 and 3 of Respondent's Exhibits, that they be stricken from the record particularly with reference to those exhibits which seem to be identical with the previous exhibits, which disclose parts not purchased in common by the three purchasers in Birmingham, Alabama.

Mr. Butterfield: The Exhibits 1, 2 and 3 were original invoices reflecting the sales made to certain purchasers in Searcy, Arkansas, Marshall, Texas and Arkadelphia, Arkansas, and there was one in there that evidently was included in error, it was a sale to Atlanta.

Mr. Schrup: That was a drop shipment.

Mr. Butterfield: No, it was shipped directly to Atlanta as I remember the exhibit.

Mr. Schrup: It was purchased, however, by the customer in Searcy?

Mr. Butterfield: And sent to Atlanta, but it was included, the amount was included in the Marshall Texas (Part 2, Page 539) comparative chart that was made up, 79-G.

Mr. Schrup: Well, that was a resale. He gets a profit on it.

Mr. Butterfield: There was no exhibit showing an analyzation of those regional invoices, those were just the original invoices, one, two and three, which is the basic material from which all of the sales must be eventually obtained. All the records that the Federal Trade Commission examined were these invoices, the basic records, that is, Exhibits 1, 2, and 3, and those were stricken this morning. Now, Exhibit 4 is an analyzation of Exhibits 5-1 to 5-502, and those are the original invoices for the town of Birmingham, Alabama.

Mr. Schrup: That isn't the point, Mr. Butterfield. We aren't questioning the original invoice, the objection is made for the purpose you are offering them.

Mr. Butterfield: I am offering these to show what sales Moog made in Birmingham, Alabama; the others were offered this morning to show the sales made in Arkadelphia, in Marshall and in Searcy, Arkansas, which was not shown on any exhibit which has been heretofore introduced.

Mr. Schrup: The exhibits serve no purpose—that is, the purpose for which you offer these exhibits is the basis for which we are objecting to them. The charts are based on those exhibits, it is true, but the exhibits are of no useful purpose as we see it. (Part 2, Page 540).

Mr. Butterfield: Well, they are introduced for the purpose of negativing the charge of injury which has been made here.

Mr. Schrup: And that is the basis upon which we have objected.

Mr. Butterfield: Well, I think we have a right to negative injury.

Trial Examiner Kolb: Mr. Butterfield, the Birmingham sales appear on chart No. 67, covering the coil action, Commission's Exhibit 72 and Commission's Exhibit 79-A, is that right?

Mr. Butterfield: That is correct.

Trial Examiner Kolb: And you are not questioning the correctness of the figures that appear on those three exhibits and on the tabulation?

Mr. Butterfield: Well, let's see, just a minute, if you please. Yes, I am questioning the figures shown there as being comparative sales and commissions to customers in specified localities, that is comparison sales.

Trial Examiner Kolb: But you are not questioning the correctness of the figures showing the net sales to the individual customers as set out in those exhibits, is that correct? (Part 2, Page 541.)

Mr. Butterfield: Well, there is one there—my next exhibit, C. E. Davie, that $94.70, that was an error and Davie shouldn't appear on there at all, on that chart.

Trial Examiner Kolb: Is he located in Birmingham?

Mr. Butterfield: Yes, he is located in Birmingham. But he shouldn't appear on this chart because he didn't buy any leaf springs, coil springs or chassis parts. That was an error.

Mr. Schrup: Was that an error committed on the books of the Moog Company?

Mr. Butterfield: Well, it was an error that checks out and shows that Davie didn't purchase—I mean there are no invoices to Davie for those particular parts.

Mr. Schrup: Well, I understand the accountant did not go through the invoices but went through the books of the company.

Mr. Butterfield: Well, that might have been, but the invoices were available, and, of course, when we analyze this, that shows up.

Mr. Schrup: Well, that specific part of Commission's Exhibit 79-A, we have no objection to correcting it. If the

chart is incorrect on that particular figure, we will certainly agree to correct it.

Trial Examiner Kolb: These exhibits will have nothing to do with the Davie account except there wouldn't be anything in there at all?

Mr. Butterfield: Yes, because he didn't purchase that (Part 2, Page 542). Now, as to the other figures on the chart, those penny figures there have not been proved out as yet.

Mr. Schrup: Read that back, please.

(Mr. Butterfield's remarks read by the reporter.)

Mr. Butterfield: We don't know yet whether those figures are the exact figures or not and I wouldn't want to be precluded from questioning the accuracy of that if it becomes necessary in the course of this proceeding.

Mr. Schrup: It is de minimis.

Mr. Butterfield: It isn't de minimis because the problem—well, as I understand it, we are not involved in dollars and cents, we are involved in a question of competition.

Trial Examiner Kolb: That is what I was getting at; what I was trying to find out. The exhibits which you are now offering—

Mr. Butterfield: They have all the material in there.

Trial Examiner Kolb: —they are not offered for the purpose of contesting the correctness of any figures appearing on these—

Mr. Butterfield: They are not offered for the purpose of contesting, but should it appear from these exhibits there are errors in there, why, the Respondent would like to reserve the right to correct those figures. These exhibits are offered—

Trial Examiner Kolb: They have to be offered for one purpose or another. You say they are not offered for the purpose of correcting these exhibits (Part 2, Page 543).

Mr. Butterfield: No.

Trial Examiner Kolb: All right.

Mr. Butterfield: These are offered for one and only one purpose and that is to lay the groundwork for the

negativing of the charge of price discrimination that the FTC has made against the respondent. That is the purpose of these exhibits.

Trial Examiner Kolb: By showing that these customers in Birmingham, Alabama have not purchased the same merchandise?

Mr. Butterfield: Yes, and further, that those who have purchased the same merchandise were not injured themselves, nor was anyone injured, nor was competition substantially lessened, nor does Moog enjoy or even—there is not even a possibility of Moog enjoying a monopoly position in the City of Birmingham. That is limited to the City of Birmingham now. And, of course, that is the thesis of the respondent's defense for all of the communities shown in these exhibits, and all of the trading areas.

Mr. Schrup: If the Examiner please, you have already ruled with reference to certain portions of similar exhibits on 1, 2 and 3 offered by the respondent. Now, as to the latter part of the grounds of respondent's counsel, there is no relevancy or materiality to that at all.

Trial Examiner Kolb: As I understand it, since they are not offered for the purpose of showing any discrepancy in the (Part 2, Page 544) tabulation, but solely for the purpose of showing that the customers mentioned did not all buy the exact same merchandise, except in certain instances where I believe three of them did, I will sustain the objection to the documents as being irrelevant and immaterial to the issues of this proceeding.

Mr. Butterfield: Mr. Examiner, in the statement made that these were offered solely for the purpose as stated by the examiner, it was not my intention to limit the introduction of the invoices from which the sales were made to these customers in Birmingham to that particular issue. As I stated, the purpose of the introduction of these invoices goes to the meat of this controversy, that is, whether or not Moog did or did not engage in illegal price discrimination contrary to Section 2-A of the Clayton Act as amended by the Robinson-Patman Act.

Trial Examiner Kolb: In what way is that relevant?

Mr. Butterfield: These show the sales Moog made in this period. That is something which has not yet been

hown in the record. The FTC chose not to show those sales in Birmingham for purposes peculiarly within the knowledge of the counsel supporting the complaint. But the respondent must show what he did in Birmingham in the face of this exhibit that has been put in since the exhibit was admitted over objection of counsel for the respondent, and since the motion to strike this exhibit from the files has been overruled and the respondent (Part 2, Page 545) is in no position to make a limited offer of the basic invoices from which these Birmingham sales were made for the period, and I don't intend to make a limited offer with regard to the basic invoices.

Mr. Schrup: Personally, to be very frank with you, your offer doesn't make sense to me. We have a chart 79-A which purports to show uncontestedly the dollar and cents sales in Birmingham. That is all we need. We don't have to have thousands of invoices in this record.

Mr. Butterfield: That is not the fact, that this is uncontestable. The showing made by this chart is contestable.

Mr. Schrup: What are you contesting? One minute you say yes, one minute you say no, we can't make head or tail out of you.

Mr. Butterfield: I could not permit this exhibit to go in and official notice taken of the fact that no attempt has been made by the respondent to prove what the sales of Moog were, what did they sell?

Mr. Schrup: Well, you have made your offer and it has been ruled on. You made your attempt.

Mr. Butterfield: Has there been a ruling, Mr. Examiner, and exclusion of these exhibits?

Trial Examiner Kolb: The invoices show what Moog sold, don't they? (Part 2, Page 546.)

Mr. Butterfield: That's right.

Trial Examiner Kolb: What does the tabulation show?

Mr. Butterfield: The tabulation shows what they sold and to whom.

Trial Examiner Kolb: Doesn't the invoices show that?

Mr. Butterfield: The invoices also show that.

Trial Examiner Kolb: What is the purpose of the invoice?

Mr. Butterfield: The tabulation is made—it is an analysation made by the respondent of these invoices for the purpose of—it is a tabulation made of these invoices for the purpose of showing what items were competitive and what items were not competitive.

Mr. Schrup: I think there now is the answer, it finally comes out. It is the same thing that has been ruled on in Exhibits 1, 2 and 3. That's what I have been telling you. You must beat yourself coming around the circle. It is another attempt in an indirect way to get the exhibits in, similar to Exhibits 1, 2 and 3, which were stricken on my motion before lunch.

Trial Examiner Kolb: We will try it again. The purpose of the offer of these exhibits is to show that competitive or non-competitive items were purchased by the various customers which are listed on Commission's Exhibit 79-A, 67 and 72, in Birmingham, Alabama (Part 2, Page 547).

Mr. Butterfield: By competitive and non-competitive, I wish to be understood. I don't mean that any of these invoices show a condition of no competition in Birmingham. I used the word "non-competitive" in a very limited sense, meaning that these items were not purchased by any other customer in Birmingham than the ones shown on these invoices as analyzed in these charts.

Trial Examiner Kolb: These charts show both competitive and non-competitive items.

Mr. Butterfield: Unfortunately I used a term there that I think I shouldn't use since—

Trial Examiner Kolb: Identical and non-identical I think is what you mean.

Mr. Butterfield: I am not using the word "competitive" in the sense of the word in the statute.

Trial Examiner Kolb: Identical—

Mr. Butterfield: Identical and non-identical, all of these items are non-interchangeable, there is no substitution of one part for another. This is not something that can be used for one purpose and then can be—someone else

can use it as a makeshift for something else. This part has only one purpose. And there were sales of parts, the single purpose parts. There were 329 separate items sold in Birmingham of which 291, I believe—

The Witness: 369.

(Part 2, Page 548.)

Mr. Butterfield: 369.

The Witness: Excuse me, the total is 531 altogether.

Mr. Butterfield: 531 items.

The Witness: And 369 were individually sold.

Mr. Butterfield: 369 were individually sold.

Mr. Schrup: Just a minute. I don't think that is proper; after all, we have an objection made and we have a ruling made, and now Mr. Butterfield is trying to put in the record indirectly what he couldn't get in directly. I don't think that is proper procedure.

Trial Examiner Kolb: Well, I want to know the purpose for which this is being offered before I make my ruling so the record will show why I made the ruling, and that is what I am trying to get down to.

Mr. Butterfield: Let me put it this way: The Government—

Trial Examiner Kolb: Let me put it this way. As I understand it, your offer of these exhibits is to show that the Commission has failed to establish the fact that no identical items were purchased by each or two or three of the jobbers or customers located in Birmingham, Alabama.

Mr. Butterfield: The Commission has failed to establish the sale of any part, any single part in Birmingham, Alabama. Not any—not one single part of Moog Industries has a sale of that been established.

(Part 2, Page 549.)

Trial Examiner Kolb: Well, I held this morning and I am still of the same opinion, that it doesn't make any difference whether or not it was a bolt or a nut or a leaf spring, if it is part of the line which is being sold to the customers as set out in their catalog for automotive parts to be used in the repair and replacement of automotive parts by garage men and other parties who do repair work, and

as I understand this offer is made to show that the identical parts were not purchased by the separate customers and, therefore, there is no competition between the two, and no injury to competition. Am I correct in that statement?

Mr. Butterfield: Your Honor, this is only part of the case.

Trial Examiner Kolb: Am I correct in my statement, as far as I have gone?

Mr. Butterfield: That is part of it, if your Honor please; that is only part of the case. I am not resting the whole respondent's case on this single showing. This is the foundation evidence from which the respondent hopes to build a defense against the charge of injury to competition or any offense against the Robinson-Patman Act, and without those invoices in the record, it is impossible for the—

Trial Examiner Kolb: From the evidence you are attempting to build what is in effect a contention that the identical parts were not involved in these sales.

(Part 2, Page 550.)

Mr. Butterfield: In most of the sales.

Trial Examiner Kolb: And since the identical parts are not involved, there is no injury to competition. Isn't that the premise of your defense?

Mr. Butterfield: There is no prima facie raising of injury to competition.

Trial Examiner Kolb: Well, if there is no—your position is there is no discrimination where the parts are not identical?

Mr. Butterfield: My contention is that the Moog Industries, the respondent, has not discriminated within the meaning of the Robinson-Patman Act.

Trial Examiner Kolb: Because the parts are not identical which were sold to competing customers?

Mr. Butterfield: Because there has been no injury. If your Honor please, I am faced with this: The Government has put in a case in which no injury has been shown and I am placed in the position where I have to negative something that the Government has not yet proved. I cannot rest, though, because I am very much afraid that the

Commission may take official notice that a mere price difference is a price discrimination as under the Morton Salt Case, and I must show what the facts are. Now, if the facts demonstrate that Moog has discriminated and is guilty of the Robinson-Patman Act, then you have helped the Government prove its case. But certainly (Part 2, Page 551) up until now no case has been shown as to injury and it is in the negativing of that injury that I first direct my attack because unless injury has been shown, unless there has been shown a price discrimination, then I have not available to me the privilege of the defenses afforded by 2-B, because 2-B applies only to price discriminations which violate 2-A.

Trial Examiner Kolb: Now we are going into what you expect to prove in the event you go ahead with your case at some later date and some later hearing, but what I am concerned with here is solely the admissibility of these particular documents—are they relevant or are they not relevant? Now, my understanding is that since they are simply to show that identical merchandise was not sold to the competing customers who are now listed in the chart, that is the purpose of that exhibit, that in my opinion is incompetent and irrelevant.

Mr. Butterfield: May I suggest, Mr. Examiner, that not by the longest stretch of my imagination can I conceive of any invoice in this period complained of being irrelevant to this proceeding. I just can't conceive of it, of an invoice reflecting a sale—it is the same as saying the sale itself is irrelevant to this proceeding. Now, Moog would not be in any difficulty with the Federal Trade Commission if it had made no sales. Now, Moog did make sales, FTC complained of the sales and Moog brings in the invoices reflecting those sales, and I cannot see how it is immaterial (Part 2, Page 552).

Trial Examiner Kolb: But you have charts that set out the sales. These charts 79-A and 67 are charts which set out the sales made by the respective companies in Birmingham, Alabama. You are not contesting, by means of these exhibits, the correctness of those figures but you are accepting those figures as being correct, since they were taken from your books, but your sole purpose for

the exhibits is to show not the incorrectness of the exhibit but to show that the items which are listed on the exhibits are not identical.

Mr. Butterfield: I am introducing these invoices to make the picture complete. These charts tell only part of the story and to the extent that they tell only part of the story, they are incorrect. I have to show the whole fact. The FTC has shown a portion of the fact.

Mr. Schrup: If the Examiner please, Mr. Butterfield keeps shifting his grounds so much and using terms that it is very difficult to see what he is driving at. If I can explain it as I see it, Mr. Butterfield offered series 1, 2 and 3 this morning; upon motion to strike by me, they were eliminated from the record. They were eliminated on the basis they purported to show the purchase of different parts from Moog by competing purchasers; the parts, however, all being embraced in the leaf spring line, including coil springs and chassis parts of Moog. Now, he has come back and he is trying to introduce a series of hundreds of invoices showing purchases by (Part 2, Page 553) three buyers in the City of Birmingham, Alabama; some of these invoices show that these buyers did not always buy identical parts and some show that they were common buyers of the same part, which is a much weaker position for him. Now, you have ruled on that. Certainly the only part—

Trial Examiner Kolb: I guess there is no reason to prolong the argument. The objections to the exhibits will be sustained (Part 2, Page 554).

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Mr. Goetz resumed the witness stand.

I have compared the charts which were prepared from original invoices on sales to Birmingham with the charts prepared by the Federal Trade Commission that were introduced into evidence as Exhibits 67 and 79-A.

Exhibit 79-A does not contain all of the customers in Birmingham, Alabama (Part 2, Page 555).

Ensley Auto Parts Company is in Birmingham, Alabama and sales were made to them, but they are not reflected in Commission's Exhibit 79-A. Sales were made to them of coil springs, chassis parts, and leaf springs during the fiscal year ending 1950.

The witness was asked to break down the classification leaf springs, coil springs and chassis parts. He stated that is a general term designed as a catchall to include everything but coil action parts and piston rings. It includes five separate, distinct classes of parts. It includes leaf springs; it includes coil springs; it includes tie rod ends; it includes shackles; and it includes king bolts.

According to Exhibit 4-Z and 4-Z-4 Enzley Auto Parts bought leaf springs. According to Exhibit 4-Z-6 they bought coil springs; they bought coil springs Exhibit 4-Z-21, Part 2, Page 556; they bought coil springs on 4-Z-22; they bought tie rods on 4-Z-2; they bought king bolts on Exhibit 4-Z-3; they bought coil action parts on Exhibit 4-W and 4-Z-9, 4-Z-10, 4-Z-11, 12, 13, 14, 15, 16, 17, 18, 19, and 20; Exhibit 4-G is leaf springs and spring parts, purchased only by Ensley Auto Parts Company, Birmingham, Alabama. That is reflected on this invoice Exhibit 5-489. Exhibit 4-T is tie rods purchased and is reflected on Exhibit 5-502 (Part 2, Page 557), and is also reflected on Exhibits 5-488 and 5-493. Those are the exhibit numbers on the original invoices. That is all of those.

The witness was then asked to turn to Respondent's Exhibit 4-Z-6 and asked if the purchase of coil springs there was reflected on Respondent's Exhibit 5-478. Coil Springs purchases are reflected on Respondent's Exhibit 5-478. I am referring to purchase by Ensley Auto Parts. They are also reflected on Exhibits 5-483, 5-494, and 5-500 (Part 2, Page 559).

The witness was then asked to turn to Respondent's Exhibit 4-Z-21, and the witness stated that the purchase of coil springs there was reflected on Exhibits 5-483, 5-500, 5-478, 5-494, 5-465, 5-486, and 5-454.

Referring to Exhibit 4-Z-22, the invoice reflecting the entry of purchase of coil springs appears on Respondent's Exhibit 5-478, and 5-486 (Part 2, Page 560) and also respondent's Exhibit 5-492.

Referring to Exhibit 4-W, the purchase of Ensley Auto Parts, Birmingham, Alabama, is reflected on Respondent's Exhibit 5-471, 476, 490, 499, and 496.

Referring to Respondent's Exhibit 4-Z-2, referring to the purchase of tie rod ends, that is, drag links, which is part of the chassis parts, that chart reflects the invoice marked as Respondent's Exhibit 5-488 and on 5-502.

Referring to Respondent's Exhibit 4-Z-3, the purchases of king-bolt kits, which is a part of chassis parts, is a classification of chassis parts (Part 2, Page 561), and the purchases on that chart reflect the invoice marked Respondent's 5-461-457-501-482 and 502.

Referring to Respondent's Exhibit 4-Z-9, the purchases on that chart reflect the invoices marked 5-476.

Referring to Respondent's Exhibit 4-Z-10, the purchases on that chart are a reflection of invoices marked Respondent's Exhibit 5-458-472-490-474 (Part 2, Page 562), as well as Respondent's Exhibit 5-463-450-451-466-468-469-491-449.

Respondent's Exhibit 5-449 are for coil actions.

Referring to Exhibit 4-Z-13, the purchases in that exhibit reflect invoices marked Respondent's 5-462-481-498-449-455-472-and 474 (Part 2, Page 565) as well as Respondent's 5-480-484-497-490-496-452-458-450-and 451.

Referring to Respondent's Exhibit 4-Z-14, the purchases shown on that exhibit are reflected in invoices marked Respondent's Exhibit 5-450-452-(Part 2, Page 566), as well as 5-458-463-475-479-497-480-496-456-449-455-472-484-490 (Part 2, Page 567).

Referring to Exhibit 4-Z-15, the purchases shown on that exhibit are reflected in the invoices marked Respondent's Exhibit 5-455-459-458-463. That is a coil action part. There are also reflected in Respondent's Exhibit 5-449-452-472-480-484 (Part 2, Page 568), as well as 490-471-475-497-450-487-and 451.

Referring to the chart or Respondent's Exhibit 4-Z-16, the purchases shown on that part are reflected on invoices marked Respondent's Exhibit 5-463-475-480-498 (Part 2, Page 569), as well as 451-449-464-490-452-458-459.

Referring to Respondent's Exhibit 4-Z-17, the purchases shown on that chart are reflected on invoices Respondent's Exhibits 5-479. That is another coil action part. 5-449-5-450 (Part 2, Page 570), as well as 5-455-459-464-471-497-475-481-484-498-453.

Referring to Respondent's Exhibit 4-Z-18, the sales on that exhibit are reflected by invoices marked Respondent's Exhibit 4-450 (Part 2, Page 571)—that is a coil action line—as well as by Respondent's Exhibit 5-451-453-455-459-476-479-481-485-491 and 497 (Part 2, Page 572).

Referring to Respondent's Exhibit 4-Z-19, the purchases shown on that chart are reflected in the invoices marked Respondent's Exhibits 5-449—those are another coil action line parts—as well as 451-455-459-460-469-466-471-477-479 485 (Part 2, Page 573).

Referring to Respondent's Exhibit 4-Z-20, the purchases on that chart are reflected in the invoices marked Respondent's Exhibit 5-449-460-466-469-477-485-498.

The purchases referred to in these various charts were purchased by Ensley Auto Parts Company (Part 2, Page 574).

Referring to Respondent's Exhibit 4-G, the invoice marked as Respondent's Exhibit 5-489 is a reflection of the invoice.

Referring to Respondent's Exhibit 4-Z-4, the invoices on which the purchases are there reflected are marked Respondent's Exhibit 5-467—that is a spring—and on Exhibit 5-470 and 495 there are other charts such as Respondent's Exhibit 4-Z-6—coil springs (Part 2, Page 575). Those purchases are reflected in invoices marked Respondent's Exhibit 5-478-483-494-500. None of those sales are reflected on charts prepared by the Federal Trade Commission in their Exhibits 67 and 79-A. I am referring to the sales on Respondent's Exhibit 4-Z-6 and on this point I am referring to Exhibit 4-Z-6 alone (Part 2, Page 576). None of those sales are reflected in FTC Exhibits 67 and 79-A.

All of the testimony that I have given in regard to these charts, this morning, has all been with reference to Ensley Auto Parts Company, and there has been no other purchaser involved in them.

Trial Examiner Kolb: As I understand it, all invoices which pertain to purchases by Ensley of leaf springs, coil springs and chassis parts, they do not appear in the Commission's Exhibit 79-A.

Counsel for Commission agreed to this statement.

The Trial Examiner inquired of the witness if Ensley was a member of a group, and the witness answered that they were not.

Trial Examiner Kolb:

Q. The exhibits also show "Purchases By The Dixie Spring Service" except in one exhibit where it states "Purchases By Cotton States on the Account of Dixie Spring." Is that a mistake? (Part 2, Page 577.)

The Witness: No, that is purchased by three concerns by Cotton States in Alabama, by Dixie Auto Parts—

Trial Examiner Kolb: Oh, then Dixie Spring Service is not a member of a group?

Witness: No.

By Respondent's Counsel:

Q. Now, Mr. Goetz, these charts and exhibits that you have prepared—these charts reflect, do they not, the fact that in many instances the largest purchasers got the smallest discount and the smallest purchasers got the "smallest" (largest) discount?

Commission's counsel objected to any questions on the charts until they had been offered and received in evidence, which objection was sustained by the Trial Examiner (Part 2, Page 578).

At this point counsel for Respondent re-offered in evidence Exhibits 4-A through 4-Z-22.

Trial Examiner Kolb: Well, to shorten this—Mr. Goetz, series 5, Respondent's Exhibits 5-1 thru 5-502, do those represent all the sales made by the Respondent to the Birmingham area?

The Witness: Yes, they do.

Trial Examiner Kolb: Covers sales to all customers in the Birmingham area?

The Witness: Yes, those are the invoices only.

Trial Examiner Kolb: On the offer of these exhibits yesterday, I refused to receive in evidence Exhibits 4-A thru 4-Z-22, and Exhibits 5-1 thru 502. On the bases of the testimony this morning, it appears that the invoices in the 5 series have shown that one customer, the Ensley Auto Parts, should have appeared on Commission's Exhibit 79-A,—and what was the other exhibit number?

Mr. Schrup: That is all, your Honor.

Trial Examiner Kolb: And consequently, it appears that that series of exhibits would be competent to show what sales were made in the Birmingham area, including the sales to Ensley Auto Parts, which was not included in the exhibit. I will accordingly receive Respondent's Exhibits 5-1 thru 5-502 in evidence.

(The papers referred to, heretofore marked for identification, Respondent's Exhibits 5-1 to 5-502, inclusive, were received in evidence) (Part 2, Page 579).

Mr. Schrup: May I ask if your Honor please, in connection with that ruling, does that extend to other exhibits other than those sales to Ensley?

Trial Examiner Kolb: I am receiving all the exhibits which Mr. Goetz has testified reflect the entire sales in the Birmingham area.

Mr. Schrup: Invoices?

Trial Examiner Kolb: Invoices only. Now, as to the tabulations, the tabulation appear to be drafting from these exhibits certain comparative data with reference to identical parts purchased by various customers. As stated yesterday, this, in my opinion, is incompetent, irrelevant and immaterial to the issues in this proceeding, so I will again refuse the admittance of Respondent's Exhibits 4-A thru 4-Z-22 (Part 2, Page 580).

October 13, 1952, at Denver, Colorado.

JOHN W. FOSTER testified on behalf of Respondent, Moog Industries as follows:

Direct Examination.

My name is John W. Foster. I am Treasurer of Foster Auto Supply Company at 550 Acoma Street, Denver, Colorado (Part 2, Page 583). I have been connected with that company twenty-eight years.

We purchased products from Moog Industries in the years 1947, 1948, and 1949. The witness was shown Commission's Exhibit Number 66, showing purchases of the Foster Auto Supply Company purporting to be in the amount of $8,085.74 for the year 1947; $713.86 for 1948; and $61.04 for the year 1949; and was asked whether those figures were approximately the amount that that company purchased during that period of time of coil action parts from Moog Industries. The witness states that he imagined the amounts were accurate; that he could check them with his check vouchers, which he did not have with him.

The witness was asked as to why the purchases for the year 1949 were about 10% of what they were in 1948; why the purchases in 1948 were less than 10% of what they were in 1947. The witness stated that the explanation for that was that Foster Company had changed to another make of coil action parts in 1948; that the company had only one coil action part manufacturer in 1947 and that then the Foster Company had the complete line of Thompson products and had changed to their coil action parts and that that accounted for the difference (Part 2, Page 584).

We are known as a distributor of automotive parts in Denver. We sell to wholesalers and also subjob some of our sales. We maintain a machine shop in our same building. We sell fleets, car dealers, independent garage men, retail outlets and sell parts at retail at a counter that we maintain at our place of business (Part 2, Page 585). We sell industrial concerns and consumer-buying groups. There is a difference in the prices we charge to these various people. We do not sell all of them at the same price. We buy direct from the manufacturer (Part 2, Page 586).

We buy at what is shown as Distributors Blue Sheet Prices. Moog furnishes no suggested selling prices. We are not bound to sell at those suggested prices. We can sell the items for whatever price we see fit. If we were selling an item purchased from Moog that has a suggested list price of one dollar, we would sell that at retail at a dollar. If a car dealer bought one of that item, and it was an emergency purchase or something like that, we would probably sell it to him for 67¢ (Part 2, Page 587). If the same item was bought by an independent garage man, we would sell it to him for 67¢. We would subjob an item like that for approximately 50¢. We would sell that item to a wagon peddler and his price would be the 50¢ price. In marking this item that we bought from Moog, we do not employ lower prices for the consumer. If we were selling direct to the consumer, there are circumstances in which we would vary that price. For instance, if a policeman on the beat would come in and want to buy that item for his own car, we would perhaps sell it to him for 75 or 80¢ (Part 2, Page 588). If the person who came in was an employe of the light company or the gas company, or the telephone company, we would give him a different price than a consumer that came off the street. We would give him a price of about 75¢. If an electric light company, an industrial concern, or a manufacturing concern bought a quantity of that item for their own use, we would make them a price of 60¢. If we were selling that item to a purchasing agent for a consumers buying group, if they were stocking the item, it would carry a 60¢ price. A subjobber or a wholesaler would get a 50¢ price. We sell to wagon peddlers and they pay 50¢. If wagon peddler bought on a voluntary basis we would probably sell it for 45¢. We vary the prices according to the volume that is purchased and according to whom the purchaser is (Part 2, Page 589).

Foster Auto Supply started in business in 1915. At that time there were other automotive distributors in Denver. One of them was Hendrie & Bolthoff. They have been in business since 1886. We are about 10% of their size. When the Foster Auto Supply Company started in business in 1915, there was a practice of rebates at that

time. When I first came with the company our full retail business was approximately 10% (Part 2; Page 590). When I came with the company in 1928 or 1929, there was very little redistribution from Foster Auto Supply. The growth record of our company has been fairly steady through the years. We had about 15% of re-distribution in the middle 30's. At the beginning of World War 2, we had 35% of redistribution, and since the war it is running over 55% redistribution (Part 2, Page 591).

The witness was referred to Commission's Exhibit 66, which, according to the exhibit, Foster Auto Supply was the largest purchaser of coil action parts from Moog Industries in the year 1947, and the exhibit purported to show that Foster received about 9% volume rebate as compared with 7½% volume rebate for Steckel and B. K. Sweeney Electric, and the witness was asked whether he was familiar with the B. K. Sweeney Electric. The witness stated he was and that that company was about five times larger than Foster Auto Supply.

The witness' attention was again called to Commission's Exhibit Number 66, and referred to the fact that in 1948 it showed coil action sales by Moog Industries to Foster Auto Supply, Steckel Auto Supply and B. K. Sweeney, and the witness was asked if that fairly represented the number of wholesalers or distributors dealing in coil action sales in Denver for that period. The witness stated that it did not; that there were about 15 concerns engaged in selling in that period.

Q. In the year 1948, it shows you as the smallest purchaser of coil action parts and that B. K. Sweeney was the largest purchaser from this particular company, Moog Industries. No, Hendrie and Bolthoff was the largest purchaser, and this Exhibit Number 66 purports to show that Hendrie & Bolthoff was the largest purchaser, and the Exhibit Number 66 purports to show that Hendrie & Bolthoff got 8% volume rebate, the same as B. K. Sweeney Electric, and Steckel Auto got 7½%, while you received no volume rebate for that year. May I ask you if that list of automotive parts distributors fairly represents the number distributing coil action parts?

A. No.

Mr. Schrup: I have an objection to the question. What do you mean by fairly representative? This list only purports to be representative of buyers. I don't know what you mean by the word "fairly". The Exhibit is very fair on its face. It is all it is supposed to represent. There are other buyers of coil action parts in the City. I think you had better rephrase your question.

Examiner Kolb: The Exhibit appears to be a group of jobbers, not a group of buyers as far as the industry is concerned.

Mr. Schrup: Maybe I misstated myself. I meant jobbers.

Examiner Kolb: I think it is understood that this does not purport to show all the jobbers in Denver.

By Mr. Butterfield: For the year 1949 the Foster Auto Supply also appears—this Exhibit purports to cover three years purchasers, and the Steckel Auto Supply and B. K. Sweeney Electric and Western Spring Service Company. Now, the Western Spring Service Company received no volume rebate in that year on $967.00 in sales while Sweeney and Steckel received 5 percent and you received 18 percent on $60.00 worth of sales.

Mr. Schrup: 17 per cent.

Mr. Butterfield: 17 per cent. What did I say?

Mr. Schrup: 18 percent.

Mr. Butterfield: I was reading the last column.

Q. Do you know when the Western Spring Service started in business?

A. I don't know the exact year, but it was 10 or 15 years before.

Q. They were in business in '47 and '48?

A. Yes.

Q. And Hendrie and Bolthoff was still in business in '49?

A. Yes.

Q. And it is still in business today, is it not?

A. Yes.

Q. Will you state how big Hendrie and Bolthoff is compared with you today?

A. They are anyway ten times larger than we are.

The $8,000.00 worth of coil action parts that we bought from Moog, in 1947, did not represent all of our purchases of coil action parts for that year. It represented about 80% of our purchases. In 1948 the $713.86 coil action parts that we bought from Moog did not represent our total purchases of coil action parts for that year. It represents about 15% of such purchases, and in 1949 the $61.04 worth of coil action parts bought represented about 1% of our purchases of such parts (Part 2, Page 595). The explanation of that is that in 1948 the Thompson Products people came out with a knee action part which they didn't have previous to that time, and because of their overall line, we bought almost all of our coil action parts from them. At the present time we are buying about 50% of our purchases of coil action parts from Moog Industries. The witness was asked whether his failure to receive a volume rebate on purchases of coil action parts from Moog in 1948 had any effect on his decision to buy or not to buy Moog parts at that time. This was objected to, and the objection was sustained. In 1948, so far as I know, we did not lose any business in our distribution of Moog parts to Hendrie and Bolthoff or to B. K. Sweeney (Part 2, Page 596).

I am fairly familiar with the sales of automotive parts, particularly coil action parts and coil action springs, in this Denver area (Part 2, Page 597).

I did not include car dealers in mentioning the 15 distributors that were in business here distributing coil action parts and coil action springs in 1947, 1948, and 1949. The car dealer sells coil action parts and coil springs to the general public. Some of the car dealers purchase these parts at about the same price that other distributors purchase theirs (Part 2, Page 598).

We are in competition with the car dealer; we sell the same customers that the car dealer sells to; the garages and that sort of trade. The car dealer also sells at retail direct to the consumer, and so do we. We sell to the car dealer and we buy some coil action parts from the car dealer (Part 2, Page 599). We purchase coil action parts from a car dealer, and they usually sell us on what they

call "dealers discount", and we sell them coil action parts for their cars at a dealer's discount also.

Q. Is there a difference in price when you sell to them or when you buy from them, according to the volume that you buy or sell?

A. When we sell to them, there is a difference in price according to their volume. We would not normally buy any volume from them.

Taking the car dealers as a whole, we sold to them in considerable volume. We sell Moog Products to the car dealer in considerable volume. I could not tell you what percentage of our sales of coil action parts, purchased from Moog, that we sell to the car dealer. I do not know. I can answer it this way: Our car dealer business will constitute about 28% of our business, which would probably cover about 28% of Moog coil action parts to the car dealers (Part 2, Page 600). In most cases the car dealer re-sells those items to the same class of customers that we sell.

Cross Examination.

The Foster Auto Supply Company carries 85 or 90 lines for re-sale. Our volume of sales for 1950 and 1951 totalled overall about a million dollars annually. About 55% of those sales are redistribution sales, re-selling to jobbers (Part 2, Page 601). About 35% of our annual volume would be to dealers and large fleets and that sort of thing, and the other 10% would be to industrial companies, individuals and that sort of thing. As to the percentage of our over-the-counter sales, they are all thrown together, but actually it figures about 50% of our business. Our trade area is the State of Colorado, with the exception of Durango, the southern part of Wyoming, and the western part of Kansas. We travel 10 salesmen.

As to selling something to consumer-buying groups, I mean by that that there are several of them which we do not recognize as dealers, but we do sell the individuals in the group. For instance, the Public Service Company has a group, the Lowry Field employes, the Federal employes have groups. We cannot recognize them unless we jeop-

ardize our dealer business. But there are several of the people that belong to these groups that do come in and buy as individuals at a discount (Part 2, Page 602). In purchasing Moog products for re-sale, I do not have our catalogue or price list with me. We buy on what is known as a distributor's cost. As to the discount we get on most of the Moog items, it figures about 60%, and then on redistribution, we would have to buy it better than 60% to re-sell it.

Q. Do you buy all of your Moog products, no matter what the re-sale, at a certain price, at a certain discount?

A. No. It is all figured on a net price.

Q. That net price is all the same for all products you buy from Moog?

A. I don't understand your question.

Q. Is there any occasion when you pay Moog a different price on the same item you buy from them?

A. No.

I have previously stated that our purchases from Moog had dropped off in 1949 by reason of switching our business to the Thompson Products line, and that of late years we have turned some of that business back to Moog (Part 2, Page 603). The reason for that was, the biggest problem we had with Moog in the years 1948 and 1949 was their cataloging, our men were unable to read their catalogs. In '50 I believe they came out with a catalog that we were able to read, and because of that and the product was good, our men liked to sell it, they have taken it back in the line.

The Foster Auto Supply Company does not belong to any buying group, as a buying group. We are members of what we call the Mid-West Warehouse Distributors. Its primary function is not as a buying group. It is an interchange. It functions as an interchange among members. We do buy some products on buying forms supplied by Mid-West The transaction is handled on our purchase orders sent to the manufacturer on the Mid-West letterhead. The merchandise is shipped to us and billed to Mid-West. We find it economical to do it that way with many small lines because we have one check to make out instead of fifteen or eighteen, or whatever number there are (Part 2, Page 604).

We joined that group late in 1949. I believe it was incorporated the latter part of 1950. In 1949 we were a customer of Thompson Products. In 1949 we were buying all of our coil action line from Thompson Products, except a few emergency pick-ups from Moog at that time. In 1950 we did go back into the Moog set-up because of their catalogfng and it runs about 50% now from Moog (Part 2, Page 605). We buy from Moog on purchase forms through the Mid-West Group.

In issuing an order from our firm to Moog, we issue it on a purchase order form at this time entitled "Mid-West Warehouse Distributors, Inc." This order is sent direct to the Moog factory and the order is shipped direct to us. We pay Mid-West Warehouse Distributors for that merchandise monthly. We do not deduct anything from the purchase price when we pay them. As a result of our purchase transactions with Moog, Mid-West remits to us a rebate if the volume is into the volume rebate bracket (Part 2, Page 606). On Commission's Exhibit 66 our purchases apparently in 1949 were $61.04. On that particular item, whatever it was, according to the chart that was subject to 17% volume rebate.

Q. Now I notice that in 1947 your purchases from Moog amounted to Eight Thousand and some odd dollars and you received 9%. That accounts for a difference of 8% on your buying price. Now, do you prefer to buy at a lower discount rate?

A. You mean do we prefer to pay more money or not?

Q. That is the question.

A. No.

Q. I understand then that you prefer to buy always at a lesser price, if possible?

A. Yes (Part 2, Page 607).

Re-Direct Examination.

Q. You say that you get about 60% on Moog, but you have to get better than that for redistribution. By that you meant that in order to re-distribute you have to get better than 60%? How do you get that better than 60% for re-distribution?

A. On Moog's volume rebate we can't afford to re-distribute because of the volume rebate that we tend to get into, and it makes it profitable to what is it, 17 percent as it shows on the exhibit.

Q. This buying group that you speak of, is that a device that is in general use by the small distributor in order to place himself in a position to re-distribute?

A. It is necessary to be competitive with the larger distributors to sell the same type of account.

Otherwise, there would be no redistribution business. At the present time we are purchasing about 50% of our coil action parts from Moog and 50% from Thompson Products. Thompson Products gives us the same kind of a redistribution rebate.

Q. The volume rebate practice is the same in both companies? (Part 2, Page 608.)

Mr. Schrup: We have an objection here at this point. I think we might as well get it clear on the record. Mr. Butterfield is seeking to prove that prices of competitors are comparable which he has a right to do, but he must do it within the interpretation of the Act as laid down in the Standard Oil decision. I want to reserve my right to object until he has completed his examination of these various witnesses, and then, if it is not connected up in the proper way, I shall make a motion to strike. At this time it cannot be determined whether it is going to be connected up or not.

Examiner Kolb: Are you objecting to the last question?

Mr. Schrup: Yes, I am, sir. I am going to make a continuing objection to all the evidence on competitors prices until he closes his case on that, and then, if he hasn't connected it up in the proper way, I shall make a motion to strike at that time.

Examiner Kolb: Read that last question.

(The last question was read by the reporter.)

Examiner Kolb: The witness may answer.

A. The volume rebate is the same percentage, but it is worked out a different way (Part 2, Page 609).

EDWARD LIVONIUS testified on behalf of Respondent Moog as follows:

Direct Examination.

My name is Edward Livonius. I am an officer and General Manager of Western Spring Service Company at 125 West 12th Street, Denver, Colorado. I have been in the automotive business about ten years. I first came with that company in 1943. We are a distributor in the Denver area, of automotive parts (Part 2, Page 610). We re-sell these parts that we purchase from manufacturers to wholesalers and subjobbers. We maintain a service shop in connection with this business. We also sell these items over the counter to various classes of customers.

We purchased from Moog Industries for the year 1949 approximately $967.00 worth of coil action parts. We received no volume discount on those purchases at that time. In 1947, and 1948 we were dealing to some extent in coil action parts and were purchasing at that time mostly from Thompson Products. At this time we are not purchasing coil action parts from Moog (Part 2, Page 611). Some of the coil action parts that we purchased from Moog in 1949 we sold at retail to consumers, some of them we sold to fleets and independent garage men, and I presume we sold some to wagon peddlers.

Q. Did you give them a volume discount according to the volume that they purchased on the sales of those coil action parts?

A. No, but we would have sold them at a lower discount if they were classified, depending upon the classification and the type of customer.

Q. Do you, where you re-distribute, do you give volume discount to your jobbers, subjobbers?

A. Not volume discounts.

We do not give them any discount based on quantity of purchases that they make of the particular item. We have all the jobbers set up, if they are qualified to be a jobber, but we feel they have to be a certain type of jobber or do a certain amount of business, to be qualified as a jobber (Part 2, Page 612).

In 1949, an item that we purchased for around 40¢, the list price of that would have been probably around a dollar.

Q. When you sold that retail to the customer, did you charge him full list price, or sometimes a list and sometimes you gave him a special price, depending upon who he was connected with?

A. Yes, sir. If he were connected with someone that could give us a purchase order.

In 1949, 70% of our coil action parts were re-distributed. We are buying our coil action parts now from Hershey Metal Products.

In connection with our distribution, we also engage in manufacturing a line of leaf springs called "Western Springs" (Part 2, Page 613).

We manufacture the same kind of springs, for the same purposes, for the same automobiles, for instance that Moog Industries sell. I have not kept current recently with the Moog pricing of leaf springs in this area, but I am thoroughly familiar with it. We do not give a volume discount in the sale of our leaf springs.

Q. In the sale of leaf springs in the Denver area by Moog, have Moog's pricing practices in any way injured you competitively?

A. No.

As to our approximate size in distribution in relation to Hendrie-Bolthoff, they are a much larger concern. I don't know what their volume would be as compared to ours. We sell them some merchandise. Western Springs Service has been in business since 1933 (Part 2, Page 614). Hendrie & Bolthoff went in business in eighteen hundred something.

Q. In 48, the year 1948, did you lose any business to Hendrie & Bolthoff that you know of?

A. Well, they had done a lot of business. We sold them a lot of merchandise in '48.

They sell to the same class of customers that we sell. We haven't been bothered by Hendrie & Bolthoff cutting into our business. We consider them a good customer.

As to the comparative size of Western Springs Service and its distribution activities to B. K. Sweeney Electric Company in the lines that we handle, we would be far larger overall. They deal in lots of products that we do not deal in. In the year 1949 we were selling to the same class of customers as B. K. Sweeney. That year we sold them some but very little (Part 2, Page 615).

In the year 1949, both our company and B. K. Sweeney purchased coil action parts from Moog Industries, and we both resold these to the same class of customers. To the best of our knowledge, in 1949 we successfully met the competition of B. K. Sweeney in the sale of coil action parts (Part 2, Page 616).

We are able to compete today with B. K. Sweeney.

Q. Have the pricing practices of Moog in the leaf spring line, or in this coil action sales line, have either or both of them injured you competitively necessarily?

A. No.

I have been in this business for ten years. We sell to car dealers and the car dealers in turn sell in competition with us. Undoubtedly, we sold coil action parts of Moog Industries to car dealers in 1949. We were selling car dealers all the time (Part 2, Page 617).

As to what percentage of our coil action parts sales went to car dealers, that is a little hard to say, without getting figures especially on one particular item when we sell so many items, but the figures are available. There is no particular item in coil action parts. By that I mean all of our overall sales I could give you a better idea of what they were, but during this one year, this $900.00 that we bought from Moog, it would be hard to say what percentage of that went to car dealers. It probably would have been in the neighborhood of, roughly, 40%, maybe 30%. That is about the same percentage that we sell to car dealers today.

Cross Examination.

Western Spring Service started buying directly from Moog, I believe, in 1949. We are not still buying from Moog. As to whether 1949 was the only year we bought

from them, there may have been a few other small purchases (Part 2, Page 618). From the Commission's Exhibit 66, our purchases amounted to, roughly, $1,000.00. That was not all of the coil action parts we purchased during that year. As to what percentage that would be of our total purchases for that year, that would be hard to answer without looking up the figures. It would probably be more than half during that year.

Western Spring Company is also a manufacturer of leaf springs. As to our sales of that item for the year 1949, I do not have the figures available; I would have to look it up. That is the only product we manufacture (Part 2, Page 619).

Q. Well, let's take the year 1950, would you give us an idea for 1950 what percentage of your sales were leaf springs manufactured by you?

A. Not manufactured by us. We don't break it down in our sales at the selling price, what part of it we manufacture and what part of it we sold, for excise tax purposes.

We buy a lot of leaf springs besides those we manufacture. We don't manufacture all the leaf springs we sell. We manufacture about 10 or 15% of the leaf springs we sell. Our annual sales in leaf springs for the year 1950 were about a quarter of a million dollars, and of that about 10 or 15% we manufacture ourselves. We do not sell on volume discount. Our list price on leaf springs is very comparable to Moog's list price. Some items are probably a little less and some a little more. It is competitive (Part 2, Page 620).

Q. I think you stated that you were not injured by the pricing practices of Moog. By that you have reference to the fact that all the Moog products are sold at suggested resale prices?

A. I don't know what Moog sells the rest of their merchandise for. I presume they offer it the same as it is offered to us for.

Q. When you are talking about the fact you are not injured by the pricing practice of Moog, you are talking about your purchases of Moog products?

A. Yes.

Q. Is that correct?

A. Yes.

Q. I think, if you refer to the chart in Commission's Exhibit 66, in the year 1949 you bought approximately a thousand dollars worth and you received no discount. Would you have preferred to have received a discount?

A. Well, we always like to buy at the cheapest price we can, but we were not redistributing, there was no redistribution program as far as we were concerned to sell to.

Q. I am not worried how you are reselling. I am talking about your buying. Are you interested in buying your merchandise at the cheapest price possible? (Part 2, Page 621.)

A. Not always. We can buy lots of things cheaper than we buy.

Q. I mean the same quality.

A. Yes.

Q. Will you tell us why?

A. There is more profit.

Re-Direct Examination.

If we sell an item that we purchase at 40¢ for $1.00, our mark-up would be about 60¢. If we sold it for 50¢, our mark-up would be 5%, 10¢ on a 40¢ purchase would be a 5% mark-up.

As to whether it costs more to sell at list than it does to sell at redistribution, it would cost more to sell a dollar's worth. It is true that the better price we receive enables us to sell a higher percentage for redistribution (Part 2, Page 622).

Q. Is the profit in your business made mostly from redistribution or from direct distribution?

A. On coil action parts and leaf springs. yes.

We purchase all of our coil action parts at the same price. Maybe I should modify that a little. We may pick up something that we are out of from some other concern here, locally. Our present suppliers do not have any volume requirements. We have to maintain a certain volume

or they would give the deal to someone else (Part 2, Page 623). On our coil action parts we get as good or a better deal from our present suppliers than we would receive from Moog under its present pricing practice.

Re-Cross Examination.

What I meant by deal was the price at which we buy the product which we sell. We buy that product from Hershey Metal Products. Their price basis is a list or a certain percentage of discount or a list price. It varies. Our purchases in 1950 were about $30,000.00 (Part 2, Page 624). We receive no volume discount. We have a flat discount that is set up as a warehouse fee, and we buy it all at that price, but we must do an adequate volume of business to be classified as a warehouse. This is the way it works: They offer us a price. We buy at that price. They furnish the sheets that they sell all their warehouses throughout the United States at. We buy it at that price, which is a price so that we can re-sell it to other jobbers and dealers. Their business price is neither higher nor lower than Moog Industries. It is very comparable. I would not know this, to be exact, but there would be a very very hair's difference, if any. We prefer Hershey Products over Moog Products. That is the reason we have them, not for quality, but there are lots of other reasons why we prefer to buy them. One reason is we are the warehouse for them instead of having another warehouse in our town to compete with us (Part 2, Page 625).

We sell Geary-Hershey coil action parts. We can talk up the name and it is our business if we can sell the customer. We commenced buying from Hershey in '49 or '50. Previous to that we bought from Moog and from local suppliers and from Thompson Products. I don't believe in 1948 we bought directly from Moog. We were not distributing any coil action parts at that time. It has only been in recent years we have gone into redistributing coil action parts. We re-distribute about 80 or 85% of the products we buy from Hershey. I mean by that we sell these to other jobbers and dealers who are selling them. In other words, they re-distribute them. The balance of

15% is sold to various fleet accounts and a little to the consumer trade; the automobile owner (Part 2, Page 626).

I have previously testified that I believe that 1949 was the last year we purchased from Moog, and according to Commission's Exhibit 66, my purchases were approximately $1,000.00, and that that probably comprised about 50% of our entire purchases of coil action parts for that year. I believe we started to purchase from Hershey in 1950. They set us up as a warehouse distributor of their product at that time. As to how much we purchased in 1950, I would not know offhand for that year or 1951. It was around $30,000.00 and probably the year before somewhat lower, because we had been growing in that field (Part 2, Page 627). Our purchases in 1949 were $2,000.00, and jumped to what amount I do not know offhand in 1950, but in 1951 it was almost $30,000.00, and was growing during that period. I have available our distributor franchise with Hershey and their price list. I do not have it with me. It is at the office. You can see it during the Noon recess. All it would be would be a price sheet. There is no signed franchise (Part 2, Page 628).

I have the price sheets from Hershey with me. We have no written franchise with them. We are just their warehouse. Answering your question as to whether we have any sort of agreement with them at all, we just buy from them what they sell and we buy at that price because we are a warehouse. There are undoubtedly letters in our file offering us a proposition and our acceptance. Most of this was done verbally. We don't make our customers sign a franchise to sell them. I do not know whether Hershey has written franchises. If they do, then we have one (Part 2, Page 629).

The Noon Recess then intervened.

Mr. Livonius resumed the witness stand.

Re-Cross Examination—Continued.

To recapitulate, we started purchasing from Hershey Metal Products of Derby, Connecticut, the latter part of '49, and they classified us as a warehouse distributor. That entitles us to buy off their blue list at a specified discount.

We buy off of the blue sheet list less 20% regardless of the volume we purchase on any given order or given period of time (Part 2, Page 631). No matter to whom we re-sell this merchandise, even if we sell as a jobber we still get the 20% discount. Even when we sell at retail, we get our 20% warehouse distributor discount. In addition to coil action springs, we purchase king pin parts from them. I don't know what percentage they amount to. We carry them on our books in one classification. They are all chassis parts. We do not entirely follow the suggested re-sale prices that are quoted by Hershey Meta Products.

We travel six salesmen who cover, Colorado, Wyoming, Northern New Mexico, Western Nebraska, the Black Hills of South Dakota, and Western Kansas. They call on jobbing accounts and automobile dealers. We call on the independent garage man locally, but not in the territory (Part 2, Page 632). As to mail order sales, all of the business that we get from the territory they either telephone or mail an order in. It has to come to us from the territory by some form of communication. We do not publish a mail order catalog. We do not belong to any buying group.

Re-Direct Examination.

In looking for a memorandum on Hershey, I ran across a Moog distributor agreement, but we are not buying from Moog at the present time, even though we signed the contract. As to how we treat these so-called franchise agreements that we sign with the manufacturer, if we desire to buy from them and they are willing to sell us according to the agreement, we buy from them. If we prefer to buy from someone else, we just don't use them. We feel that we have the right to buy from anybody we want to buy from that wants to sell us (Part 2, Page 632), and we have the right to sell whomsoever we want to sell to. As to the consumer, we sell him at whatever price we care to sell him, even though we have bought the goods all at the same time at 20% off the face of the invoice on blue sheet prices. The supplier does not restrict us on sales to consumers. In fact, we sell direct to consumers.

At this point Respondent's Exhibits 6-A and 6-B, 6-C, and 6-D were marked for identification.

At this point Respondent's Exhibit 7-A, 7-B, 7-C and 7-D were marked for identification.

The witness was shown Respondent's Exhibit 6-A and on it part number 225, Geary-Hershey jobber price 66¢, list price $1.49, and asked what that item was. The witness answered that it was an upper, outer pivot pin bushing for a Chevrolet (Part 2, Page 634). Moog's Number K-25, 65¢ distributor's net cost is the same item as that part number 225.

Mr. Butterfield: At this time, if your Honor please, I would like to offer in evidence Respondent's Exhibits 6-A to 6-D, inclusive, Geary-Hershey prices to the distributor and the suggested re-sale sheets supplementary thereto and the current price sheets of Moog Industries being the distributor's net cost and suggested re-sale price list supplemental thereto.

Examiner Kolb: That is Exhibits 7-A to 7-D, inclusive?

Mr. Butterfield: Yes.

Mr. Schrup: We have no objection to Respondent's Exhibits 7-A through D, being the Moog prices. We do have an objection as previously made to Respondent's Exhibits 6-A through 6-D. We will reserve our objections and make them in (Part 2, Page 635) in full at the close of the presentation of all of the testimony of this nature. Apparently, this is being offered as a defense under Section 2 (b) of the Act.

Examiner Kolb: Nothing has been said about the basis on which it has been offered.

Mr. Schrup: I can see no other reason for offering exhibits of competitors.

Examiner Kolb: Do you want to reserve the right to object at a later time?

Mr. Schrup: What is the purpose of the offer, Mr. Butterfield?

Mr. Butterfield: It is a chain of questions that were asked here on cross-examination, and this material was brought in at your request, and the purpose of the offer is to clarify the questions that were asked on cross-examination and re-direct.

Mr. Schrup: If I wanted to offer them as exhibits, I would offer them. I had no intention of offering them as exhibits. If they are offered by you for any purpose relative to a defense under Section 2 (b), I make that objection on that basis.

Examiner Kolb: Section 2(b) has not been mentioned in this proceeding. There is no defense under 2 (b) they are being offered unless you are insisting they are being defended upon that basis. I don't know. The documents will be received in evidence as Respondent's Exhibits 6-A to 6-D and 7-A to 7-D, inclusive.

(Respondent's Exhibits 6-A to 6-D and 7-A to 7-D, inclusive, for identification, were received in evidence, Part 2, Page 636.)

As a matter of practice, we make a practice of following the suggested re-sale prices of the goods we re-sell. We find it advantageous as a reseller of automotive parts to be a so-called warehouse distributor.

Re-Direct Examination.

As long as we abide by O. P. S. regulations we may want to sell that commodity at a different price than the re-sale price.

(At this point Respondent's Exhibits 8 and 9 were marked for identification.) (Part 2, Page 637.)

Mr Butterfield: If your Honor please, I had marked for identification Exhibit 8, the Geary-Hershey Replacement Parts Catalog D-6, and Exhibit 9, the current Moog Catalog, which includes chassis replacement parts but also has leaf springs and the other complete Moog line. I offer them for they are the catalogs with which this transference can be made between Exhibits 6 and 7.

Mr. Schrup: No objection to 9. Continuing objection to 8.

Examiner Kolb: What is the purpose of these Exhibits being offered?

Mr. Butterfield: The purpose of the exhibits is to show the pricing practices of the Geary-Hershey Company, one of the competitors of Moog, in the primary line and to show the method of distribution by one of Moog's

former customers who had bought Moog in 1949 and is now buying Geary-Hershey going to the question of injury to competition under 2 (a).

Examiner Kolb: How does that prove injury to competition?

Mr. Butterfield: This prove injury?

Examiner Kolb: Yes.

Mr. Butterfield: It is not to prove injury to competition.

Examiner Kolb: What is the purpose of it then? You say you want to show injury to competition.

Mr. Butterfield: It goes to the question of injury to competition by showing what the competitive picture is (Part 2, Page 638) and what is going on in the Denver area in which the Government has introduced Exhibit 66, an exhibit based on the Denver area showing Moog's activities in the Denver area about which the Government is complaining.

Examiner Kolb: Do you want to show that Moog is selling less than Geary-Hershey?

Mr. Butterfield: No. I am showing that Geary-Hershey is an account which is selling on the same basis that Moog is selling.

Examiner Kolb: Well, your witness has testified that in the overall picture of all the coil action parts that it would be about the same whether he bought from Moog or whether he bought from Hershey.

Mr. Butterfield: That's correct.

Examiner Kolb: It looks like even putting in Exhibits 6-A and 7-A tends to confuse the issue, because you are only taking one particular item to show that that is sold at approximately the same price when the witness says some are sold more and some are sold less and in the overall average they would be about the same. That is correct, isn't it, Mr. Witness?

The Witness: Yes.

Mr. Butterfield: Exhibits 6-A to D and Exhibits 7-A to D are complete pricing schedules of coil action parts of Geary-Hershey and Moog Industries (Part 2, Page 639).

Examiner Kolb: You are offering those to show that they both sell at about the same price?

Mr. Butterfield: That's correct.

Examiner Kolb: Well, I think that simply confuses it to put those price lists in, because there is no way of determining which applies to which.

Mr. Butterfield: That is the purpose of Exhibits 8 and 9, because in Exhibits 8 and 9 is a complete photograph of each part and exactly what they are used for, and the photographs are in here, and by taking a page of Exhibit 8 and a page of Exhibit 9 the photographs describe exactly what they are on dimensions. The dimensions and everything are in here and the purpose for which they are used and what car they go on and what model car it goes on, and the pictures in the two catalogs are identical.

Examiner Kolb: The witness has testified that the prices are approximately the same. Now, are you offering that to substantiate this witness' testimony or to contradict it?

Mr. Butterfield: No. He testified from these two Exhibits.

Examiner Kolb: That is only one item.

Mr. Butterfield: Yes. I can take each item on here.

Examiner Kolb: What do you expect to show in the last analysis on it? (Part 2, Page 640.)

Mr. Butterfield: In the last analysis that any competitor, that any jobber or wholesaler or distributor in the Denver area that is not satisfied with Moog's prices, he can get the same prices from Geary-Hershey or even better.

Examiner Kolb: The witness testified that he has the exclusive for Hershey here in the Denver area.

Mr. Butterfield: That's right.

Examiner Kolb: Then, he could not get the same thing from Geary-Hershey, could he? I don t want a lot of useless stuff for me to read that I can't figure out, nor do I want to pass a lot of useless stuff to the Commission for them to read. If you say all that this will prove is that the prices were substantially the same, the witness has

testified to that. He says some are higher and some are lower, but on the average the parts he would buy are about the same.

Mr. Butterfield: These aren't the only two companies that are selling in the Denver area. There are other companies selling in here too.

Examiner Kolb: As between Moog and Geary-Hershey there is no chance of buying from Geary Hershey, because this man has the exclusive for this territory.

The Witness: Other jobbers can buy.

Examiner Kolb: Through your warehouse?

The Witness: Yes.

Examiner Kolb: But not on the regular deal that you (Part 2, Page 641) have with Hershey.

The Witness: No, but it still would be comparable to what they bought from Moog.

By Mr. Butterfield:

Q. Anyone buying on the blue sheet from Moog can buy on the blue sheet from Geary-Hershey?

A. Yes, and they are comparable.

Examiner Kolb: But would not receive the discount that you receive as warehouseman?

The Witness: But the Moog blue sheet doesn't have any discount either. In other words, they would be buying at that blue sheet.

Examiner Kolb: Any further objection?

Mr. Schrup: None other than what we have stated. We are waiving any authentication of documents or anything of that nature.

Examiner Kolb: Well, they will be received in evidence as Respondent's Exhibits 8 and 9.

(Respondent's Exhibits 8 and 9 for identification received in evidence).

By Mr. Butterfield:

Q. You testified that you sold, say, for instance, a jobber, a subjobber of yours. When you sell on this blue sheet, Exhibit 6-A or Exhibit 7-A, if you are buying Moog, a jobber whose customer refuses to deal with that jobber,

is there any (Part 2, Page 642) way he can get it from you direct?

A. Yes.

We sell it to him at the same price that our jobber would sell it to him. That is an ordinary practice and prevails throughout the industry. We give assistance to our jobbers with these customers. If we set up a jobber we will say at Durango, and our salesman calls on the car dealer and advises the car dealer that the stock is available through our jobber in Durango, he can go to the jobber, but if he doesn't like the jobber he can send the order to us at the same price that the jobber there would sell to him. But the jobber is there to maintain the stock and to adequately serve him. We can promote the customers for the jobber but we cannot force him to buy from that jobber. We will sell to him at the same price that our jobber would sell to him (Part 2, Page 643). We sell to one of our jobber's customers, whatever class of trade it might be, at the same price that the jobber would sell to him and make his normal margin of profit.

Re-Cross Examination.

In this re-sale to the customer of our jobber, we buy that merchandise at the net price of a warehouse distributor and that is a lower price than the price for which we re-sell that merchandise to jobbers.

RUSSELL E. FARRIS testified as a witness on behalf of Respondent as follows:

Direct Examination.

My name is Russell E. Farris and my business is known as Empire Spring and Shock Absorber Service, Inc. (Part 2, Page 644), I am President of the company. I buy coil action parts and leaf springs from Moog. Our business was started seven or eight years ago when I came out of the Service. When we started business I was re-building shock absorbers. About three years afterwards I went into the re-distribution of automotive parts. About a year and

a half ago we went into the manufacture of leaf springs. Before we began manufacturing leaf springs ourselves, I bought them from Burton Spring Corporation, Tuthill, and from Western Spring, locally (Part 2, Page 645). Western Spring is in Denver—that is Mr. Livonius' company. Tuthill is located in Chicago; and Burton Spring is in Chicago. We began the distribution of coil action parts approximately three years ago. We first began purchasing them from Regal Tool and Manufacturing Company, Newark, New Jersey. We have a choice of buying coil action parts from either Moog or Regal Tool and Manufacturing Company. We got the better deal from Regal (Part 2, Page 646).

Q. What sort of a proposition does Regal Tool and Manufacturing Company offer? (Part 2, Page 646.)

Mr. Schrup: I have the same objection I have had heretofore to those price lists, catalogs, and so forth of competitors of Moog.

(The question was read by the reporter as follows: "What sort of a proposition does Regal Tool and Manufacturing Company offer?")

Mr. Butterfield: I want to finish my question.

Q. Offer you in coil action parts?

Examiner Kolb: What is the purpose of that?

Mr. Butterfield: The purpose is to show the negation of injury to competition by demonstrating the facility with which a distributor can secure the same product from other sources.

Examiner Kolb: Well, the fact that a distributor can sell and procure the same product from either one or another manufacturer what bearing does that have on the selling at different prices by the one manufacturer?

Mr. Butterfield: The Moog Industries in Denver is selling at the same price to everybody on this coil action kit on Exhibit 7-A, and Regal Manufacturing Company is offering and I propose to show by this witness that Regal Manufacturing is offering a better price and what the form of that price takes. Moog gives a volume discount off of this coil action list price as shown in the exhibits already in evidence.

Examiner Kolb: As I understand your statement, Mr. (Part 2, Page 647) Butterfield, assuming for the purpose of argument at this time that a price discrimination had been shown upon the part of Moog Industries, you would then attempt to defend that on the basis, while there was a price discrimination, the customer would be able to buy his stuff some place else and it would not make any difference.

Mr. Butterfield: That is not my position.

Examiner Kolb: I would like to find out your position.

Mr. Butterfield: My position is this: that the Government has filed a complaint against Moog Industries, Inc. for price discrimination. Now, the Government has put in what it considers to be the case demonstrating what they consider demonstrates price discrimination on Moog's part, and the purpose of my defense is to show that no such price discrimination as contended by the attorneys for the Federal Trade Commission does, in fact, exist in these areas. Now, over my objection at the time there was introduced in evidence Exhibit No. 66, Government's Exhibit No. 66, and no further testimony was taken in regard to that exhibit and no hearings were held in Denver, and none of the customers of Moog that are listed on that exhibit were examined, and since the Government did not examine those witnesses and since the Government has felt content to rest with the mere showing of a price difference. I am charged I believe with the duty of (Part 2, Page 648) showing that the price difference which is attempted to be shown on that sheet is not price discrimination which the Government contends. If the Government contends that this showing of 66 is price discrimination, then I think that I can do no more than to show what the facts actually are as they exist so that the Commission may have before it not only this Exhibit 66 but the operation of the Moog pricing practices in the area purported to be covered by the exhibit.

Examiner Kolb: For example, on 66 and during the year 1949 there are four distributors or jobbers listed—call them jobbers—jobbers listed. One receives 17 percent discount, two others receive 5-percent discount, and one receives no discount. Now, as I understand, and I

assume the Commission contends that that indicates a price discrimination as between those separate customers, —now, take, for example, one of those, say, who receives 5-percent discount as compared to one who receives a 17-percent discount, as I understand your statement, you are now saying that while it may be true that this man receives a 5-percent discount in discriminating by Moog, to that extent he can go to some other manufacturer, he can buy from Moog at the higher discount. Is that what you are getting at?

Mr. Butterfield: No, your Honor.

Examiner Kolb: That is the best I can get out of your statement so far (Part 2, Page 649).

Mr. Butterfield: That 17 percent refers to 1949. Foster Auto Supply receives 17 percent on $61.04 worth of merchandise. I believe that is what the evidence shows. The Western Spring Service Company received none at all.

Examiner Kolb: On $967.00.

Mr. Butterfield: Received none at all. Leaving it at that, if that is all the Commission had before it was that there was no discount at all to Western Spring Service and a 17-percent discount to Foster Auto Supply Company, if that is all the Commission had before it, the Commission might be led to believe that the Western Spring Service Company was a small distributor who was being frozen out of the Denver market because of the practices of Moog in selling to Foster at 17-percent discount on a $61.00-item, that that illegal practice in itself without the showing of more would eventually force Western Spring Service Company completely out of the market and the B. K. Sweeney Electric and the Steckel Auto Supply and thus create a monopoly in Foster Auto Supply Company, or that Foster Auto Supply Company by receiving this 17 percent had so injured, prevented or destroyed competition in the Denver area that there no longer existed that free competitive enterprise in Denver in regard to coil action sales which the Congress intended to preserve when it amended the Robinson-Patman Act, when it amended Section 2 of the Clayton Act called the Robinson-Patman Act to Section 2 of the Clayton Act (Part 2, Page 650), or that these pricing

practices prevented, injured or destroyed the competitive business marked between the customers of Foster and Western Spring and B. K. Sweeney or that Moog Industries was injuring other manufacturers of automotive parts such as Western Spring Service and Geary-Hershey Metal Products and the car manufacturer suppliers and other manufacturers of coil action parts. Now, if the Commission had only this before it, it might draw such a conclusion. If such a conclusion were drawn by the Commission from this record, I would have been completely derelict in not bringing the fact to the Commission that in so far as this Exhibit 66 is concerned in coil action sales to jobbers in Denver, Colorado, by Moog Industries that these men have testified up until now on this they have not been injured or hurt nor have their customers been injured or hurt nor is there any reasonable possibility of Moog Industries or any of its customers monopolizing the automotive market in Denver, Colorado, in the sale of automotive parts.

This difference that is shown here as Moog Industries' sales to Western Spring and Foster Auto, to use the extremes here, 17 percent as shown by the evidence so far introduced in the Denver area, is a difference that is considerably less than the differences at which these customers of Moog, themselves sell and distribute Moog products, and, as they have testified, it is the practice in the industry when you buy (Part 2, Page 651) as a distributor to sell to all classes of customers. Those who buy on the blue sheet sell at every price from the next highest price to the list price. That is the purpose of the questioning that I have made of this witness, is to demonstrate that, to give the facts from which the Commission can draw the conclusion as to whether or not there has been or whether these price differences amount to that thing which Congress referred to when it passed the Robinson-Patman amendment to the Clayton Act in which Congress said it shall be illegal to discriminate in price where the effect of such price, such discrimination, where the effect of such discrimination is to tend to create a monopoly or to prevent, to injure or to destroy commerce in any line of interstate commerce between the sellers or between the customers of either the buyers or the sellers.

Examiner Kolb: Doesn't your statement boil down to the proposition there can be no price discrimination under the Robinson-Patman Act as long as the customers can buy comparable materials from some other supplier?

Mr. Butterfield: My position is this: that there can be no such thing as a price discrimination under the Robinson-Patman Act unless it has been shown and demonstrated that there has been an injury to competition or there has been a reasonable possibility of a tendency to create a monopoly. That is, it is not my contention, and I do not (Part 2, Page 652) believe it is the Commission's contention that every price difference amounts to a price discrimination and these price differences that are shown on this sheet, and there is only one reason for which this sheet could have been introduced and that is to show a price difference, and the theory, as I understand from counsel for the plaintiff, is that that is all the further he needs to go. That is the prima facie case. Now, if that is his position, that is his prima facie case, I am forced into the position of negating this presumption which counsel has taken and which counsel hopes the Commission may take negating this presumption by fact and testimony in the record.

Examiner Kolb: It is too complicated for me. Is there a question pending?

Mr. Schrup: I think Mr. Butterfield meets himself coming back. Our position is briefly this: that we see no reason in the absence of cost justification and in the absence of a possible 2 (b) defense why Moog Industries, Inc., can charge different prices to competing customers. Now, the testimony here is that these various jobbers must handle many, many lines, and I think it is just as obvious as the nose on your face, if the Foster Auto Supply Company gets 17 percent on everything it buys and somebody else doesn't and they are competing, one is hurt very badly.

Mr. Butterfield: Do you also maintain that, if the (Part 2, Page 653) wholesaler sells, that he has to sell at the same price to everybody? Do you maintain that the consumers' prices are out of line because of the margin of mark-up?

Mr. Schrup: That is not the question at all, Mr. Butterfield. The statute provides that any customer that competes with another customer in the absence of justification by the seller must be treated the same. That is, all distributors buy at the same price in the absence of any justification. When the distributor buys at the distributor's price, he can sell at a different price from a jobber, but when he competes with a jobber and sells at a distributor's price, he performs no function at all to that jobber. He is in competition with the jobber, and they are attempting to sell the same customer with the distributor getting a price rate with no services performed to the jobber for which he gets the price rate.

Mr. Butterfield: Under your theory of the case everything that these men are doing with the merchandise they get is illegal.

Mr. Schrup: Don't put words in my mouth.

Mr. Butterfield: Is that true or isn't it?

Mr. Schrup: The effect on competition—

Examiner Kolb: Let's save this argument for the back room or something and go on with this case. I will let the witness answer the question. Read the last question (Part 2, Page 654).

(The reporter read the last question.)

Examiner Kolb: The witness may answer the question.

Mr. Schrup: We have our continuing objection as we have announced from the very beginning to the introduction of competitor's prices.

A. They will grant me 20 percent off the face of the blue sheet, of course, the same proposition as G and H offers Western.

Examiner Kolb: Do you deal with Moog?

The Witness: I deal with Moog.

Examiner Kolb: Is it the same proposition that Moog offers you?

The Witness: No, sir, it is not. I have to buy so much from Moog to get a volume rebate. I can buy $10.00 worth and still get 20 percent off the face of their invoice, and I am not a warehouse distributor.

By Mr. Butterfield:

Q. Do you sell on this blue sheet, this 7-A, take K-19 there, the top one, the first one, the distributor's price 58 cents, here are suggested resale sheets, 73 cents on 7-B, 57 cents on 7-C, and 94 cents on 7-D, do you follow these resale price lists?

A. We follow these resale price sheets when we sell this type of account.

Q. If you bought this item here at 58 cents, this K-19, you (Part 2, Page 655) would sell it everywhere from $1.25 to 73 cents depending on what type of account it was?

A. What type of account it was (Part 2, Page 656).

Cross Examination.

You're darn right that I can buy similar products to those of Moog from other sellers at cheaper prices than I can from Moog. The reason I buy from Moog is I am primarily their largest leaf spring account in the Rocky Mountain Empire, and I prefer to sell under one catalog which my road men and city man, instead of thumbing through a big, thick catalog, like to sell through one catalog, and Moog has a fine trade name. We pioneered the Regal line in this area. It is not too well known. We feel we want to be on the band wagon. Moog does a lot of National advertising. Regal does not.

Q. In buying, now that you have finally selected Moog products for reasons that you have given us, are you still interested in buying Moog Products that you especially can get at Moog?

A. At the cheapest price they will give me. It has got to be better (Part 2, Page 656).

We started buying coil action parts from Moog about a year and a half ago. Since the first of this year, I have bought exclusively Moog. Before that we bought from Regal. We started purchasing leaf springs from Moog about a year and a half ago. Previously we bought them from Burton and from Tuthill. Their prices were higher than Moog's on leaf springs to this extent that with Moog I worked on a volume rebate on the spring line, and I do come into a nice bracket. As to what our sales of Moog Products are, both leaf springs and coil action parts, it is

difficult to give you an exact figure. I do not know. I would say pretty close to $75,000.00 for the year 1951 (Part 2, Page 657). That includes both leaf and coil springs, and overload, whatever they sell in their line. They have leaf springs and coil springs and chassis parts. As to the percentage of the $75,000.00 in that line, I would say I sold $50,000.00 of their merchandise. As to the coil action line, I would say I only sold Two or Three Thousand Dollars worth. I can't compete with the market.

Q. I understood for 1951 that your entire sales of Moog Products were about $75,000.00?

A. That's right.

Q. How was that broken down? They have a coil action line, and they have a leaf spring line which includes coil springs and chassis parts. Have you any way of dividing that $75,000.00 between those two lines?

A. Yes, approximately $73,000 in their spring line which includes their coil springs (Part 2, Page 658).

Q. That is the leaf spring line?

A. Yes, leaf spring, overloads, and the $3,000 in their coil action.

Q. Coil action line?

A. That's right.

As to the agreement I have with Moog, I buy off of that contract right there (Indicating Commission's Exhibit Number 1, Distributor's franchise). We do not do any subjobbing business in the spring line or in the chassis line. We do no subjobbing business in any of the Moog products. We do sell Moog Products over the counter, both retail and wholesale (Part 2, Page 659), I would say that about 90% of our sales are wholesale sales to the different type of accounts—dealers, garages, general trade, and companies that authorize their employes to buy under a purchase order.

Re-Direct Examination.

As an example of a company that authorizes its employes to buy under a purchase order, for instance Yellow Cab Company will issue a purchase order to their employes; Pacific Inter-Mountain Express will do it; Gallagher Transfer Company will do it; Public Service Com-

pany of Colorado will grant their employes that. We do not give those employes, if they do not have a purchase order different prices if they want to buy one for their own car, unless we know they work there, are entitled to have a purchase order, and have bought previously from us. If they work at that place and have previously bought from us on a purchase order, then they can buy the same item for their own car at that same price (Part 2, Page 660).

We manufacture approximately 5% of our leaf springs. None in the coil springs. They are manufactured in competition with Moog. We manufacture some of the same items that we buy from Moog.

RICHARD F. PATTERSON testified as a witness on behalf of Respondent as follows:

Direct Examination.

My name is Richard F. Patterson (Part 1, Page 661). I am connected with Colorado Jobbers Supply, 875 Broadway, Denver, Colorado.

I heard the testimony of Mr. Livonius of Western Spring Service. I heard him refer to this Geary-Hershey deal that he had. The witness was asked how exclusive that deal was in the Denver area and stated that they had offered the deal to him within the last three weeks on the same basis on the same basis that they were selling Western Spring Service. I did not accept the deal, however, even though they offered it to me. I do not buy those products from Moog Industries. At the present time I am buying them from Toledo Steel Products.

Q. Have the pricing practices of Moog Industries, in distributing its automotive products here, have they injured Colorado jobbers? (Part 2, Page 662.)

A. No.

Mr. Schrup: I would like to get an objection in here. I understand the witness is not purchasing, the Colorado jobbers is not purchasing Moog products at the present time.

The Witness: That's right.

Mr. Schrup: I think the question is entirely out of order.

Q. Well, you are in competition, are you not, with Moog customers?

A. Yes, sir.

Q. Do Moog distributors sell to the same people you sell to?

A. That's right.

Mr. Schrup: The question you directed was the practice that exists between Moog and its customers.

Mr. Butterfield: Yes. I said do the pricing practices of Moog Industries injure him in dealing with his customers.

Mr. Schrup: Well, he doesn't buy from Moog. The discrimination charge is between the customer and Moog and the injury to their customers.

Mr. Butterfield: The injury to the customers of Moog or the customers of those who buy from Moog.

Mr. Schrup: He doesn't buy from Moog.

Mr. Butterfield: He sells to the same customers that Moog's customers sell to (Part 2, Page 663).

By Mr. Butterfield: Q. Isn't that correct, Mr. Patterson?

A. Yes.

Examiner Kolb: The objection will be sustained (Part 2, Page 664).

* * *

Examiner Kolb: The ruling of the Hearing Examiner refers to the objection to the original question as to whether the pricing practices of Moog affect the jobbers and customers (Part 2, Page 665) in Denver to which the witness answered no. That objection is sustained, and the answer of the witness is stricken.

We buy from Toledo. We sell to certain jobbers in the Denver area, in the three-state area. In fact, we go into four states. We have competition in this area who buy from Moog, and in many cases these competitors sell to the same jobbers that we sell to.

By Mr. Butterfield:

Q. Are Moog's pricing practices,—strike that, please. In the products that Moog sells in this area and in the area in which you sell Toledo products is Moog destroying competition in that area?

Mr. Schrup: Just a moment. I have an objection to that. If testimony is to be brought into this matter properly as to what effect the pricing practices of Moog may have on competitors the proper testimony is the seller competitor of Moog. This man is not a jobber customer of Moog, so, he is in no position to tell the jobber practices of Moog or the effect on that jobber customer.

Q. Do you buy Moog products, Mr. Patterson?

A. No, sir (Part 2, Page 666).

Q. Do any of your customers buy Moog products?

A. Yes, sir.

Q. Do the same customers also buy Toledo products?

A. Yes.

Q. Is there a tendency on the part of Moog to monopolize the sale of those products in this area?

Mr. Schrup: Objection. It calls for an improper conclusion upon the part of the witness.

Examiner Kolb: The objection will be sustained.

Q. Is there to your knowledge any competitive injury in this area because of the way Moog sells in this area?

Mr. Schrup: Same objection.

Examiner Kolb: Sustained.

I have personally been in this area since 1936 in the automotive industry and except during War time, I have devoted myself exclusively to this line of business. I do not know which manufacturer distributes the greater amount of coil action parts in this area, nor do I know which distributes the greater amount of these springs (Part 2, Page 667). I would say there are approximately four competing products of leaf spring products in this area. That is the ones I know. There are about six manufacturers of coil action parts in this area. I think that is correct. There are a larger number of distributors in this area at this time than there were in 1936. I would say there are about 50%

more automotive parts distributors now than there were then (Part 2, Page 668).

There are a larger number of distributors of coil action parts to-day than there were in 1936 and there are a larger number of jobbers distributing leaf springs, chassis parts and coil springs than there were in 1936. Since 1936 there have been a considerable number of smaller distributors entering the field in coil action parts (Part 2, Pages 669, 670). That same answer holds true as to leaf springs, coil springs and chassis parts.

Cross Examination.

By Mr. Schrup:

There are a considerable number more automobiles on the road in 1951 than there were in 1936. In 1936, as best as I can remember back, there were in the neighborhood of four distributors or re-sellers of coil action parts in this area (Part 2, Page 670). To-day there are around twelve. and as to leaf springs distributors I would say there are pretty close to the same number in the Denver and vicinity area.

Re-Direct Examination.

I know what the Moog prices are. I know what the Geary-Hershey prices are. The question was asked of the witness to state whether the prices of Geary-Hershey were less or higher than Moog prices.

There was an objection which was sustained (Part 2, Pages 671, 672).

At the present time I am Sales Manager and Purchasing Agent of Colorado jobbers. It is a part of my duties to acquaint myself with prices and I have acquainted myself with Moog prices as well as Geary-Hershey prices, and I have acquainted myself with the prices of all the distributors of those prices that concerned us in this area. I know what those prices are (Part 2, Page 672). The prices of Geary-Hershey are lower than Moog's prices.

Mr. Schrup: We have the objection in the record. The best evidence of the prices of competitors would be to bring the competitors in, have the competitors bring those price

lists in. We certainly would like an opportunity to examine the competitors.

Examiner Kolb: I doubt if it would help to examine the prices of comparable companies. He can answer as to the price of any particular item that is sold by Moog and sold by Hershey. I think we are going in a roundabout way to attempt to develop that information. I will sustain the objection. Strike the answer (Part 2, Page 673).

Denver, Colorado, October 14, 1952.

RUSSELL E. FARRIS resumed the witness stand and testified on behalf of Respondent as follows:

Re-Direct Examination.

At this point Respondent's Exhibits Numbers 10-A, 10-B and 10-C were marked for identification.

Yesterday I testified that I was purchasing coil action parts from Regal Tool and Manufacturing Company under the designation of coil suspension parts. Exhibits 10-A, 10-B and 10-C correctly state the conditions under which I buy Regal Coil Action Parts and that is a schedule of my purchases for the years 48 to '51, inclusive.

At this point Respondent's Exhibit Number 11 was marked for identification (Part 3, Page 676).

At this point, Respondent's Exhibit 10-A, B and C were offered in evidence. There was an objection made to the offer on the ground it was immaterial to any of the issues, and after argument between counsel the Examiner delayed ruling on the objection (Part 3, Pages 677, 678).

The witness was then asked if the invoice, Respondent's Exhibit Number 11, correctly reflects the effect of the terms and conditions contained in the Regal contract (Part 3, Page 678). There was an objection and the objection was sustained.

The examiner suggested to Respondent's counsel that he have the witness explain further what the document was before passing on objection. The witness explained the document by stating that when Regal's Tool representa-

tive came out to Denver, the witness pioneered this line in the Rocky Mountain Empire; that Regal had been their only source of supply so far and that one of these exhibits is the document given to him as a contractor, the contract stating in its different schedules how much I am supposed to maintain. I have never bought any purchases unless they show just exactly what the purchases have been (Part 3, Pages 679, 680).

This invoice is one received from Regal Tool and Manufacturing Company. It has been paid at the amount shown there and my books will so reflect it.

At this point counsel for the Commission made a further objecti as follows:

We have no way of knowing whether this particular contract is a usual or unusual contract or a standard contract, whether it is one they use nationwide or whether used in selected areas, or whether it is an individual contract with this particular buyer. We have a right to ascertain all the pricing practices of Regal. The proper witness for that is to bring into this trial the competitors of Moog, whose prices he is seeking to introduce in this indirect manner.

At this point the Examiner questioned the witness, who testified as follows: I have never signed a contract with Regal Tool and Manufacturing Company, to my knowledge. Respondent's Exhibits 10-B and 10-C is a statement of the terms and conditions under which Regal Tool and Manufacturing Company hopes to sell their merchandise to us. I do believe I did sign a contract, now when I think of it, similar to this one, and they took it back with them, as I recall it now. I did not retain a signed copy signed by them.

At this point Respondent's Exhibits 12-A, B, C, D, and E were marked for identification (Part 3, Page 681).

Counsel for Respondent then resumed the questioning.

Witness was then shown Respondent's Exhibits 12-A, B, C, D, and E and asked if those were the price lists under which this invoice was billed.

The witness replied that this price billing here has been changed since; that this was their latest price and is not the same as that one. The witness stated that he bought

on this sheet, Respondent's Exhibit 12-A, and that Respondent's Exhibits 12-B, C, D, and E were suggested prices furnished by Regal Tool.

At this point, Respondent's Exhibit 13 was marked for identification (Part 3, Page 682).

Respondent's Exhibit 13 is the catalog describing the various items contained in the price list.

Examiner Kolb: As I understand, Mr. Farris, Respondent's Exhibit 12-A, which is the wholesale distributor's price sheet, shows the prices at which you purchased from Regal, subject to a discount as provided in Schedule A of the Schedule of Discounts?

The Witness: Well, they say you must maintain $25,000 worth of merchandise here and you are granted 20 percent. I have just been buying whatever I so desire and still getting the 20 percent on the face of the invoice.

Examiner Kolb: You received 20 percent discount on all purchases made and the purchases shown in Respondent's Exhibit 10-A show the purchases made during the particular year?

The Witness: That's correct.

Examiner Kolb: And on those you received the 20-percent discount?

The Witness: That's correct (Part 3, Page 683).

At this point Respondent's Exhibits Numbers 10-A, 10-B, 10-C, 11, 12-A, 12-B, 12-C, 12-D, 12-E, and 13 were received in evidence.

We sell the items purchased from Regal Manufacturing Company according to the schedule that they put out. They have a wholesaler's schedule, a dealer's schedule, and a general trade schedule. We purchase this on the white sheet. We sell some of the items on the blue sheet, Respondent's Exhibit 12-B; and some of the items we sell on the pink sheet, Respondent's Exhibit 12-C; and the white sheet is Respondent's Exhibit 12-A, the one we buy on. Some of the items we sell on the green sheet, Respondent's Exhibit 12-D; and some of the items that we purchase on the 12-A sheet we sell on the yellow sheet, Exhibit 12-E (Part 3, Page 684).

The witness' attention was called to a typical item, R-25, and asked what it was (Part 3, Page 684). R-25 is an upper outer pin for a Chevrolet. The corresponding number in the Moog line is K-25. We purchase the item R-25 under Respondent's Exhibit 12-A and sell it under Respondent's Exhibits 12-B, C, D, and E.

At this point leave was granted to substitute photostatic copies of the exhibits (Part 3, Page 685).

Cross Examination.

I previously stated that I estimated our sales of Moog Products for 1951 was approximately $75,000.00. What I meant was I purchase about $75,000.00 from Moog.

Re-Direct Examination.

Of the $75,000.00 that I purchased from Moog, a very small percentage is coil action parts. I would say less than $2,000.00. The balance of the purchase is leaf springs, overloads, and coil springs.

GEORGE C. SWEENEY testified as a witness on behalf of Respondent as follows (Part 3, Page 686):

Direct Examination.

My name is George C. Sweeney. I am Vice-President of B. K. Sweeney Electric Company. I have been with them since 1939, and the company has been in business since 1901. Our company is smaller than Hendrie & Bolthoff. I cannot state how much larger it is than our company. Hendrie & Bolthoff went in business some time in the eighteen hundreds. At this point the witness was shown Commission's Exhibit Number 66, purporting to reflect coil action parts to jobbers in Denver, Colorado, for the year 1947, and was shown the different discounts received by various jobbers and was asked whether as a result of that difference whether B. K. Sweeney Electric Company suffered any loss of sales by virtue of that difference in rebates.

Counsel for the Commission objected as calling for speculation and conclusion, and was sustained.

The witness was then asked the question whether Foster Auto Supply was as large in 1947 as B. K. Sweeney Electric Company.

There was an objection and the objection was sustained.

Respondent made an offer of proof as follows:

Mr. Butterfield: I offer to prove by Mr. Sweeney the Foster Auto Supply Company is a very small business compared with B. K. Sweeney, and this was the small businessman, the Foster Auto Supply Company, that received a rebate discount, functional compensation potential for the mariginal mark-up of 2½ percent on his sales on the volume rebate more than his large competitor, B. K. Sweeney Company. I offer to prove (Part 3, Page 689) by this witness that the fact that the Foster Auto Supply Company received 9 percent on $8,085.74 worth of sales and the fact that B. K. Sweeney received 7½ percent on $5,895.04 for a period in 1946-47 of which only two months were for the same period, I offer to prove by this witness that the B. K. Sweeney Electric Company did not suffer an injury to its competitive position in the Denver marketing area by virtue of that. Further, I offer to prove that the ability of the Foster Auto Supply Company to create a monopoly in sales of coil action parts in the Denver area is not reasonably possible under the present marketing conditions in Denver, nor is it reasonably probable or possible that such an event will accrue from the giving of volume rebates on purchases of coil action parts afforded by Moog Industries, Inc. to the distributors in this area. It is for those reasons that I have asked this question.

Examiner Kolb: The offer of proof will be denied.

By Mr. Butterfield:

Q. I call your attention to Government's Exhibit 66 for the year 1948. I beg your pardon, I will withdraw that. The year 1949, in which the B. K. Sweeney Electric Company for the year ending 2/28/49 purchased from Moog Industries, Inc., coil action parts $3,811.44 on which it received a volume functional compensation and volume rebate discount for potential marginal mark-up (Part 3, Page 690).

Mr. Schrup: May I ask you if you are going to use the word "functional discount" use it correctly. We are not attacking functional discount as you know. So, don't inject it into this record. It is a prejudicial matter.

Examiner Kolb: Read the question, Please.

Q. —of 5 percent and where the Foster Auto Supply Company for the 6-months period commencing July 1 of 1949 for five months subsequent to the period they were just talking about from July 1, 1949, to December 31, 1949, purchased $61.04 on which it received or purported to have received a 17-percent functional compensation volume discount rebate or potential marginal mark-up of 17 percent, whether the facts as reflected on this exhibit or whether the facts as they exist resulted in an injury to the B. K. Sweeney Electric Company in the sale or distribution of Moog coil action parts.

Mr. Schrup: Same objection as previously made—

Q. In Denver, Colorado.

Mr. Schrup: It calls for speculation.

Q. —for the period covered by the exhibit.

Mr. Schrup: May we have the question read back? I think there are so many alternatives in it.

Examiner Kolb: It appears to be a hypothetical question. It does not appear to reflect the correct facts as set out in the exhibit. Objection will be sustained (Part 3, Page 691).

The witness was then asked to examine Commission's Exhibit 66 and was asked whether there are any facts on there that reflected an injury to B. K. Sweeney Electric Company in the competitive distribution of Moog Coil Action Parts for the periods covered by this exhibit.

There was an objection on the ground that it was a roundabout way of asking the witness to determine the ultimate facts in the case, and the objection was sustained.

The witness was then asked if the Foster Auto Supply Company had at any time in the past, or was now, injuring B. K. Sweeney Electric Company in its competitive distribution of coil action parts of Moog Industries in the Denver area.

This was again objected to on the grounds that it called for a conclusion and speculation, and the objection was sustained.

Q. Mr. Sweeney, would you or would you not know whether you were being injured competitively in the sale and distribution of coil action parts in the Denver area? (Part 3, Page 692.)

A. Well, all I can say is I would not know, but the results would indicate that we were.

Mr. Schrup: I think in view of the fact he would not know I move to strike the answer.

Examiner Kolb: The latter part of the answer as to the results will be stricken. The witness' answer stands.

We are now selling a small amount of Moog coil action parts in the Denver area.

Q. Is there any reason why since 1949, when you purchased $3,811.44 worth of Moog coil action parts, and I understand you are purchasing none direct from Moog at the present time?

A. Not to my knowledge unless we are picking up local warehouse articles.

Although we purchased for three successive years, according to Exhibit 66, $5,895.00, $8,234.00, and $3,811.00, the reason we are no longer a customer of Moog's is that we are buying from another supplier (Part 3, Page 693). I cannot answer the question as to whether we are now buying at better prices or not, but I guess it is the same, but I don't know actually whether it is or not. Our present supplier of coil action parts is Seld Power Corporation, Muskegon, Michigan.

Cross Examination.

During the years 1947, 1948, and 1949, when we were a purchaser of Moog Products, the trade area in which we offered them for sale was, generally speaking, in Colorado. We offered the products to service stations, garages, car dealers, redistribution accounts and fleets (Part 3, Page 694). Distribution accounts are those that buy from us rather than buy direct from the manufacturer for re-sale.

B. K. Sweeney has branches at Colorado Springs, Pueblo, Alamosa, Grand Junction, Greeley, Fort Collins and Sterling and one in Englewood and Aurora. We travel salesmen out of all the branches. Our company sells a number of various automotive lines, approximately 200 lines of automotive parts (Part 3, Page 695). It is a fair statement to make that our overall profit on each one of the lines contributes to our general business health.

According to Commission's Exhibit 66, in 1947 we received 7½% on our purchases of Moog products. It is fair to say we would have preferred to have received 9%.

Q. Would you tell us why?

A. Well, I think you answered it for me: to make a little more profit.

Re-Direct Examination.

Q. Would you have preferred that Moog Industries give them to you at no cost to you? Well, let me put it this way: Would the answer to my question that I gave you be the same as your answer to Mr. Schrup's question?

A. That's right (Part 3, Page 696).

The witness was shown Commission's Exhibit 15, distributor's net cost sheet in Coil action parts, known as the "Blue Sheet", and asked if he purchased from Moog Industries the coil suspension parts, as shown on Commission's Exhibit 66, at the prices listed on that sheet.

The witness stated he was not familiar enough with the details of business to know whether that was the sheet that he bought off of; that he judged, by looking at the type of sheet, that it was the sheet they used to buy from as a distributor's sheet (Part 3, Page 697). We purchased on the blue sheet and sold them on the pink sheet prices. We sold some of the same items that we purchased on the blue sheet at green sheet prices, and sold some of the same items purchased on the blue sheet at canary sheet prices, and we sold some of the items that we purchased on the blue sheet at list.

October 21, 1952, at Dallas, Texas.

HUBERT B. BRADEN testified on behalf of Respondent as follows:

Direct Examination.

My name is Hubert B. Braden. The name of our company is American Gear and Parts Company, Inc.; we are engaged in the distribution of automotive products in the Dallas area. I am President and General Manager of that company. I have been in the automotive parts business since 1916 (Part 3, Page 700). It was a corporation when we took it over in 1943 and I was President. Then it was a partnership in 1944, and was so operated until either 1947 or '48, when we re-incorporated, and I was Manager and president at that time.

Q. I show you Government's Exhibit 79-F, indicating sales of leaf springs and coil springs and chassis parts for the year ending—for the fiscal year 1950 from Moog Industries, Inc., by distributors in Dallas, Texas, the Automotive Appliance Company, showing gross purchases of those products of $216.63, on which a 12% allowance was made from distributor's net prices; Motor Supply Company of Dallas, Texas, $1,301.62, on which an allowance of 12% was made from Distributor's net prices; American Gear & Parts Company, purchases of $553.76, with an allowance of 13.47%; Terry Automotive Supply, purchases of $955.42, on which an allowance was made of 15% on distributor's net prices for that year; Henderson Auto Parts, purchases of $523.18, on which is shown no allowance; and Truett-Worrell Spring and Aligning Company, purchases of $4,090.16, on which an allowance was made of 7.29% on distributor's net prices. I will ask you whether you know whether or not the fact that an allowance of 15% was made to the Terry Automotive Supply Company injured your company, American Gear & Parts Company, competitively (Part 3, Page 701 in the distribution of Moog Industries' leaf springs, coil springs, and chassis parts during the period indicated?

A. No, sir.

Q. Do you know whether it did?

A. No, sir. Frankly, I didn't know Terry Automotive had Moog up until three or four months ago.

Q. Well, were you injured competitively by it?

A. No, sir.

Q. By virtue of the spread you were not?

A. No, sir.

Cross Examination.

The witness was asked if he was interested in purchasing Moog Products as cheaply as possible, and answered that he was. He was then asked why, and answered the cheaper we buy merchandise the more profit we make when we sell it (Part 3, Page 702).

Q. And that helps you competitively?

A. Well, you can put it competitively, not necessarily competitively, but it gives us more profit on our total sales.

If we make more profit, we make more money and pay more dividends to stockholders. We would expand our business.

The witness was asked if he knew the price at which his competitors bought Moog products and his answer was that they buy all Moog products off of one sheet, which is distributor's net price sheet. I do not know the discount or rebate that our competitors receive, and I knew before coming to this hearing that Terry Automotive Supply was getting a 15% rebate while I was only getting a 12 or 13.47%. Mr. Butterfield showed me that about a week or ten days ago. I got 13.47 in 1950 (Part 3, Page 703). I would prefer to get 15% if our purchases run into that. I think our purchases this year will put us in the 15% bracket. I know of no objection to buying at the cheapest price. I am a member of a buying group—Automotive Southwestern, Inc., located at 2101 Commerce Street. I am President and General Manager of that group. That group has a standard distributor's contract with Moog, operated strictly on a rebate basis according to our purchases. The members purchase through Automotive Southwestern purchase forms (Part 3, Page 704). If a member wants to order Moog products, he

fills out the Automotive Southwestern form to Moog Industries to ship to him and he mails the order to Moog. Moog ships direct to him and bills Automotive Southwestern, in duplicate. The original goes to Southwestern at Dallas, and the duplicate and triplicate go to the member. Automotive Southwestern, in turn, charges the member with that invoice on our books, and once a month renders him a statement for all purchases of all lines. The member pays his bill on the 10th, Southwestern remits to the manufacturer, and at the end of the year Moog gives us check for the rebate that is earned, whatever scale of rebate we get into and this year we got into the 13.47% bracket. The group distributes that check to each member according to his purchases, less his pro rata share of the operating cost of the organization. There are sixteen members in our group (Part 3, Page 705). I don't have the list of members with me, but I believe they are as follows:

American Gear & Parts Company, Dallas; Automotive Parts & Supply Company, Tulsa, Oklahoma; Automotive Supply Company, Amarillo; Barrett's Automotive, Lubbock, with branches in Odessa and Abilene; Davis Automotive Supply, Henderson, with branch in Rusk and a branch in Orange; Davis Automotive Supply, Canyon, Texas; East Texas Automotive Supply, Tyler; Kennedy Supply Company, Shreveport, Louisiana; Hall-Fuller Company, Austin, Texas; Moore Brothers Electric, Houston; Mount-Joy Parts Company of Houston in Houston, Texas; Motor Parts Company, Corpus Christi; Galbert Brothers in McAllen (Part 3, Page 706).

These jobbers are not all the same size. Some are smaller and some are larger. American Gear and Parts Company, my company, from a redistribution standpoint covers what we call Northeast Texas, which would be a line approximately North of here to Red River, which includes Gainesville, across to Paris, down to Commerce, Sulphur Springs, in through Gilmer, Tyler, Athens, and back into Dallas normally. Also in the City of Dallas calling on small jobbers. When I say "re-distribution" I mean reselling the small jobbers. About 70% of our sales are in that category and the other 30% are to car

dealers, fleets, and independent garages. Our trade for those latter sales is somewhat smaller as far as fleets and independent garages in the City of Dallas is concerned. We do get into Mesquite, Garland and Grand Prairie but in a very small way (Part 3, Page 707).

I cannot tell you accurately how many of the members of Southwestern are purchasing Moog products. My estimate, without looking at records, is that there are nine or ten. Prior to buying from Moog Industries, we handled Thompson products. However, originally Thompson did cover the front end parts completely and that was the reason for taking the Moog line at that time, and it still is the most complete front end parts line in the business, and that is the reason we sell Moog products. I would say there are approximately ten of our members handling Moog products. There are sixteen members in our group and six purchase from sources other than Moog (Part 3, Page 708).

As to the circumstances into which we entered into a contract with Moog Industries, American Gear and Parts Company were buying from Moog before we got into the group, and after we got into the group we merely switched our purchases through Automotive Southwestern. I cannot tell you offhand whether any of the officials of Moog called on me when we changed over. That is too far back. I have known Mr. Appel, the General Manager for years and years, and I don't think Mr. Appel has ever been in Dallas. He didn't come to see us.

The witness was asked the question whether he would consider it desirable, from the group standpoint, if all the members purchased from Moog, and the witness answered, "not necessarily, no, sir" that the group was getting into the extreme bracket, and that those members who do not see fit to handle Moog do not have to. On the present basis of purchasing, I am positive we are in the top bracket now (Part 3, Page 709). If we are not there in the top bracket now, naturally we would like to reach it. It would be more profitable. Up until we became members of the group, our purchases from Moog didn't allow us to sell as re-distributors. In other words, we couldn't sell the Moog line to a jobber because there

was not any profit to the company, and yet to-day 70% of our Moog products is going to other jobbers. Our members do their purchasing as a group to re-sell to other jobbers.

Q. Do you enter into a contract between the jobbers, yourself, and Moog?

A. Normally they have a contract we can sign up, but normally we don't; I don't think we have one signed. But that is the basis on which we are operating. We do not report our sales to Moog. We do not purchase all the products of Moog (Part 3, Page 710). We purchase from them coil action and front end parts or coil action and coil springs. That comes under leaf springs, but we do not handle leaf springs at all. Normally our purchases on leaf springs would not run $25.00 a year, and we do not handle their piston rings.

The witness was asked the question—prior to the changeover by the group to the Moog Industries line, how many members of the group were purchasing Moog products? The witness answered that was a question he could not answer because when the group was organized there were only originally four members. Other members have come in over the years. That he thought that the group was organized in 1945 and that American Gear and Parts was probably the fourth or 5th member. As to how many handled Moog products before they went into the group and how many handle them to-day, he could not tell that, but that he did not think that any of them switched to Moog that were not originally handling Moog products; that he believed the ones handling Moog products to start with were continuing to handle them through the group (Part 3, Page 711).

Re-Direct Examination.

Prior to the formation of the group there was always a certain amount of distributors in Dallas pooling their purchases from various manufacturers. To-day, Sunnen Products have a quantity price on a lot of their merchandise, and Albert Taylor Automotive Supply and I usually pool our purchases. One time I will buy and they ship to us, and another time he will buy and they ship to him.

On motion the Trial Examiner struck this answer. I remember that we sell these small jobbers on the blue sheet prices.

Q. Now, if this volume rebate to which has been referred here should be eliminated, you would lose about 70% of your volume, wouldn't you? (Part 3, Page 712).

Mr. Schrup: I object to the hypothetical situation.

Mr. Butterfield: I believe on cross-examination Mr. Schrup asked a question of this witness about what percent of his present volume was to small jobbers, and his answer was 70%. Now, the witness has said he sells these small jobbers on the blue sheet and that the volume discount, he says, is the margin by which he is enabled to handle that redistribution.

Mr. Schrup: That question was objected to.

Mr. Butterfield: I did not object. You asked the question, and I made no objection.

Trial Examiner Kolb: Read the question.

(The reporter read the question referred to.)

Trial Examiner Kolb: There is nothing involved in any elimination of rebate, is there?

Mr. Butterfield: I just asked him if—

Trial Examiner Kolb: (Interposing) That has nothing to do with this case. The objection will be sustained.

Mr. Butterfield: Do I understand that volume rebate is not involved?

Trial Examiner Kolb: No, there is no question, as I understand it, about any elimination of the discount to the distributor.

Mr. Butterfield: Well, I asked for a bill of (Part 3, Page 713) particulars. I really can't tell what is—

Mr. Schrup: (Interposing) If you are going to go into another argument on the record in the presence of witnesses, I will have to make a motion again to exclude the witnesses.

Trial Examiner Kolb: As I understand, this case does not involve the elimination of the discounts to jobbers or to distributors, as such. Your question is predicated upon the theory that would be eliminated. That not being in-

volved, I sustained the objection. Proceed with your next question.

Mr. Butterfield: I think the question was misunderstood, but I will rephrase it.

By Mr. Butterfield:

Q. Mr. Braden, referring to Exhibit 79-F, showing 13.47% differential from distributor's net prices on $553.76 worth of merchandise in the fiscal year ending 1950, I ask you whether or not the elimination of this differential, 13.47, of distributor's net prices, the elimination of that differential would result in the loss of approximately 70% of your present redistribution volume on the Moog line?

Mr. Schrup: The same objection as previously made.

Trial Examiner Kolb: Sustained.

Mr. Butterfield: I offer to prove by this witness (Part 3, Page 714) that the price differential shown on Exhibit 79-F between distributor's net prices—

Trial Examiner Kolb: (Interposing) Off the record.

(Discussion off the record.)

Trial Examiner Kolb: On the record.

Mr. Butterfield: I'd like to finish my offer of proof. Will you read as far as I got with it, please?

(The reporter read the statement referred to.)

Mr. Butterfield: —from distributor's net prices, if eliminated by Moog Industries, Inc. would result in the loss of approximately 70% of the present volume of American Gear & Parts Company in redistribution to small jobbers.

Trial Examiner Kolb: The offer of proof being based on a contingency which is not involved in this proceeding, it will be refused (Part 3, Page 715).

ALBERT S. TAYLOR testified on behalf of Respondent as follows:

Direct Examination.

My name is Albert S. Taylor, and I am Secretary and General Manager of Automotive Appliance Company.

Q. Mr. Taylor, I call your attention to Government's Exhibit No. 79-F, showing for the year ending 12/31/50, purchases by Automotive Appliance Company of $216.63 of leaf springs, coil springs and chassis parts from Moog Industries, with an allowance off distributor's net prices of 12%. I call your attention to American Gear & Parts Company purchases for the same period of a little over twice that amount, $553.62 (Part 3, Page 716) with an allowance off distributor's net prices of 13.47%; Terry Automotive Supply, purchases of $955.42, with an allowance of 15% off distributor's net prices, and I will ask you if you know whether or not you were injured competitively during that period of time by virtue of the fact of this differential spread on allowances off distributor's net prices in the purchase of Moog leaf springs, coil springs and chassis parts resold by you to your customers?

A. Yes.

Q. You were so injured?

A. No.

Cross Examination.

The trade territory of Automotive Supply Company is a fifty-mile radius of Dallas. We employ five salesmen who sell through that territory. In the re-sale of Moog products we re-sell to car dealers, garages, fleets, and service stations (Part 3, Page 717). I do not believe we sell any Moog products to jobbers. I am a member of a buying group. Its name is Ark-Tex Warehouse Distributors, located in Texarkana. I hold no office in that concern.

I believe I am familiar with the buying prices of the various other purchasers competing in the re-sale of Moog products with me in the Dallas area. We are supplied the catalog sheets. I have their actual buying prices available. I know to-day what the buying price would be of a member of the Southwest Warehouse Group based on rebates. I don't know the actual net buying price.

I have been purchasing Moog products eight to ten years. I became a member of the group about two or two and a half years ago (Part 3, Page 718). I believe there are fourteen members belonging to that group. They are: Cogdell Automotive Supply in Fort Worth; Motor Supply

Company, Marshall; Motor Supply of Dallas; Cogdell Motor Supply, Waco; Mt. Pleasant Auto Parts Company; Tyler Service Parts Company, Tyler; Westbrook-Reynolds Company of Texarkana; Sulphur Springs Auto Parts; D. White Auto Parts Company, Henderson; Grant Auto Parts Company, Paris; Riley-Ball Motor Supply Company at Longview, and Riley-Ball Motor Supply at Gladewater. There is an account in Houston; I don't believe I can call the correct listing of their company; it is just a new member.

I do not know how many of those members purchase Moog products. We purchase Moog products through purchase orders written direct to Moog or their warehouse. The Moog salesmen call on us possibly once or twice a year, and when they call they try to promote the sale of their line to us (Part 3, Page 719). I have never requested their salesmen to accompany our salesmen on calls to our customers, but I am sure they do. I could not say if they have ever referred any orders to us. They check our inventory and we place our orders with them and they take the order along with them. Most of our orders are delivered from their local warehouse located here in Dallas (Part 3, Page 720).

We pay for the products through Ark-Tex Warehouse Distributors. We receive an invoice from Moog for the purchase. During the month we will receive a recap of different manufacturers' purchases billed to us by Ark-Tex. At the end of the month we receive a statement of the Ark-Tex invoices and make direct payment to Ark-Tex, and they, in turn, pay Moog. We obtain our rebate on the purchase of Moog products at the end of the year. It is paid in the form of a check by Ark-Tex, coming direct from Ark-Tex to us. I couldn't say as to how the check is figured as to what is due us. I could explain the entire method that is figured, but whatever the total volume, we are placed into that bracket and get our pro rata part of the rebate received (Part 3, Page 721). That bracket is obtained by the combined purchases of the various members of the group. According to the figures that I am looking at here, in 1949 we were placed in a bracket which gave the group a 12% rebate in buying Moog products. Our company is interested in buying Moog products

at the cheapest price possible. The reason for that is profit. That enables us to expand and grow.

Q. Now, directing your attention to Commission's Exhibit 79-F, I believe Mr. Butterfield called your attention to various customers of Moog listed opposite Dallas, Texas. Here is your company. Your purchases had a rebate of 12%. I direct your attention to Terry Automotive Supply, a member of the Southwest Warehouse Group, receiving 15%. Would you prefer to receive that amount, rather than 12%?

Mr. Butterfield: I object, if Your Honor please.

Trial Examiner Kolb: Overruled. You may answer.

A. Yes (Part 3, Page 722).

Re-Direct Examination.

I do not consider the ability to grow and expand as being anything evil or illegitimate.

CHARLIE S. COOK testified on behalf of Respondent as follows:

Direct Examination.

My name is Charlie S. Cook; I am President and General Manager of Motor Supply Company of Dallas.

Q. I call your attention to Government's Exhibit 79-F. The Motor Supply Company of Dallas, for the year ending 12/31/50 is shown as having purchased $1,301.62 worth of leaf springs, coil springs and chassis parts from Moog Industries, St. Louis, on which an allowance was received of 12% off distributor's net prices. American Gear & Parts Company, during the same (Part 3, Page 723) period of time purchased $533.76 worth of leaf springs, coil springs and chassis parts and is shown to have received an allowance off distributor's net prices of 13.47%. Terry Automotive Supply Company, for the same period of time, is shown to have received on $955.42 worth of leaf springs, coil springs and chassis parts, an allowance off of distributor's net prices of 15%. I ask you if you know whether or not for that period of time the Motor Supply Company of Dal-

las suffered any competitive injury by virtue of this differential in allowances off of distributor's net prices in purchases of leaf springs, coil springs and chassis parts from Moog Industries, which they purchased from Moog and resold to its customers?

Mr. Schrup: The same objection.

Trial Examiner Kolb: Overruled.

Q. Do you know whether or not you were injured?

A. I do.

Q. Were you so injured?

A. No (Part 3, Page 724).

Cross Examination.

As to what I base my answer to Mr. Butterfield's last question, we use as far as we know the same suggested re-sale price as furnished by the manufacturer; that is our re-sale so far as we know, and that is my reason.

Motor Supply Company of Dallas covers Dallas and about a thirty-five mile radius. We have three salesmen. We sell to independent garages, service stations, car dealers and fleets, and a small amount to jobbers, about from 5 to 7%. We sell a small percentage to car dealers, preferably new car dealers (Part 3, Page 725). I am a member of the buying group known as Ark-Tex Warehouse Distributors. I believe I joined that group in 1950. I first started buying Moog products about five years ago. Naturally I am interested in buying Moog products at the cheapest net price obtainable because there is more profit, so we can pay our taxes.

The witness was asked the question, after all his operating expenses were paid and his taxes were paid what his net return of profit was on his sale. This was objected to as not an issue in the case, and was overruled by the Trial Examiner (Part 3, Page 726). The witness asked if the question was directed to the overall net profit. This was again objected to on the ground that the Respondent could not bear the defense of every line that the witness was buying, and that it was unfair to ask Respondent to bear the burden of defending the whole industry. The witness was directed to answer the question. I'd hate for

you to see my financial statement at the end of the year and try to dig out the profit. You asked for the net figure after everything was paid. The percentage, if I recall, is 6.2%. That is just a figure that I believe is correct as close as I can figure, that 's net profit (Part 3, Page 727). After taxes are paid, it came down to four point something. It came below 4%. I would not be exact as to any part of it.

BEN E. HENDERSON testified on behalf of Respondent as follows:

Direct Examination.

My name is Ben E. Henderson. I am operating the Henderson Auto Parts and have been familiar with the operation of that concern for twenty years (Part 3, Page 728).

Q. I call your attention, Mr. Henderson, to Government's Exhibit 79-F, indicating for the year ending 6/30/50—

A. Yes, sir.

Q. —there were purchases by Truett-Worrell Spring & Aligning Company of $4,090.16 worth of merchandise, with an allowance—merchandise consisting of leaf springs, coil springs and chassis parts—with an allowance off of distributor's net prices of 7.29%; American Gear & Parts Company, purchases of $553.76 worth of merchandise, an allowance of 13.47% off of distributor's net prices, and Motor Supply Company of Dallas, on purchases of $1,301.62, received an allowance off of distributor's net prices of 12%. Automotive Appliance Company on purchases of $216.63 received an allowance off of distributor's net prices of 12%, and I will ask you would you know whether or not by virtue of the spread and differential in allowances off of distributor's net prices the Henderson Auto Parts Company was competitively injured in the purchase of leaf springs, coil springs and chassis parts from Moog Industries, Inc., in the sale of such products to its customers?

A. Yes.

Q. Was it so injured?

A. I do not think so (Part 3, Page 729).

Cross Examination.

Q. Would you tell us the reason why, sir?

A. We have a conservative little business in auto parts; it is a personalized business, and we are not a member of any buying group and we have been up there for about twenty-one years, and I have no particular observation or point to make that we suffered any injury, but as of this time and during this period I have not been able to determine any injury if there was one that we did or might have suffered.

Our trade area is the City of Dallas and occasionally a few customers on the outskirts of the City limits. We do not have any customers in Highland Part or University Park. At the present time I have no salesmen. In 1949 I had a part-time salesman covering the City of Dallas. I make over-the-counter sales (Part 3, Page 730). As to what percentage of our sales that amounts to, I would have to hazard a guess. I would say that about 75% are over the counter. The other 25% are accounts that trade with us—who have credit—and call and ask for merchandise to be delivered. Generally they are service stations, garages, and very few automobile dealers. Occasionally on a critical item they would purchase from us, but not generally. Some few fleets and local service stations and garages.

When I say I was not competitively hurt, I meant by that as follows: As I qualified my statement there, I said I hadn't been able to determine if we were, and we are handling the Moog line and are glad to have it, and it is a satisfactory line and we are satisfied with our profit on it.

Q. We will get to that in a minute. When you say you don't believe you are competitively hurt, you mean you don't know if anybody undercuts the prices at which you offer Moog products to your customers?

A. No, sir, I do not.

Q. Is that the basis on which you say you are not competitively hurt?

A. That is true.

I have an interest in Henderson Auto Parts. It is owned by my family. It has been owned by my father, who was a blacksmith who came to Dallas in 1889. I am General Manager.

Q. I take it from your testimony you are not particularly interested in what price you pay for your merchandise?

Mr. Butterfield: I object to that characterization as to what he takes from the testimony; I think he should confine himself to what the testimony shows.

Trial Examiner Kolb: Overruled.

A. Naturally, I am interested in what we pay for merchandise.

Q. You have been shown the buying prices of your competitors.

A. True enough.

Q. They are all buying considerably cheaper than you are?

A. True enough.

Q. Would you prefer to buy at the considerably cheaper price at which they buy?

Mr. Butterfield: I object to that. It is a very foolish question.

Trial Examiner Kolb: Overruled.

A. I do not know what circumstances confront these other (Part 3, Page 732) people, not having been in their business, and I don't know.

Q. I am not asking about their business; I am asking about your business.

A. Naturally, I would like to buy as cheaply as I could.

Q. Why?

A. Profits, for one reason; availability of the material; a larger stock to operate from; more variety of merchandise for customers to pick from; have less investment in my merchandise. We could go on for time immemorial.

Q. Would that help you competitively?

A. Possibly. I doubt it seriously. Some of these items, as we go through the store there, some items we don't handle for the reason there is a small item mixed up in it for some reason or another.

Q. We are talking about Moog products. You stated the reasons why you would like to buy cheaper products?

A. Yes, sir.

Q. You have given the reasons why?

A. Yes, sir.

Q. Those reasons you have given, you do not consider they help you in your business?

Mr. Butterfield: I object to that as argumentative.

A. Yes, it would help to some degree in the business (Part 3, Page 733).

October 27, 1952, at New Orleans, Louisiana.

ALMON G. BARDIN testified as a witness on behalf of Respondent as follows:

Direct Examination.

My name is Almon G. Bardin. I am owner of Auto Shock Absorber Sales Company.

Q. I show you Government's Exhibit No. 62, showing coil action sales and rebates to jobbers in New Orleans, Louisiana, by the Moog Industries, Inc., for the years '47, '48, and '49.

The Auto Shock Absorber Sales Company, as shown by this exhibit, purchased no coil action parts from Moog in '48, but in '49 purchased $1,333.71 coil action parts, and paid for them at the rate of 94.6 percent of distributors' net prices, or an approximate rebate there of 5.4 percent.

For the same year Auto Spring & Brake Service purchased (Part 3, Page 738) $6,192.69, and paid for them at 92½ percent of distributors' net prices, or a discount of 7½ percent.

Auto Chassis & Spring Company purchased no coil action parts during that period of time—no, purchased $318.26 in that period of time, and received a cash discount of 6.37, and the excise tax of 15.59, and paid a net price of $296.30, on purchases of $318.26.

Greiner Auto Parts purchased $805.46 for the year ending 12/31/49, and paid for them at the rate of 91 percent of distributors' net prices, or a discount of 9 percent.

I call your attention to the fact that the annual period for Greiner was 12/31/49; the annual period of Auto Shock Absorber, 2/28/52; the annual period for Auto Spring & Brake ended 1/31/49, and the annual period for Auto Chassis & Spring ended 1/31/50.

Do you know, Mr. Bardin, whether, by virtue of this difference in percentages in payment for coil action parts from Moog Industries by your company and the other companies shown there, do you know whether or not you were injured competitively?

A. Yes, I know.

Q. Were you injured competitively?

Mr. Schrup: Just a minute. I have an objection to the answer; improper, calling for a conclusion, speculation on the part of the witness. It is a matter of determination by (Part 3, Page 739) Examiner on the facts as developed, and I don't think any proper foundation has been laid for the witness to answer that question.

Trial Examiner Kolb: The objection will be overruled. The witness may answer.

By Mr. Butterfield:

Q. Were you so injured competitively?

A. No, I was not injured competitively, in my opinion.

Q. Mr. Witness, I show you Government's Exhibit 79(c), New Orleans, Louisiana, showing purchases of leaf springs for the year 1949 by Greiner Auto Parts of $1,898.74, with a discount from distributors' net prices of 4.79 percent.

Auto Chassis & Spring Company for 1949, for the year ending June 30, 1949, purchased leaf springs, $957.20, distributors' net prices without any discount.

And Dealers Truckstell Company purchase of leaf springs for the year ending June 30, 1949, of $1,526.39.

Now, for the fiscal year ending 12/31/50, this exhibit, as you see, shows Greiner Auto Parts having purchased $3,373.71 of leaf springs, coil springs, and chassis parts, with a discount of 14 percent off of distributors' net prices, the Auto Chassis & Spring Company purchasing $1,687.68, with discounts off distributors' net prices of 5 percent; and Dealers Truckstell Company, for the year ending 6/30/50, purchases of $447.30, with discounts off distributors' net price of 5 percent (Part 3, Page 740).

Now, I will ask you whether or not you purchased any of these products from Moog Industries, Inc., during that period of time; that is leaf springs or leaf springs, coil springs and chassis parts?

A. I'd have to check my records to be positive about an answer on that. I believe I did buy some parts from them during that period.

Q. Do you know this Dealers Truckstell Company?

A. Yes. I am not close to them, but I know of them being here, or formerly being here locally. I don't think they are here any more. They used to be back on Broad Street, where they built a new underpass. I understand they went back to their office somewhere up the country (Part 3, Page 741).

Cross Examination.

Prior to 1949, I purchased coil action parts for re-sale from several companies. I bought some parts from Logley on a subjobber basis, such as coil action and coil springs. I bought from Greiner Auto Parts, some from Auto Spring, some from New Orleans Auto Supply, some from out of town from Elgin Machine Works, Elgin, Illinois, some from Regal Manufacturing Company, which subsequently I returned because the merchandise was unsatisfactory, and I bought some from Automotive Wholesale. The balance was not Moog parts. They were not all Moog parts, some and some weren't. As to how many were Moog parts, that would be a hard question to answer. At that particular time, there wasn't an over-abundance of parts, and in lots of cases it was a question of buying them

when you could get them. In 1949 we bought Moog parts. I also bought from other jobbers who represent Thompson Manufacturing Company, and Geary-Hershey, and Permite, and several of them packed under different names (Part 3, Page 742).

Referring to Commission's Exhibit 62, 1949 coil action parts, my reason for buying Moog parts was Moog had a very fine representation in the front end parts business, very good quality merchandise. I selected them because I wanted to try to improve my business. I felt to put Moog's name on my door was an asset to my business. At that time I was rather anxious to try to get lined up with some source of supply on a direct basis rather than being obligated to a jobber with whom I had to deal locally. I felt it would increase the whole picture of my business. In other words, expand my purchasing power. I would increase my credit rating if I am buying from Moog or Elgin or from any manufacturer away from here, and as I pay my bills and they are doing business with me, I get opportunities from other manufacturers who would possibly like to sell me. At present I am not buying direct. Would you like to? No, sir, I would not like to because I am a small business man and while I could possibly buy my parts direct a little bit cheaper (Part 3, Page 743). The method here I am using, for a small operator with limited capital, I have found from experience that I am better off not to buy direct. Yes, in '49 I did buy direct. That is, I thought I wanted to buy direct.

Q. In acquiring Moog parts for resale, are you interested in buying those parts at the cheapest net price available to you?

Mr. Butterfield: I object to that question, please, being rhetorical.

Trial Examiner Kolb: Overruled.

The Witness: Would you give me the question again?

(Record read.)

A. I would answer the question this way: Not necessarily so.

By Mr. Schrup:

Q. Why not?

A. Because I can buy Moog parts locally for a very slight increase over what I would have to pay for them direct, and the local jobber will carry all the cats and dogs that I can carry of popular merchandise, that I sell readily every day, but when I get a call for parts which I can't afford to put up on my shelf because I don't have the capital to put it up there—it is (Part 3, Page 744) not always an advantage to buy too cheap.

Q. Let's put it this way:

In buying the part that you want to offer for re-sale, and you have selected what you want to buy for resale—and we are talking about Moog parts—are you interested in buying those parts that you want to offer for resale cheaper—at the cheapest net price available?

Mr. Butterfield: I object on the same ground.

Trial Examiner Kolb: Overruled.

A. I would say possibly that would be correct, yes. If I would put it this way—

Q. Just a minute.

A. Could I finish answering your question?

Q. Certainly.

A. It might not be necessarily true, to answer your question truthfully. I might be able to buy a particular part from the factory direct a little bit cheaper than I could go over and buy the same part from a Moog distributor here, but I don't have any transportation cost; I don't have any bookkeeping cost—they are less. I can run right over there and get it when I need it, turn around and sell it; I have made my profit and I am happy.

Q. That is very true, but let me ask you this question:

In 1949 you bought approximately $1,300-some-odd worth of coil action parts, according to Commission's Exhibit No. 62 (Part 3, Page 745), upon which you received a rebate of 5 percent?

A. That's correct.

Q. Greiner Auto Parts bought $805, upon which they received a rebate of 9 percent. Now, would you have preferred to receive the 9 percent on those purchases that Greiner Auto Parts received?

Mr. Butterfield: I object.

Trial Examiner Kolb: Overruled.

A. Well, the rebate that you get at the end of the year, it's a nice little thing to receive, I'll agree to that.

By Mr. Schrup:

Q. Would you prefer to receive it or not? Would you prefer to buy it at 5 percent or buy it at 9 percent?

Mr. Butterfield: Same objection.

A. I would say that anybody in their right mind would rather buy it at 9 percent than 5 percent.

I am buying very few Moog parts to-day. I buy to-day several makes of front end parts; I buy some Moog parts. I buy Monmouth, and Geary-Hershey parts. I do not buy any of these parts direct. In re-selling the coil action parts in 1949, I sold to garages, service stations, and independent repair men (Part 3, Page 746).

I sold jobbers only on a courtesy basis. If he was out of some particular number and wanted to pick it up, I'd sell it to him. I made no efforts to get jobber business. I don't cater to that class of trade. I am selfish in my business. I want to deal with people I make the most money from. A little felliw like me can't make a profit selling at a long discount. It has just crossed my mind I am at present buying leaf springs direct (Part 3, Page 747).

In 1949, when I was buying Moog parts for re-sale in New Orleans—coil springs and chassis parts—as appears on Commission's Exhibit 79-C, and Commission's Exhibit 62, I would say I think I was acquainted with the prices that our competitors were paying for those same parts. I was familiar with the entire set-up as far as purchasing direct from Moog was concerned. I cannot tell you to the penny but I have a pretty good idea of the discount from the list price that my competitors were paying. I was aware before I came in to-day that in 1949 I was only getting 5%, and, according to Commission's Exhibit 62, Greiner was getting 9%. It would not surprise me if there were some that maybe were getting more. If my purchases would have justified it, I would have perferred to have gotten more. I wanted to get all I could get (Part 3, Page 748). After I got it I might buy me a fifth of Old Crow.

or something like that, around Christmastime when you get it. As to whether it would help my business to get a better price, it might in a small way help me.

Referring to Commission's Exhibit 97-C, I believe I bought some leaf springs, coil springs and chassis parts during the year of 1950 (Part 3, Page 749). I could not recall how much. As to whether I got any discount, I cannot say. I would have to look up my records. Before coming in to testify I did not check my records for that particular question. I have all of them at home. I can dig every one of them up if necessary. I was not asked to refer to my records to come down here to testify. I just came down to answer any questions that you asked. I may have bought some products direct in 1950 and some of them locally (Part 3, Page 750).

As to the names of the salesmen who called on me from Moog, they have had several salesmen. Ben King calls on me with some regularity, and then they had two other fellows; I can't call their names, but they had two other representatives. Mr. King is in the room here. He comes with some regularity. They have other salesmen, too. I can't think of his name. He came by several times and then I think the sales manager or somebody else from Moog came to call on me a couple of times. That was sometime ago, not recently. The last time King called on me was possibly three months ago. Mr. King did not ask me to come in as a witness. I didn't see him until this morning. Mr. Butterfield requested me to appear here (Part 3, Page 751). I made no reference to my records before coming in to testify.

Re-Direct Examination.

At the present time I am buying the majority of my coil action parts, about 95%, from the NAPA Warehouse, locally. The deal I am getting from them is better. However, the price from Moog would probably be a bit cheaper but NAPA has a warehouse stock here. In other words, they serve a whole bunch of stores and have a tremendous amount of stock and I can draw it by one item at a time, as cheap as I can buy 200 pounds worth from Moog. In a small business, it is awful hard to get an order big enough

to buy a 200 pound shipment. That's the reason I changed my method of operation, the reason that I don't buy any more from Moog except on a pick-up basis, locally. Yes, I handle Moog springs (Part 3, Page 752). I buy those from Trainer National Spring Company, Newcastle, Indiana. I don't think they are giving me a better deal than Moog. I just buy off the distributors' net price sheet. They never approached me on giving me a volume rebate discount.

JOSEPH N. GREINER testified on behalf of Respondent as follows:

Direct Examination.

My name is Joseph N. Greiner. I am Vice-President of Greiner Auto Parts Company, Inc. (Part 3, Page 753).

I am in charge of purchases and sales and I held that same position in 1949.

Q. Mr. Greiner, I show you Government's Exhibit No. 62, showing purchases for the year ending January 31, 1949, by Auto Spring & Brake Service, of coil action parts, from Moog Industries, Inc., St. Louis, in the amount of $6,192.69, at a price of 92½ percent of distributors' net prices. Purchases by Auto Chassis & Spring Company for the year ending 1/31/50, of $318.26. The payment for those distributors—for those goods being $296.30; purchases by Auto Shock Absorber Sales in the amount of $1,333.71 for the year ending 2/28/50, and a price of 94.6 of distributors' net prices, and purchases by the Greiner Auto Parts Company for the year ending 12/31/49, of $805.46, with purchases at a price of 91 percent of distributors' prices, for that period of time.

Now, Mr. Greiner, will you kindly state to what class of customers you sell the merchandise that you purchase from Moog Industries? (Part 3, Page 754.)

A. Independent garages and repair shops.

We purchase on the blue sheet prices. Moog has a suggested re-sale price that we follow because 99% of the factories that we buy from do have suggested re-sale prices.

We use them because if we didn't we would spend all of our time making up our price sheets. Although they are only suggested prices, we follow them. We follow their sheets except on occasions where every once in a while you will have a car dealer, like a General Motors, Chevrolet dealer, who will get short. The only time he buys from us is when he is short. Then when we ask him 60¢ for it and he says I can buy it for 54; I can beat it; we chatter around like that (Part 3, Page 755). This answer was moved to be stricken, as it was hearsay, and the latter part of the answer was stricken.

Counsel for Respondent asked the Trial Examiner to consider his ruling, as it was related by a party to the transaction and testifying as to what occurred at the transaction and at the price at which the item sold, and that the witness was originally called in and testified on behalf of the Commission and had previously testified to sales to car dealers.

The Trial Examiner ruled that he would abide by his decision (Part 3, Pages 756, 757).

We do sell to car dealers but very little. We try to sell them at Moog's suggested re-sale prices so that we can get a normal margin of profit, but sometimes you can't always do that because you have got other people in competition with you who will sort of chisel on the price a little and get it down to where Chevrolet can buy from his factory, and he will get the business. If you don't meet it, you will have to pass it up. A lot of times, it is plus business, so we take it.

Cross Examination.

In the re-sale of Moog products, as a matter of practice we try to follow the suggested re-sale prices. I really don't know what our competitors in New Orleans who re-sell Moog products do as to following suggested re-sale prices. It has never come to my attention. They are competitors—I don't know what they are doing.

Q. Well, certainly, in trying to sell a customer Moog products, if they were offered a better price they'd advise you, wouldn't they?

A. Like the car dealer does? (Part 3, Page 758.)

Q. Well, the other customers, too?

A. You see, on a Moog item, it is not like a Chevrolet item that you go out to sell; it is a car item.

Q. You seem to single out the car dealers for special attention?

A. That is because they put me out of business.

I cannot tell you what percentage of our sales are to car dealers. If I told you what percentage, it would be an estimate and I would not want to be held to it. I would estimate it at about 10% of our sales of Moog products are to car dealers. As to the other 90% of our sales, to my knowledge I have never run into any customers who were being offered the same products by our competitors at a lesser price than that which we offered them (Part 3, Page 759).

We are a member of a buying group known as Cotton States, Inc. We place our order direct to the factory through Cotton States, on an order form. The goods are shipped direct to us. We pay Cotton States and Cotton States pays Moog. There is a rebate returned to us by Cotton States at the end of the year. Moog has a regular rebate schedule. The rebate is made by Moog to Cotton States (Part 3, Page 760), and Cotton States, in turn, rebates our proportionate share to us. At the present time Moog's salesman calls on us. They have had others in the territory. When he comes he checks our store and we get together. A lot of times I will have items that are in obsolescence. I might have some defective merchandise and then we will get together on it. We'll get together and be hollering about some other outfit that is more competitive than we are. You know, try to get the price in line, just normal. As to whether any of the Moog salesmen accompany our salesmen on their calls, they have done so at times when we asked them to. They do "missionary work" with us. Their salesmen have never referred any orders to us for filling (Part 3, Page 761).

In 1949 we had four salesmen. Now we have five. We make no re-sale of Moog products to other jobbers. A Moog salesman calls on us about every six to eight weeks.

He doesn't spend too much time with us because we are all set up and everything. He doesn't have to worry about selling me the line. It is difficult to say how much time he spends. It depends on circumstances and how busy I am. As to how long we have handled the Moog line, I can't tell you that. I came out of the Service in 46 and I think we had it then. I know we had it prior to then. I could not tell you without checking.

Before we had the Moog line we had McQuay-Norris line (Part 3, Page 762). We still handle McQuay-Norris products.

As to what was the occasion for taking on the Moog line, there was more profit in it. Now I still handle McQuay-Norris. I do not handle Moog's complete line even though I could buy through the group, because I can buy McQuay-Norris from a warehouse in town. On some items that Moog sells, I don't do a good enough job to fool with them. I pay more money to McQuay-Norris when I buy it from them. It's like Mr. Bardin stated in his testimony—I can get a sale on something, run downtown and get it, and I have made a fast buck. With the Moog line I have got my money invested and have got obsolescence to take care of. I buy from Moog all my front end stuff, your coil action parts. I buy king bolt sets and shackle sets from McQuay-Norris because I don't do enough business on those to pay me to stock them. The only way you can make money is turnover (Part 3, Page 763). It is obvious I am interested in making money. That's just a business decision and it does not pay me to invest my money and leave it on the shelf. I do a good enough job with the parts I buy from the Moog line to justify me to stock the line. On coil action parts I do a sizable business, where I can turn my inventory five times. I could not make that turnover with a complete stock of king-bolt sets. That's why I buy them from McQuay-Norris. That's why it is more profitable for me to buy Moog parts in the way I am buying them rather than go to a local warehouse and buy McQuay-Norris parts as a substitute. I can buy Moog parts cheaper, but sometimes it even pays us to pay a little more for it. That's why we pay for the

service of McQuay-Norris. I want to be paid for my functional service when I do that to other jobbers here in town just like Moog's people do it for me.

Q. You understand we are out to eliminate that?

A. You can't eliminate it. It is what the industry is built on (Part 3, Page 764).

Q. You had that in mind today when you testified?

A. No, just happened to come up, brought up the subject, and that's the way it came.

Q. Well, now, in buying Moog parts, you buy them outright, and resell them?

A. Yes, sir.

Re-Direct Examination.

I have testified that I ordered the goods from Moog and we paid for them by sending the payment to Cotton States, and at the end of the year I got my proportionate share of the volume rebate (Part 3, Page 765). As to how they figure the proportionate part I get, I do not know. They figure it on a proportionate basis less their operating costs. This 9% that is shown here on this exhibit is the 9% rebate that was received by Cotton States. It was not received by me from Cotton States. Evidently if Cotton States received 9% I would have received that amount less the operating costs of Cotton States. I cannot tell you whether the 9% is exactly right or not. That might be the figure, but I know I do not receive the entire rebate that Cotton States receives.

We do not manufacture any leaf springs or strip steel (Part 3, Page 766).

CLARENCE J. SPORL testified on behalf of the Respondent as follows:

Direct Examination.

My name is Clarence J. Sporl. I am the owner of Auto Chassis and Spring Company. We manufacture some leaf springs from raw strip steel.

Q. I call your attention to Government's Exhibit No. 62, an exhibit showing the purchases of coil action parts in New Orleans, Louisiana, from Moog Industries, Inc., for the years '47, '48 and '49. Auto Chassis & Spring—that is your company—doesn't show as having purchased any coil action parts from Moog for '47 and '48, but for '49 it shows that you purchased $318.26 for the year ending 1/31/50, and on which you paid (Part 3, Page 768) $296.30 for those purchases.

Now, for the year ending 1/31/49, Auto Spring & Brake Company purchased $6,192.69, with an allowance of 7½ percent or purchase price paid of 92½ percent of distributors' net price.

Now, Auto Shock Absorber, for the year ending 2/28/50, purchased $1,333.71, with a net allowance of 5.4 percent or 94.6 percent of distributors' net prices, while Greiner Auto Parts, for the year ending 12/31/49, bought $805.46 of coil action parts from Moog Industries, and paid therefor 91 percent of distributors' net prices.

Now, do you know, Mr. Sporl, whether for that period of time so shown on that exhibit, Auto Chassis & Spring Company was injured competitively in the purchase and sale of Moog coil action parts in New Orleans, by virtue of that differential from the distributors' net prices or difference in allowances?

A. No, it was not.

Q. It was not?

A. It was not hurt.

Cross Examination.

I base that statement on the fact that our volume is so low it could not hurt us any. Most of our work is retail (Part 3, Page 769).

Q. If you could have gotten a discount or could have bought at a cheaper price, would you have liked that?

Mr. Butterfield: Object as being rhetorical.

Trial Examiner Kolb: Objection overruled.

A. Well, we may have. I wouldn't say yes or no (Part 3, Page 770).

Our trade discount is important to us because we give a little trade discount, too. We pass it right on. We buy

direct from Moog according to the set price list, and did so in 1949. I am talking about coil action parts, the ones referred to on Commission's Exhibit 62. Some of our customers have a 2% cash discount. We do not regard our cash discount any more important than our trade discount. Both of them are important to us. In 1949 we received no trade discount on coil action parts.

At this point there was a discussion as to whether the witness knew what trade discount meant (Part 3, Page 771).

We bought from Moog Industries direct in 1949 and bought on what is called the "blue sheet" distributors' price list. On those purchases we got a cash discount of 2% and always took it.

Q. Did you get—apparently, from Commission's Exhibit 62, which Mr. Butterfield showed you, you got no trade discount—

Mr. Butterfield: Just a minute.

A. From my knowledge that blue sheet is what our trade discount—we have a markup.

By Mr. Schrup:

Q. That is the price you add to it when you resell it? (Part 3, Page 772.)

A. When you resell it, that's right.

Q. When you bought it from Moog did you get any discount from Moog other than the cash discount?

A. No.

Q. Now, would you have preferred to have gotten in addition to your cash discount what we call—whatever you want to call it—a trade discount or rebate or volume discount from the purchase price from Moog?

A. I'd prefer it if I had enough volume on it.

Q. Regardless of whether you had volume on it, you would still like to buy it at a cheaper net price than what you do now?

A. If possible.

Q. Why?

A. It would allow us to make a little more profit.

1949 was the first year we bought from Moog as we went in business the latter part of that year (Part 3, Page 773).

I do not know the prices which our competitors paid for Moog parts.

Q. And notwithstanding the fact that you do not know the prices which your competitors pay for Moog products in the New Orleans area, you still state you are not competitively hurt by your buying price.

A. No, I am not at the time.

Q. Will you explain that a little more fully? I don't quite understand that.

A. Well, you see, we started in the latter part of '49, which we really wasn't hurt. Most of our business is retail. We are doing front end work.

We re-sell very few Moog parts over the counter. I would say about 10% to a few garages. The balance of it is used in our own repair work (Part 3, Page 774).

Yes, other distributors are doing similar work in this area. We do not have a job price that we give to someone coming in to have repair work done; we have a set price.

Q. Would it be fair to state that the lesser price you pay for your merchandise that you use in your repair work would give you more profit in that work?

Mr. Butterfield: That is counsel's statement. That is counsel testifying; rhetorical.

By Mr. Schrup:

Q. That would help your business to grow and expand?

A. It would help the profits out a little.

Q. The more profit you make, the larger you would eventually grow and expand?

A. Yes (Part 3, Page 775).

In addition to purchasing coil action parts from Moog Industries, we also purchase leaf springs, coil springs and chassis parts. Our purchases of these were quite substantial. Referring to Commission's Exhibit 79-C, it shows our purchases for the period ending 7-31-50 of some $1,-

600.00, receiving a 5% discount. We also received a 2% cash discount on the products that we purchased that appear on Commission's Exhibit 79-C. We re-sold those products to independent garages. There were a few over-the-counter sales (Part 3, Page 776).

We have no salesmen. In selling to garages, they call in for the parts and we send them to them. Of course, I think I would have preferred to receive 14% discount, as it would help the profits and help the business. I would not say it would help us competitively.

Q. Mr. Sporl, you bought in the period ending 7/31/1950, approximately $1,800 or $1,600 worth of products, upon which you received a discount, volume discount, rebate, or whatever you wish to call it, of 5 percent, and I asked you whether you would have preferred to receive a discount of 14 percent instead of the 5 percent, and I believe you answered "Yes"?

A. Yes.

Q. Now if you had received that 14 percent discount, I ask you, would that not have helped you competitively? (Part 3, Page 777.)

Mr. Butterfield: I object to that question if Your Honor please.

Trial Examiner Kolb: Overruled.

A. No, I don't think it would.

By Mr. Schrup:

Q. Why not, sir?

A. Well, we have a set discount we give the trade. If we'd receive more, it would be to our benefit, our profits.

Q. I don't hear you.

A. It would be for our profits.

Q. The more profit you make, doesn't that help you competitively?

A. Well, it all depends. Do you mean if we are going to pass them on?

Q. No, no, no (Part 3, Page 778).

• • •

By Mr. Schrup:

Q. Mr. Sporl, if you bought your merchandise at a cheaper net price from Moog Industries, Inc., than you are now paying, would that help you in a business way?

A. Well—

Mr. Butterfield: I object to that question, if Your Honor please, for this reason: He is buying at a certain price from Moog now. As to what would happen if he bought it at a cheaper price is within the realm of speculation.

Trial Examiner Kolb: Objection overruled.

The Witness: Would you explain what you mean, how it would help me competitively?

By Mr. Schrup:

Q. Well, would you not grow a little bit, expand, give your customers a little better service?

Mr. Butterfield: I object to the counsel testifying.

By Mr. Schrup:

Q. Possibly invest a little more in your business, clean up your place, advertise a little more, things of that nature? (Part 3, Page 779).

A. It would help us out, but—

Re-Direct Examination.

By Mr. Butterfield:

Q. Do you buy on the blue sheet from Moog?

A. Yes.

Q. That blue sheet represents a trade discount price from list on every item that you buy?

Mr. Schrup: Just a minute. I don't think that question was framed properly.

A. Trade discount price from list?

Q. That's right.

Mr. Butterfield: Off the record?

Trial Examiner Kolb: The blue sheet is the price which Moog charges to its distributors.

Mr. Butterfield: That represents the price to the trade. It represents the trade discount from list.

Mr. Schrup: No.

Trial Examiner Kolb: There is no list.

Mr. Butterfield: Yes, there is.

Trial Examiner Kolb: You mean—

Mr. Butterfield: The suggested resale—

Mr. Schrup: Wait a minute, that is not—

Mr. Butterfield: If we could go off the record—

Mr. Schrup: I understand what you are driving at, but (Part 3, Page 780) that is not the fact. The blue list represents the purchase price by the jobber who buys direct from Moog, but that purchase price is subject to a discount depending on the amount of the purchases made by the jobber; his ultimate purchase price from Moog is the purchase price on the blue sheet less the discount.

Mr. Butterfield: In answer to counsel's statement, I wish to state this: The blue sheet represents in varying degrees from 55 to 60 percent trade discount off of net list.

Mr. Schrup: Wait a minute. The selling price of Moog is not the retail list price of Moog. They don't sell direct to the retailer. That is their suggested retail price (Part 3, Page 781). * * *

Q. What do you mean by the word "trade discount"?

A. I don't understand what you mean on that question about trade discount.

Q. Mr. Sporl, I show you Government's Exhibit 79(c) for the fiscal year during 1950; in leaf springs, coil springs and chassis parts for the year 1949—in leaf springs, Greiner Auto Parts purchased $1,898.74 worth of leaf springs, with an allowance of 4.79. Auto Chassis & Spring purchased $957.20 and Dealers Truckstell Company, Inc., purchased $1,526.39. For the year ending 12/31/50, on leaf springs, coil springs and chassis parts, Greiner Auto Parts purchased $3,373.71, with an allowance of 14 percent off of distributor's net prices. Auto Chassis & Spring purchased for the year ending 7/31/50, $1,687.68, with an allowance off distributors' net prices of 5 percent. Dealers Truckstell, Inc., purchased for the year ending June 30, 1950, $447.30 worth of leaf springs, coil springs and chassis parts, with an allowance of 5 percent off of distributors' net prices.

Do you know whether for the period so indicated on this exhibit Auto Chassis & Spring Company was injured competitively (Part 3, Page 782) by reason of the differences in allowances off of distributors' net prices for that period of time?

A. Competitively, I would say no.

Mr. Butterfield: That is all I have.

Re-Cross Examination.

By Mr. Schrup:

Q. When I examined you previously, we talked about two different discounts. We talked about 2 percent discount you received for paying cash for the merchandise, and we also talked about another discount that you received on your purchases, which we called either trade discount, volume discount, rebate, or whatever you want to call it. Now, referring to Commission's Exhibit No. 79(c), for the year ending 12/31/50, one of the buyers in New Orleans received a 14 percent discount; that is exclusive of the cash discount. That is the second discount we are talking about.

A. Yes.

Q. You received a 5 percent discount?

A. Yes (Part 3, Page 783).

Q. Would you not have preferred to receive the 14 percent discount?

Mr. Butterfield: I object, if Your Honor please.

Trial Examiner Kolb: Overruled.

A. I'd prefer to receive the 14, personally. for the business' sake (Part 3, Page 783).

New Orleans, Louisiana, October 28, 1952.

Trial Examiner Kolb: Are we going to go through the same testimony you had during the last three weeks? I mean are your questions—

Mr. Butterfield: I don't know, Judge. I don't know yet. After I have examined this transcript, there may be some line of questioning that may develop from this tran-

script that should be explored, and it may take a little different form.

Trial Examiner Kolb: Well, I don't see any occasion for spending any time at Memphis or Birmingham to ask witnesses whether or not they have been injured competitively, because of differing prices, which Whitaker or Moog may have allowed to their competitors. It seems to me like we are getting into cumulative testimony and wasting a lot of time for all of us in doing it (Part 2, Page 786).

Mr. Butterfield: Well, it may be that I can work out something with counsel where we could reach an agreement or stipulation in regard to the testimony.

Trial Examiner Kolb: Would you be willing to stipulate, Mr. Schrup, that if these witnesses were called at Birmingham and Memphis that their testimony in chief and cross examination would be substantially the same as that of the witnesses who were called in New Orleans, Dallas and Denver?

Mr. Schrup: Well, I would assume it would be. I would have no idea of who the witnesses were to be, but if the witnesses are to be jobber witnesses, I presume that the testimony of the jobber witnesses would coincide with the testimony of the other jobber witnesses who have appeared as witnesses in the records in both the Moog and Whitaker case.

Trial Examiner Kolb: Suppose we enter into that stipulation would it eliminate the necessity of calling these witnesses?

Memphis, Tennessee, November 19, 1952.

B. C. McKee, testified on behalf of Respondent as follows:

Direct Examination.

My name is B. C. McKee. I am the owner of McKee-Moog Spring Company. Moog Industries, Inc., has no interest in my company. I have been connected with my company since 1944.

Q. Mr. McKee, I show you Government's Exhibit No. 61 showing sales of Moog Industries, Inc., coil action parts to jobbers in Memphis, Tennessee, and is shown on this exhibit the year (Part 2, Page 790) 1947, J. B. Cook Auto and Machine Company for the year ending March 31 of that year purchased $1,884.99 of coil action parts from Moog Industries, Inc., at distributors net prices and received thereon a differential of 10 percent, $175.49 as shown on this exhibit.

The McKee-Moog Spring Company for the period ending 8-31-1947 is shown on this exhibit to have purchased $21,381.91 coil action parts at distributors' net prices with a differential of 15 percent or $2,985.89. Ozburn-Abston Company for the same year, for the year ending 12-31-47 is shown to have purchased $23,764.83 with differentials off distributors' net prices of 19 percent in the amount of $4,199.25.

Mills-Morris for the year ending 12-31-47 is shown on this exhibit to have purchased $7,846.79 of coil action parts at distributors' net prices of, with a differential of distributors' net prices of 19 percent amounting to $1,379.67.

In the following year, 1948, this exhibit also shows that J. B. Cook Auto and Machine Company for the year ending 3-31-48 is shown to have purchased $1,817.75 coil action parts from Moog Industries, Inc., at a differential of distributors' net prices of 10 percent.

From McKee-Moog Spring Company in the same period, same year ending 8-31-48, is shown to have purchased $9,267.80 at differentials of distributors' net prices of nine percent. The Ozburn-Abston Company for the year ending 12-31-48 is shown to (Part 3, Page 791) have purchased $24,482.59 of coil action parts from Moog Industries, Inc., with a differential of distributors' net prices of 19 percent.

The Mills-Morris Company for the same year ending 12-31-48 is shown to have purchased $4,004.78 cents of coil action parts from Moog Industries, Inc., at differentials of distributors' net prices of 19 percent.

For the year 1949 the J. B. Cook Auto and Machine Company is shown to have purchased $1,765.42 for the year

ending 3-31-49 at distributors' net prices with a differential of 10 percent.

McKee-Moog Spring Company for the year ending 8-31-49 is shown in this exhibit to have purchased $5,904.69 with differentials of distributors' net prices of seven and one half percent.

The Ozburn-Abston Company for the year ending 12-31-49 is shown to have purchased $9,775.62 with differentials of distributors' net prices of $1,729.21.

The Mills-Morris Company for the year ending 12-31-49 is shown to have purchased $1,662.56 of coil action parts from Moog Industries, Inc., with differentials off distributors' net prices of $247.51.

I also call your attention to Commission's Exhibit 79 showing purchases by Mills-Morris Company for the year ending June 30, 1949, of leaf springs from Moog Industries, Inc., of $2,815.33 with differential of distributors' net prices, 4.65 (Part 3, Page 793) percent.

The Ozburn-Abston Company having purchased, the same period of time, $10,293.12 of leaf springs from Moog Industries, Inc., at distributors' net prices with a differential of distributors' net prices of eight percent.

The J. B. Cook Auto and Machine Company purchased $615.31 of merchandise at distributors' net prices; the Dealers Truckstell Sales Company having purchased $5,960.41 worth of merchandise at distributors' net prices, and McKee-Moog Spring Company having purchased $23,675.81 at distributors' net prices, the last three that I have read having not received a differential of distributors' net prices in the purchase of these springs.

For the year ending or for the year 1950, Exhibit 79-F, I call your attention to the amount shown on here, Mills-Morris Company having purchased for the year 1950 $5,301.09 of leaf springs, coil springs and chassis parts from Moog Industries, Inc., there being no indication of which of these they purchased, but in that classification, at the differential off distributors' net prices of 14.96 percent.

The Ozburn-Abston Company purchased $14,881.31 of leaf springs, coil springs and chassis parts from Moog In-

dustries, Inc., with differential off distributors' net price of 14.99; J. B. Cook Auto and Machine Company having purchased for the year ending 6-30-50, $1,260.25 of leaf springs, coil springs and chassis parts at distributors' net prices with a differential (Part 3, Page 793) of 15 percent, and the Dealers Truckstell Sales Company, Inc., having purchased for the same period ending 6-30-51 $922.54 of leaf springs, coil springs and chassis parts with a differential of $46.13.

The McKee-Moog Spring Company purchased for the year ending 6-30-50, $26,230.04 with a differential off distributors' net prices of $3,409.91 as shown on this exhibit to amount to 13 percent.

Now, Mr. McKee, I ask you if as a result of the differentials from distributors' net prices shown on these exhibits, 61 and 79-F in the Memphis area in the purchase and sale of coil action parts, leaf springs, coil springs and chassis parts, do you know whether or not you were competitively injured by virtue of those differentials?

Mr. Schrup: I have an objection at this time. There is no proper foundation laid as to any conclusion on this witness as to any facts read to him. It is within the province of the Hearing Examiner to determine the very point in issue.

I would like to direct one question, if the Examiner please, to the witness in line with my objection to ascertain one fact if permissible.

The Witness: Shall I answer his question?

Trial Examiner Kolb: Just a minute. The question is simply whether or not he knows.

Mr. Schrup: Well, I think that is true, but if he (Part 3, Page 794) does or doesn't know, if you want to restrict the answer to yes or no and make a further question, I will reiterate my objection.

Trial Examiner Kolb: You may answer yes or no as to whether or not you know.

By Mr. Butterfield:

Q. Do you know whether or not by virtue of the figures and facts shown on these exhibits 61 and 79-F, as I have shown you, whether or not you know whether you were competitively injured by virtue of those differentials?

A. No, sir, none whatsoever.

Mr. Schrup: Just a minute, please. Don't be so anxious to answer.

Trial Examiner Kolb: The question calls for a yes or no answer as to whether you know.

The Witness: No, I wasn't injured.

Mr. Schrup: I move the answer be stricken and the witness be confined to answer yes or no whether he knew or not.

Trial Examiner Kolb: The answer may be stricken.

By Mr. Butterfield:

Q. Do you know whether you suffered an injury or not?

A. No, I didn't suffer.

Mr. Schrup: Just a minute. We aren't so interested in getting your answer you are making as we are to find out whether or not you have the knowledge, yes or no, whether you know, and at that time I would like to make my objection (Part 3, Page 795).

The Witness: You want to know what, now? What is your question?

Mr. Schrup: I think Mr. Butterfield has a question pending.

Trial Examiner Kolb: Mr. Witness, the question is directed to your knowledge as to whether or not you know, not whether or not you did or did not, but whether or not you know whether you did or not. That calls for a yes or no answer.

The Witness: Whether I know I was injured, that is the question he asked me, was I injured.

Trial Examiner Kolb: Do you know whether or not you were injured? You know or you don't know. He will ask you a further question on that.

The Witness: My answer still was no.

Mr. Schrup: I think the witness misunderstands the question.

The Witness: You asked me if I was injured.

By Mr. Butterfield:

Q I asked if you know whether or not you were injured.

A. Do I know whether or not I was injured?

Q. Yes.

A. The answer is I don't think I was injured. I don't see how I could be injured. I would say, whether I know whether I was injured or not?

Q. Yes, do you know?

A. I don't know as far as either way. I am not injured in any way. I mean, the question was asked, am I injured. We have, all the fellows are competitors.

Q. Who in your organization would know better than you whether you were injured or not?

A. Whether I was injured, in what way are you asking? Your question is whether or not I was injured?

Q. That is right.

A. No, I am not injured.

Mr. Schrup: I still move that answer be stricken and we have a yes or no answer to the question.

Trial Examiner Kolb: We will let the answer stand.

Mr. Butterfield: You may cross examine.

Trial Examiner Kolb: It is too complicated to get straightened out (Part 3, Page 797).

Cross Examination.

When I speak about buying prices I am referring to the cost sheet, the jobbers' sheet.

When I first became acquainted with these facts, I can't go right back to the year and tell you the exact year because I have been in business since 1944. Prior to Mr. Butterfield showing me the two Commission's exhibits, I knew the buying prices of each one of my competitors on those exhibits. I knew the discount that I got. I tried to find out what they got. As to whether I knew my competitors' exact buying prices after all the discounts were taken that were allowed by Moog, I knew there was a price schedule (Part 3, Page 798). I never tried to find out at what price my competitors were buying.

A. I guess I could have found out, but we just, in a competitor's in the parts end of it, we don't quote our cost on everything because we are all competitors. The

gentlemen's names that he put on there is my main competitors in this area.

Q. Well, did you know their— Coming back to the question I asked you, did you know their exact buying price?

A. The exact buying price?

Q. That is, after all the discounts were taken from the buying price that were allowed by Moog to your competitors?

A. Yes, I knew there was a price schedule on it, sure (Part 3, Page 798).

Q. Did you know what they were buying, at what price they were buying?

A. At what price they were buying?

Q. Yes.

A. I never tried to find out.

Q. Then, what do you base your statement that you weren't competitively hurt that you paid more in some instances than your competitors did?

A. I paid more?

Q. Yes.

A. I don't know I paid more because the deal that I had with them is my cost on it and they have a cost sheet and I don't see that I paid more.

Q. Are you interested in buying Moog products at the cheapest net buying price that you can obtain?

A. I am interested in buying anything cheaper, yes.

Q. Do I understand that it is your position that if your competitors buy Moog products at a cheaper net buying price than you do that you are not hurt thereby?

A. If my competitor is buying cheaper?

Q. Yes.

A. Well, I can answer that this way. I haven't been hurt.

Q. What do you base that on? Are you interested in buying your products as cheap as your competitors buy their products?

A. I definitely am, yes (Part 3, Page 799).

Q. If you pay more for those products than your competitors pay, you don't believe that hurt you?

A. I don't get where we are buying, paying more, because we have the same price schedule.

Q. You have the same list price but your net buying price varies depending on your volume discounts you receive from that list price?

A. I receive my volume discount as shown on the exhibit here, and I consider that I am buying it as cheap as I can possibly buy, because after all, I am a, I buy my things from Moog, and of course, I buy from other places. I am not 100 percent Moog jobber.

Q. That isn't the question, sir. I am not talking about any justification. I am asking you in purchasing Moog products for resale in the City of Memphis, are you interested in purchasing those products as cheaply as any other competitor?

A. Absolutely.

Q. Why is that?

Q. Yes.

A. Well, I couldn't answer that because I am not the biggest buyer down here.

Q. That isn't the question. You stated you were interested in buying as cheaply as any of your competitors buy for resale. Why are you interested? (Part 3, Page 800.)

A. I am interested in buying anything as cheap as I can buy it.

Q. Why is that?

A. Why is that?

Q. Yes.

A. You have more buying power, and anything you can buy cheaper, if I can buy a suit of clothes cheaper than another man for the same one—

Q. How does that help you?

A. How does that help me?

Q. Yes.

A. Well, I can make a few more dollars.

Q. That will help you competitively?

A. Any time you can make some more money it will help, yes, sir.

Re-Direct Examination.

By Mr. Butterfield:

Q. Mr. McKee, you don't buy all your leaf springs from Moog?

Mr. Schrup: Objected to as immaterial.

A. No, sir.

Trial Examiner Kolb: Objection sustained.

Mr. Schrup: I move the answer be stricken.

Trial Examiner Kolb: The answer is stricken.

By Mr. Butterfield:

Q. Mr. McKee, do you manufacture any of these springs yourself? (Part 3, Page 801).

A. Yes.

Mr. Schrup: I object to it as immaterial. Just wait a minute, Mr. Witness. Let me have an objection. It is immaterial.

Trial Examiner Kolb: I don't think that is proper re-direct examination.

Mr. Butterfield: I would like to recall him to ask that one question, if Your Honor please.

Trial Examiner Kolb: It is not material as to whether or not he makes his own springs, makes part of them and buys from somebody else.

Mr. Butterfield: The complaint as I understand it is directed to what is called the primary and secondary line, and the reason I would like to recall him to ask this question is because I can demonstrate by his answer that he is also a spring manufacturer and he is not, as it would indicate from these exhibits, merely a jobber or wholesaler. He manufactures in competition.

Mr. Schrup: I have an objection. It has been going on all through the case. Mr. Butterfield puts on a witness and examines partially and Mr. Butterfield wants to put him back on for re-direct examination. I don't think it is an orderly procedure.

Trial Examiner Kolb: The objection is sustained.

Mr. Butterfield: I understand my offer of proof is (Part 3, Page 802) rejected?

Trial Examiner Kolb: You had an opportunity to put the man on and get the information you had. Then you turn over for cross examination. Now, your re-direct examination is beyond the scope of the cross examination. If this was an isolated instance, I wouldn't say anything about it. It has been happening time and time again, and it is time it has to stop. If you want to examine him, let's examine him and turn him over for cross.

Mr. Butterfield: If the Examiner please, on cross examination I made no objection whatever. The cross examination was much broader than the direct examination I had made. Because of the broadness of the scope of the cross examination I asked for permission to recall the witness to offer proof that he too is a spring manufacturer.

Trial Examiner Kolb: I have ruled on the objection.

Mr. Butterfield: And my offer of proof is rejected?

Trial Examiner Kolb: Yes (Part 3, Page 803).

JAMES A. WILLIAMS testified on behalf of the Respondent as follows:

Direct Examination.

My name is James A. Williams; I am auditor and supervisor of dealers Truckstell Sales Company in Memphis since 1945.

Q. I call your attention to Government's Exhibit 78 showing sales by Moog Industries, Inc. as shown on your exhibit, Dealers Truckstell Sales, Memphis, Tennessee, the year ending June 30, 1949, $5,960.41 and sales for the year ending 1950, $922.54, a differential off distributors' net prices of five percent and New Orleans, Louisiana, for the year ending June 30, 1949—the year ending June 30, 1950, sales of leaf springs, coil action, from Moog Industries, Inc. $536.29 and for the year ending June 30, 1950, $447.30, differentials off distributors' net prices of five percent, and I ask you, does the Dealers Truckstell Sales Company, Inc., still maintain a store in New Orleans (Part 3, Page 804) Louisiana?

A. No, sir.

Q. How many stores do you have at this time?

A. One.

Q. That is located at Memphis?

A. Right.

Q. When did you close your store at New Orleans?

A. Actually the remaining inventory was shipped in September of 1950 back to Memphis. We began proceeding to close it in June of 1950 and we were away from there by September 30, 1950.

Q. Mr. Witness, I show you Government's Exhibit 61 purporting to show coil action sales, Moog Industries, Inc. in the Memphis area for the years 1947, 1948, 1949. This exhibit shows that J. B. Cook Auto and Machine Company purchased for the year ending 3-31-47, $1,884.99 of coil action parts from Moog Industries, Inc. differential off distributors' net prices of 10 percent. McKee-Moog Spring Company for the year ending 8-31-47 purchased $21,381.91 with differential off distributors' net prices of 15 percent and the Ozburn-Abston Company for the year ending 12-31-47 purchased $23,764.83 of coil action parts off distributors' net prices from Moog Industries, Inc. differential off distributors of 19 percent. The Mills-Morris Company having purchased for the same period of time, the year ending 12-31-47, $7,846.79 of coil action parts from Moog Industries, Inc. with a differential off distributors net prices of $1,397.06. The (Part 3, Page 805) following year, 1948, this exhibit shows that J. B. Cook Auto and Machine Company for the year ending March 31, '48, purchased $1,817.75 of coil action parts from Moog Industries, Inc. with a differential of 10 percent, and the McKee-Moog Spring Company for the year ending 8-31-48 purchased $9,267.80 of coil action parts, a differential of nine percent of distributors' net prices.

Ozburn-Abston Company for the year ending 12-31-48 purchased $24,482.59 with a differential off distributors' net prices of 19 percent.

The Mills-Mooris Company for the year ending 12-31-48 purchased $4,004.78 with a differential off distributors' net price of 19 percent.

For 1949 J. B. Cook Auto and Machine Company, the year ending 3-31-49 purchased $1,765.32 coil action parts from Moog Industries, Inc., with a differential off distributors' net price of $1,643.60.

The McKee-Moog Spring Company for the year ending 8-31-49 purchased $5,904.69 with a differential off distributors' net price of $412.30.

The Ozburn-Abston Company purchased for the year ending 12-31-49, $9,775.62 with a differential off distributors' net price as shown on this exhibit of 19 percent while the Mills-Morris Company for the same period of time is shown to have purchased $1,661.56 with differential off distributors' net price of $247.51 (Part 3, Page 806).

I also call your attention to Government's Exhibit 79-F showing sales of leaf springs for the year ending June 30, 1949, Mills-Morris Company, $2,815.53 with a differential off distributors' net price of $131.05. The Ozburn-Abston Company purchased $10,293.12 with a differential off distributors' net prices of $823.45 while J. B. Cook Auto and Machine Company purchased in the same period $615.31 as shown on this exhibit from Moog Industries at distributors' net price.

Dealers Truckstell Sales, Inc., purchased $5,960.41 at distributors net price, and McKee-Moog Spring Company purchased $23,675.81 for McKee-Moog Spring. For the year ending 12-31-50 Mills-Morris shown on this exhibit purchased $5,301.09 with a differential off distributors' net prices of 14.96 percent. Ozburn-Abston is shown to have purchased for the same period of time $14,881.31 with differential off distributors' net price of three one-hundredths of one percent more than Mills-Morris Company.

The J. B. Cook Auto and Machine Company is shown on this exhibit to have purchased for the year ending June 30, 1950, $1,260.25 at distributors' net price with a differential of 15 percent; Dealers Truckstell Sales Company having purchased for the year ending 6-30-1950 leaf springs, coil springs and chassis parts as shown on this exhibit at distributors' net prices $922.24 with a differential of five percent.

The McKee-Moog Spring Company for the same period of time is shown to have purchased $26,230.04 with a dif-

ferential (Part 3, Page 807), off distributors' net prices of 13 percent.

Now, Mr. Witness, I ask you whether or not you know whether Dealers Truckstell Sales Company, in the purchase and sale of parts of the Moog Industries, Inc., whether or not you know if the company was competitively injured by virtue of the differences in the differentials allowed at the distributors' net prices to the persons shown in these exhibits.

Mr. Schrup: I ask the witness to answer that question yes or no.

Trial Examiner Kolb: The question will be answered yes or no as to whether or not you know.

The Witness: May I ask a question of you?

Trial Examiner Kolb: Yes.

The Witness: In his question he mentioned parts; I mean, my understanding of parts, I take that to mean small components and not as I understand it—The only purchases we have made and the only ones I have ordered and checked have been overload springs. That is the only ones that we have any knowledge of, is overload springs. It is a unit to us. It is not as a part. I wanted that one thing clear.

Trial Examiner Kolb: I think he is referring to parts and that comes in the general phase.

The Witness: All right.

Trial Examiner Kolb: The question is whether or not you know; not whether or not you are injured, but whether or not (Part 3, Page 808), you know whether or not you were injured.

A. Yes, I would know.

By Mr. Butterfield:

Q. Were you so injured?

Mr. Schrup: I have an objection, calling for an improper conclusion on the part of the witness. I don't believe there is any proper foundation laid for any testimony of that nature in the absence of any showing as to how or what this witness knows about the buying prices of his

competitors not being used in a differential of buying prices they obtained over this witness' firm.

Trial Examiner Kolb: The witness says he knows. That qualifies his answer as to whether or not he knew properly would be a question for cross examination. Objection overruled. He may answer.

By Mr. Butterfield:

Q. What was the company, how was the company injured by virtue of the differentials?

A. We were not to my knowledge.

Q. Mr. Witness, did you sell all the merchandise you ordered from Moog Industries?

A. Yes, sir, we did.

Mr. Butterfield: You may cross examine.

Cross Examination.

By Mr. Schrup (Part 3, Page 809):

Q. When you state you were not competitively injured to your knowledge, what did you mean, Mr. Witness?

A. I mean that the only thing we can possibly know is what we know and we know we were not.

Q. How do you know you were not? You make a statement—

A. Because we know what we know.

Mr. Butterfield: I object.

Trial Examiner Kolb: Overruled. It is proper cross examination.

By Mr. Schrup:

Q. What do you base it on?

A. Because we know what we know.

Q. Give us the facts upon which you base your conclusion. Relate to us why you come to that conclusion.

A. There were no instances—you are talking about this period in here?

Q. I don't know. Yes, during that period. You were the one that stated you were not competitively hurt.

A. Does he relate to this question? He pointed to a period of June 30, 1949, and fiscal year 1950. We had no

instance, there was no instance came to our attention whereby we were injured.

Q. Well, what do you mean by that, no instance came to your attention?

A. Competitively (Part 3, Page 810).

Q. Explain that.

A. I think if we were injured, do you not think we would know it?

Q. That is what I am questioning you about, whether you would or would not. Tell me what facts you base it on.

A. On the fact that we were not injured. To our knowledge, we were not injured just as I stated.

Q. You still leave me in the dark on what part you base it.

Mr. Butterfield: You will always be in the dark.

By Mr. Schrup:

Q. You stated you were not competitively injured. Tell us the facts on what you base that conclusion.

A. I base that conclusion on the fact that we had no injury brought to our attention.

Q. What do you mean by injury?

A. What do I mean by injury?

Q. Yes.

A. Any effect competitively. There was no effect competitively.

Q. How do you know? How do you know what your competitors did with their better buying price?

A. I didn't say I did (Part 3, Page 811). * * *

A. I thought I had answered. I think if anyone would know it we would know it.

By Mr. Schrup:

Q. Mr. Witness, I don't want to argue with you. You come in (Part 3, Page 812) and say no, you were not hurt. I say what led you to that conclusion, what facts?

Mr. Butterfield: I submit the witness answered the question and that question was if anyone knows if he was injured or not he would know it.

Trial Examiner Kolb: The witness has not answered the question. He has not stated what constitutes competitive injury in his mind and what effect that has on his business.

Mr. Butterfield: I think he already answered that he sold all the merchandise he ordered.

Trial Examiner Kolb: That is not an answer to the question. Maybe he could have sold more or ordered more.

The Witness: I think we probably could have ordered if we had sold more. We didn't carry all the stock.

Mr. Schrup: I still think there is a question pending.

By Mr. Schrup:

Q. I am interested in finding out the fact on which you base your conclusion.

A. That we were not injured?

Q. Yes.

A. The books and records of Dealers Truckstell Sales would show that we had no instance. Our territory men had no instance to report to us whereby they had ran into any complication that was caused by our price, our purchase price. That is one (Part 3, Page 813) thing. Another thing, the books and records of Dealers Truckstell Sales will show you that all the purchases we made were sold. We had no dead stock. We did make a profit. It will also show you that approximately .0065 percent of our sales are made up of purchases made of Moog Industries. That is a negligible amount to us, and therefore we are not interested. That is a small part of our business and it would not affect us competitively, no.

Q. Let me follow you through. You base the fact that you paid more for Moog products than some of your competitors, but it didn't hurt you competitively because the amounts you purchased were rather small compared to your other lines. is that right?

A. That is true.

Q. You also state you ran into no instances where your competitors used their cheaper buying price to undersell your selling price to respective customers, is that right?

A. That is right.

Q. You also state that you made a profit on Moog that was satisfactory to you?

A. That is right.

Q. Now, when you state that you were not hurt competitively; do you have an opinion that because your volume of purchases is not as great as your competitors, therefore you are not entitled to buy at the same price that your competitor is? (Part 3, Page 814).

A. Would you repeat? Did you ask if I had an opinion?

Q. Yes.

A. Would you repeat the question?

Q. Yes. Do you have an opinion that because your volume of purchases of Moog products for resale is not as great as some of your competitors that therefore you are not entitled to buy at the cheaper net price they pay for merchandise?

A. My opinion is that on volume basis, if we purchased as much as we are entitled to buy as cheaply as our competitors (Part 3, Page 815).

By Mr. Schrup:

Q. You feel that—

A. In fact I know that to be a fact because our contract so reads.

Q. If you have a competitor offer you for resale that buys in greater volume than you do, do you feel that you should get the same buying price that he has. Is that what you base your opinion on that you weren't competitively hurt?

A. No, sir, I base my opinion, as I explained to your question asking what I based it on, I based it on three things: One, that we had no instance in the field whereby any of our men reported that we were affected competitively.

Q. You mean by that no instances where resale prices as suggested by Moog were not observed?

A. Would we be affected any other way competitively except in the retail sales field?

Q. I have an opinion. I am trying to find your opinion, what you base it on. If you will continue—

Mr. Butterfield: He has the facts.

Mr. Schrup: He may have the facts but conclusions on those facts may be erroneous. That is what we are trying to find out.

Mr. Butterfield: You have had 12 years or more.

Trial Examiner Kolb: Let's discontinue the side remarks and let the witness answer the question (Part 3, Page 816).

By Mr. Schrup:

Q. Would you continue, sir? I think you told us once, that the reason you state you are not competitively hurt is that you have not observed any of your competitors using their better buying price to undercut their resale by Moog?

A. That is true.

Mr. Butterfield: Is this on direct examination?

By Mr. Schrup:

Q. The second one?

A. All our purchases had been sold. We had no desire to carry a large inventory.

Q. In buying products for resale, are you interested in buying those products as cheaply from Moog as any of your competitors in the City of Memphis?

A. We are interested in buying them on the same basis as our competitor.

Q. Well, by that you mean, as I am trying to understand you, if your competitor buys in greater volume, do you believe he is entitled to a better buying price from Moog than, for instance, you buying lesser volume?

A. You are asking for an opinion; you said could I believe?

Q. Yes.

A. It is my opinion he would be entitled to a better buying price, yes, sir.

Q. Why do you say that? (Part 3, Page 819.)

A. That is a general business practice.

Q. Then you are basing your statement, then, that you are not hurt competitively because of the fact that Moog

products had volume discounts and that a competitor of yours who buys in greater volume than yours is entitled to buy at a cheaper price than you do, is that correct?

A. Yes, sir, because the same price is available to me. We can buy in volume if we want and get that same price.

Q. Well, of course you could buy from another competitor, too, and buy it cheaper if you wanted to, perhaps, or pay more for your merchandise.

A. We might.

Q. Now, let me ask you this. You are interested in buying Moog products at the cheapest net price you can, are you not?

A. Well, we have agreed to buy them at a contract price, yes, sir.

Q. That isn't the point.

A. Maybe I misunderstood your question. Maybe I did, I don't know.

Q. Let's look at the exhibit here. Now, according to 79 of various of your competitors get discounts ranging 14.96, 14.99, 15, 13 and you bought at 5 percent. Now, would you prefer to buy your products or do you desire to buy your products at 14.96, 14.99, 13 instead of 5 percent?

Mr. Butterfield: I object to that question, if you (Part 3, Page 820) please. It is purely rhetorical.

Trial Examiner Kolb: Overruled.

A. The records would indicate that we did not choose to buy our products and obtain the volume discount because we did not desire to carry the inventories.

By Mr. Schrup:

Q. Let's forget about the volume discount. No justification by Moog as yet on volume discount. In purchasing the $5,960.41 of products for resale from Moog in the year 1949, Mr. Witness, upon which you bought at 5 percent discount, would you have preferred to buy that amount at let us say 15 percent discount?

Mr. Butterfield: Same objection, if Your Honor please.

Trial Examiner Kolb: Overruled.

A. Naturally, I think anyone would have preferred to if they would have desired to carry the inventories required if they made that purchase.

Q. Why would you prefer to buy at 15 percent rather than five percent off the buying price?

A. Why would we have preferred to buy it?

Q. Yes.

A. Anyone would like to buy anything as cheaply as they could.

Q. Why, sir?

Mr. Butterfield: I object.

A. I think it is the desire to obtain your own possessions, hold on to what you have, not pay out any more than you have to (Part 3, Page 821).

By Mr. Schrup:

Q. In buying products cheaper, does it help you competitively?

A. Does it help us competitively?

Q. Yes.

A. Are you speaking generally of McKee-Moog purchases?

Q. Make your own choice, Mr. Witness.

A. As related to Moog purchases, I would say no. As related to other purchases, say of Truckstell where we do a volume business, I would say yes.

Q. Well, now, you always confine by saying—I am asking you on the basis of what you have bought for resale for the year 1949, if you had bought those products at a lesser buying price than what you actually paid, would that have helped you competitively?

A. I don't believe that it would.

Q. Why not?

A. Because we are not affected competitively.

Q. I am trying to get the answer why would not the fact that you could buy your merchandise cheaper than you bought it not help you competitively?

A. Because we sold all that we bought. Why would we buy more and let it lay in a warehouse?

Q. I am not interested in what you sold more or less. I am asking you this: if you make more profit than you are making now, would that help you competitively? (Part 3, Page 822).

A. If we make more profit?

Q. I am not trying to trap you. I am trying to find out.

A. I am trying to give you a direct answer too. Will you repeat your question, please?

(The reporter read the question as follows:

"Question: I am not interested in what you sold more or less. I am asking you this: If you make more profit than you are making now, would that help you competitively?")

A. I think if you make more profit any time that it would help you.

Q. And if you bought Moog products for resale at a cheaper price than you are presently paying for that, wouldn't that help you competitively?

A. If we bought Moog products at a cheaper price than we are paying now, would that help us competitively? Yes, sir. Any profit would help us competitively I stated before.

Q. Now, following that last statement that you made, and having the evidence before you that your competitors paid less for Moog products for resale than you did, why do you state that you are not hurt competitively?

A. Why do I state that?

Q. Oh, sir—

Mr. Schrup: Read the question back to him.

(The reporter read the question as follows:

"Question: Now, following that last statement (Part 3, Page 823) that you made and having the evidence before you that your competitors paid less for Moog products for resale than you did, why do you state that you are not hurt competitively?")

Mr. Butterfield: I object to that question, if Your Honor please. This has been gone over and over and over again here and he has given the answer.

Trial Examiner Kolb: This is cross examination.

Objection overruled.

A. The first reason is that we had no complaint from the field that we were injured competitively. The second reason is that we would not desire to carry additional in-

ventories and the third reason is that we sold all of the merchandise which we purchased.

By Mr. Schrup:

Q. I realize you have given those reasons, but they don't square with your statement.

Mr. Butterfield: I object to the characterization of the witness' testimony by counsel as to his opinion. In my opinion it does square.

Mr. Schrup: The witness has just stated on the record that it would help him competitively to buy Moog products for resale at a lesser price than what they paid. Now the witness says that although his competitors paying a lesser price pays for the same products for resale, that it (Part 3, Page 824) does not hurt him competitively. Now, I ask him to reconcile those two statements.

Mr. Butterfield: He has already stated that he ties it up in inventory.

Mr. Schrup: Mr. Butterfield, I am not interested in your opinion. I am interested in the witness'.

Mr. Butterfield: You told the witness you were interested in whether he sold—

Trial Examiner Kolb: Let the witness testify.

A. If we had made more money on Moog products, we would not have tied it up in additional Moog products. We would have tied it up in other inventories. We have had uses for money.

Q. Would that help you competitively?

A. In another line of business, probably; not in the Moog business.

Q. It would help you in over-all business?

A. That is true. Any profit would, as I stated before.

Mr. Schrup: I think that is all.

Re-Direct Examination.

By Mr. Butterfield:

Q. Mr. Witness, you stated that your purchases of Moog products for the period covered amounted to .0065 or sixty-five one thousandths of one percent of your sales, is that correct?

A. Yes, sir. that is right.

Mr. Butterfield: That is all (Part 3, Page 825).

Re-Direct Examination.

I believe I stated that my purchases of Moog products for the period covered amounted to .0065 of one percent of our sales.

Re-Cross Examination.

Our profit on every line that we handle contributes to our overall business health (Part 3, Page 826).

November 20, 1952, at Memphis, Tennessee.

MISS U. V. BOLAND testified as a witness on behalf of Respondent as follows:

Direct Examination.

My name is Miss U. V. Boland and I am Secretary-Treasurer of Mid-South Distributors, Inc. I have been connected with that company since June, 1934.

The witness was shown Commission's Exhibit 61, showing coil action sales to Mills Morris & Co., Memphis, Tennessee, for the year ending December, 1947, with a rebate of $1,397.06, and was asked whether she knew Mills-Morris Company to have received this rebate amount from Moog Industries. The witness answered that Mills-Morris had not received that amount (Part 3, Page 828), but that Mid-South had received from Moog on account of sales to Mills Morris of coil action parts, leaf springs, coil springs, and chassis parts for the year ending in December, 1947, a rebate of $2,817.20; that Mid-South Distributors did not distribute that amount of money to Mills-Morris Company. The witness was then shown the same Commission's Exhibit, showing Mills-Morris Company to have received a rebate of $708.41 on coil action sales for the year ending December, 1948, and was asked if Mills-Morris & Company had received that amount of money from Moog Industries. The witness stated that Mills-Morris & Company had not received that amount of money

from Moog Industries, but that Mid-South Distributors had received on account of sales to Mills-Morris & Company for the year ending December, 1948, on coil action, leaf springs, chassis parts, and coil action parts, $1,616.74, and that that amount of money was not paid over to Mills-Morris & Company (Part 3, Page 829).

The witness was shown Commission's Exhibit 61, showing that in 1949 Mills-Morris Company reportedly received on coil action springs from Moog Industries on December 31, 1949, $247.51 rebate, and was asked whether Mills-Morris had received that amount of money. The witness replied they had not; that Mid-South had received from Moog Industries on account of sales to Mid-South Distributors, shipped to Mills-Morris & Company for that period, on coil action parts, chassis parts and leaf springs, $1,300.50; that Mid-South Distributors did not pay that amount over to Mills-Morris & Company.

Cross Examination.

By Mr. Schrup:

Q. I will show you Government's Exhibit 61, Miss Boland. As I recall it you were examined by Mr. Butterfield on purchases of Mills-Morris of coil action parts for the years '47, '48, and '49.

A. Not purchases; volume discount is the figures that were given.

Q. Well, now, the years '47, '48, 49, Chart 61, Government's Exhibit 61 discloses Mills-Morris purchased $7,846.79 for 1947, and that brought for the volume discount, how much?

A. That figure combined with the figures on leaf springs (Part 3, Page 830), coil action parts and chassis parts brought to Mid-South $2,817.20.

Q. How do you arrive at that figure, by adding the total purchases on chart 61 and—

A. No, sir, by actual discount received.

Q. I am talking about purchases. You lump your volume discount on purchases of coil action sales and rebates and the volume discount?

A. Volume discount is not figured on lump purchases. It is figured on the different items because they carry a different schedule.

* * *

Q. Yes. Well, now, let me ask you this: Mills-Morris would be no exception on purchases from Moog Industries; whatever would apply to Mills-Morris would apply equally well to all the members of the group?

A. That is correct.

Q. Taking Mills-Morris as an example, will you tell us, then (Part 3, Page 831), how the discounts are computed on purchases from Moog of the various products of Moog?

A. According to the schedule in which their total purchases arrive on each class of merchandise.

Q. Well, as I understand it, you received a volume discount each month from Moog on all the purchases of the group?

A. No, sir.

It works out semi-annually, based on the aggregate year's purchases of all the group. We receive a volume discount in a lump sum. That volume discount is allocated out to the various members according to the purchases of each class of merchandise (Part 3, Page 832). The same rate of discount applies to all the purchase figures.

Q. But if Mills-Morris purchased fifty thousand dollars and another member purchased only twenty-five thousand dollars, a proportionate share of Mills-Morris of that volume discount would be greater, would it not?

A. Of that discount, yes.

The entire discount that is received by Mid-South is not remitted in its entirety to the members. Before remittance is made to the members, we take out the expense of operating the group and after that is done, each of the members proportionately bears the expense of his operation of the group (Part 3, Page 833), and is distributed according to earnings. The greater the member's earnings are, the greater portion of expense he pays. His earnings are based on purchases, and by "earnings" I mean the discount received on purchases made through Mid-South

(Part 3, Page 834). Mid-South Distributors has five employes (Part 3, Page 835). They have a Manager, a Secretary-Treasurer, two bookkeepers, and a warehouse man (Part 3, Page 836).

The warehouse was established in February of 1952, and the operating expenses consist of salaries to those people, office rent, and incidentals. Without the figures in front of me, I cannot approximate what the yearly operating expenses would be for the years 1949-1950.

Yes, I was a witness yesterday in the case against Mid-South. The witness was then handed a document entitled "Mid-South Distributors, Memphis, Tennessee, certified statement" and was asked if that refreshed her memory. The witness stated that it did refresh her memory, but could not give him a percentage figure, but from it could give him the gross amount of expenses, which was $34,-700.00 for the year (Part 3, Page 837). This document is a statement of a certified public accountant for Mid-South (Part 3, Page 838).

At this point Counsel for Respondent objected that this was truing the case of the Commission against Mid-South, in that Commission's counsel was asking what the total amount of discount received from all manufacturers of Mid-South on purchases were for that particular year, and objected thereto, and was overruled (Part 3, Page 840). For the year 1935 through 1950 the entire volume discounts received from all sellers by Mid-South amounted to $3,173,582.59. The operating expenses were $274,805.63. The net earnings allocated to the various members of the group amounted to $2,898,776.96. The fiscal year of Mid-South ends on June 30th (Part 3, Page 841).

Q. To further clarify your testimony, I show you the same document which is the Oliver P. Cobb and Company Certified Accountant statement. This is your document. That chart shows the distribution of earnings after deduction of operation expenses to the various members of Mid-South for the fiscal year ending July 15, 1950. What purchases does that, what period of purchases does that cover?

A. That would cover purchases from July 1, 1949, through June 30, 1950, which we pay for on the tenth.

Q. And according to that, after the deduction of operating expenses there is a pro rata or there is a distribution of volume discounts to the various members which was made at three times during the year 1950?

A. Yes, sir.

Q. Now, would I be correct in stating that during the year 1949 that fourteen members of the Mid-South Distributors, Inc., purchased Moog products?

A. Fourteen members during that month, so that would mean during the year, yes, sir.

Q. Would I also be correct in stating that the purchases amounted to $96,463.63?

A. No, this is a calendar year.

Q. Oh, I see. Could you tell us what the purchases would have been? You wouldn't know that, I suppose, without consulting your records?

A. No, I don't have that.

Q. On the purchases they made, taking for example, 1949, you described to us you received a volume discount from Moog on the total amount of purchases?

A. Yes.

Q. After the deduction of operating expenses which are, of course necessary to the operations of the group, the balance of that volume discount was then distributed to the purchasers?

A. Yes, it was paid to the members according to these figures.

Q. Now, with reference to the exhibits which Mr. Butterfield has shown you and your statement that the amounts shown on those exhibits were not paid over to the various members purchasing Moog products, that sum does reflect the amount that would have been paid over prior or in the absence of the deduction of any operating expenses of the group?

Mr. Butterfield: I object to that as highly speculative as to what would have been paid over if the government has demonstrated there were deductions from those figures so it would have been impossible to pay over those amounts, and she so testified those amounts were not paid over. As to what would have happened—

Trial Examiner Kolb: She testified the amounts were not paid over. We want to know what was paid over. Objection overruled (Part 3, Page 843).

By Mr. Schrup:

Q. You may answer, Miss Boland.

A. Those amounts less operating expenses; not those amounts.

Q. Not the amounts shown on the charts?

A. That is right.

Q. Those amounts less the operating expense of the group was the sum that was paid over?

A. Yes.

Q. And the operating expenses and so forth, are such as you have testified to?

A. Yes, sir.

* * *

Mr. Schrup:

Q. You were questioned, Miss Boland, by Mr. Butterfield, with reference to Commission's Exhibit 61, and did you state that the figures on Commission's Exhibit 61 were incorrect?

A. He asked me whatever the figure is over there is what we received.

Q. Referring to which column, please, that shows rebate of Mills-Morris of $1,397.06?

Mr. Butterfield: She testified that Mills-Morris did (Part 3, Page 844) not receive that.

Mr. Schrup: Wait a minute. Let the witness testify and not you, Mr. Butterfield.

A. And this figure—

By Mr. Schrup:

Q. You referred to $2,817.20 which does not appear on the chart.

A. That is right.

Q. Which is a figure you testified to?

A. As taken from our records.

Q. What is that figure?

A. Of the amount received from Moog on all purchases, I don't have it broken down according to—

Q. Now, that is, let me get it straight if I understand you. The entire amount of volume discounts received from Moog Industries for the year 1948 on the purchases of all members of Mid-South Distributors amount to $2,-817.20; is that what you mean to state?

A. Well, I lost you there because you had the wrong year. 1947 purchases for Mills-Morris and their branches. I can't give you the figures that the purchases amounted to but we received on their purchases of various items $2,817.20.

Q. Well, now, in order that we won't be misinterpreted by examination on direct, coil action sales, this chart is to coil action sales and the rebate on coil action sales is the (Part 3, Page 845) amount of $1,397.60. Is that figure of $2,817.20 you testified include any other products than shown on that chart?

A. It does.

Q. Well, obviously that couldn't be correct examination direct by that chart because that chart is confined to coil action figures. $20,016.20 could not refer to coil action sales but includes also other parts, does it not?

A. This figure covers other items, yes, sir.

Trial Examiner Kolb: But that figure is correct as to coil action parts?

The Witness: I don't have that broken down.

* * *

Q. In other words, coming back to Commission's Exhibit 61, Miss Boland, as it stands, and confined only to coil action sales and rebates, the figures on that chart as you understand (Part 3, Page 846) it are correct?

A. I can't say that because I have no way of checking. We don't keep the accounts separated.

* * *

Q. Now turn over to Commission's Exhibit 78. Now, that takes care of leaf springs, coil springs, and chassis parts but 61 is only coil actions, so that wouldn't be of any help to us, or would it?

A. The dates don't seem to agree. This is 50 and this is 49.

Trial Examiner Kolb: Try 50.

The Witness: I don't have 50 on here.

By Mr. Schrup:

Q. Well, Miss Boland, let's come back to Commission's Exhibit 61 in view of all this confusion. You testified as to three sums, I believe, whether your 1947, if I recall correctly it was $2,817.20. For the year 1948 it was $1,-616.74 and for the year 1949 it was $1,300.57, is that correct? (Part 3, Page 847.)

• • •

By Mr. Schrup:

Q. Were those the figures you testified to, Miss Boland?

A. They were, yes.

Q. What did those figures represent that you testified to?

A. Volume discount received from Moog Industries by Mid-South on purchases.

Q. Of Mills-Morris Company.

A. Shipped to Mills-Morris Company or their branches.

Q. What products do those figures embrace?

A. All of the merchandise that was shipped.

Q. And they included coil action but were not restricted to that. It included also leaf springs, et cetera?

A. That is correct.

Trial Examiner Kolb: It is not your contention that (Part 3, Page 848), the figures appearing on Commission's Exhibit 61 showing the sales or purchases of Mills-Norris and discounts received through Mid-South is not correct?

Mr. Butterfield: There is a contention and that was the purpose of introducing this witness to show that those figures were not correct.

Trial Examiner Kolb: Then you admit you are trying to foul up this record?

Mr. Butterfield: Your Honor please. I am attempting to defend. The Government's Exhibit on coil action parts as prepared by Mr. N. C. Steel, and after that case prepared

and in the middle of this case Mr. Steel decided he wanted to try something else. He prepared a series of charts which no one on earth can find out what those charts mean and all I can do to defend myself against them is to show the charts Mr. Steel prepared reflecting payments so much percentage of discounts to Mills-Morris are not correct and the witness so testify.

Trial Examiner Kolb: Your accountant did not so testify. You are testifying now. Your accountant did not testify. These charts admitted in evidence.

Mr. Butterfield: Our accountant did not testify.

Trial Examiner Kolb: Submitted to your accountant. He went over them. There was no objection raised. I don't propose to have any argument with you on this matter right now. If you want to prove up this chart is incorrect let your (Part 3, Page 849) witness bring in the record and show it is incorrect.

Mr. Butterfield: I would like to recall to Your Honor, if your Honor please, at the time these charts were introduced into evidence, I made vigorous objections to these charts and despite every objection I made all the objections were overruled. The things I attempted to show in those charts as incorrect were ignored and those charts admitted in evidence and nothing I could do to help myself.

Trial Examiner Kolb: Are you trying to prove the coil action figure is wrong? Let your witness bring in the figures now and show it is wrong. I am not going to put up with that kind of practice before me. I think it is reprehensible.

Mr. Butterfield: How else can I prove it, Your Honor?

Trial Examiner Kolb: Let your witness come in with her figures and show that figure is wrong. The chart on its face shows it applies to only one particular phase of the purchases. You come in and have the witness say that the amount received was so much including other things. Then you make a statement to me this chart is wrong. I am not going to take that kind of practice before me.

Mr. Butterfield: If Your Honor, please—

Trial Examiner Kolb: Unless you want to bring in your witness, I am going to strike the entire testimony this morning (Part 3, Page 850).

Mr. Butterfield: May I have a five minute recess?

(A short recess was taken.)

Trial Examiner Kolb: On the record.

Miss Boland, you were shown Commission's Exhibit 61 which was made by an accountant for the Commission who testified in this proceeding and purports to show the amounts of discounts which were paid to Mid-South on the Mills-Morris Company account for the years 1947, '48 and '49 covering coil action sales only. Now, as I understand it, first, your records do not break down the coil action sales and the sales of leaf springs and other items which are sold by Moog Industries upon which this account is paid.

A. That is right.

Q. And when you testified that a discount of $2,817.20 was received for the year 1947 and $1,616.74 for 1948 and $1,300.57 for 1949 on the Mills-Morris account, you are testifying that that was the total discount received on all items received.

A. That is correct.

Q. Now the fact that this particular exhibit, 61, shows an item of $1,397.06 for 1947, $708.41 for 1948 and $247.51 for 1949, that would be included in the amount which you testified to as having received?

A. Yes, sir.

Q. And as far as you know those figures could be correct?

A. They could be, yes (Part 3, Page 851).

Mr. Butterfield: May I ask one question?

Trial Examiner Kolb: All right.

Re-Direct Examination.

By Mr. Butterfield:

Q. These figures to which you have just testified do not reflect the, they include but do not reflect the payments made to Mills-Morris? By that I mean the payments by Mid-South to Mills-Morris were figures less than the figures shown on this chart, is that correct?

A. That is correct, it would be less.

Q. Do you have those figures that were paid to Mills-Morris on account of these payments received by Mid-South that you have testified to?

A. No, sir, they are intermingled with others.

Re-Cross Examination.

By Mr. Schrup:

Q. In other words, the figures that are shown on Commission's Chart 61 reflecting a discount, a column, discount received on Moog Industries on the purchases of Mills-Morris, I believe shows the figure of $1,397.06 for the year 1947 which reflects the rebate of 19 percent. You state that Mills-Morris receives from Mid-South a lesser sum than $1,397.06?

A. Let me say it this way: those are gross figures and our cost of operation is deducted from gross volume discount.

Q. That is right (Part 3, Page 852).

A. Which would actually make it less.

Q. That is right. In other words, so it would be clear for the record. Commission's Exhibit 61, the amount of rebate of $1,397.06 received on the purchases of Mills-Morris is the amount that would go to Mills-Morris except for the deduction of operating expenses of Mid-South Distributors' operation.

A. That is correct, assuming that figure is what we would have.

Mr. Butterfield: I wish to call your Honor's attention to the fact that this Exhibit 61 does not reflect or does not refer to and says nothing about sales to Mid-South Distributors. It is entitled coil action sales and rebates to jobbers in Memphis, Tennessee, and it says Mills-Morris Company having received 19 percent rebate.

Trial Examiner Kolb: As I understand that exhibit shows the rebate which was earned by Mills-Morris. The testimony, I think, is very clear that that was not paid to Mills-Morris direct but paid over to the Mid-South Distributors and by them redistributed to Mills-Morris subject to a deduction to cover expenses.

Mr. Butterfield: The operating expenses, that is correct (Part 3, Page 853).

January 12, 1953, at New York, New York.

ABRAHAM L. TREITMAN testified as a witness on behalf of Respondent as follows:

Direct Examination.

My name is Abraham L. Treitman. I am Secretary-Treasurer of American Motor Specialties. The witness was shown Commission's Exhibit Number 64, referring to coil action sales and rebates to jobbers in New Jersey. American Motor Specialties is designated on the exhibit as a jobber in 1947, 1948, and 1949. That is the same as a wholesale distributor (Part 3, Page 856). American Motor Specialties does not buy from Moog Industries but did buy from Metropolitan Automotive Wholesalers. That was the Cooperative. In 1947 on this same exhibit there appears Wheels, Inc., American Motor Specialties Company, and Clinton Square Auto Parts. In 1948 there appears Wheels, Inc., Alfa products, American Motor Specialties, and Clinton Square Auto Parts.

Q. I ask you, Mr. Treitman, to study this exhibit showing these sales and rebates, and I ask you if, by virtue of any of the differentials shown in rebates or commissions or differences on this sheet, whether you know if American Motor Specialties was injured competitively in its re-sale of the coil action parts of Moog Industries, Inc., for the years indicated.

Mr. Schrup: I ask that there be a yes or no answer.

A. No. The same as it was in the other case.

Q. And by "No" you mean that you were not injured competitively by reason of the differentials shown on this sheet? (Part 3, Page 857.)

Cross Examination.

With reference to Commission's Exhibit 64, Clinton Square Auto parts is a member of Metropolitan Whole-

salers. According to this schedule, Commission's Exhibit 64, I cannot point out any customer listed thereon who purchased Moog coil action parts as cheaply or cheaper than the two group members shown thereon.

Q. Directing your attention again to Commission's Exhibit 64, it reflects that American Motor Specialties Company and Clinton Square Auto Parts Corporation did buy at the best net price, the coil action parts from Moog Industries, Inc., is that not so? (Part 3, Page 858.)

* * *

A. I don't know if that is the best price or not, but according to these figures, they show a better percentage. (Pause) Yes, according to this exhibit (Part 3, Page 859).

We purchased Moog Products through the Metropolitan Group. That was the situation in 1949. Prior to our association with that group we purchased Moog products directly from them (Part 3, Page 859).

We stopped purchasing direct from them when the Group was organized. Our purpose in buying from the Group was to get a better price. Moog's salesman calls on us. As to how many times a year he calls, I cannot tell you definitely. I don't see him all the time.

We had two branches in operation for a period of years, and I am opening another one to-day. The two branches are at 57 Park Street, Orange, New Jersey and 717 Lyons Avenue, Arlington, New Jersey. They are independent of the main store location, which is at 53 Lock Street, Newark, New Jersey (Part 3, Page 860). We cover a radius of about ten miles from the main store. Newark is the center of our trade area. We sell to garages, service stations, car dealers, and fleet operators and very few jobbers. We sell no Moog products to jobbers nor did we sell any in 1949. We have six salesmen who cover the entire territory (Part 3, Page 861). All of them operate and report out of our main store. As to our method in the purchase of Moog products, we maintain a perpetual inventory, and by going through our records, we find out what we are short and we place an order with Metropolitan Automotive Wholesalers Cooperative and they in turn pass the

order on to Moog. We use an order blank form furnished by Metropolitan Automotive Wholesalers headed with their name (Part 3, Page 862). The orders are written up by our inventory clerk in our office. To my knowledge the Moog salesman has never written up an order for us. We send the order in to Metropolitan Automotive Wholesalers and they in turn pass it on to Moog. Moog ships the merchandise direct to us, but it is billed to Metropolitan Automotive wholesalers, and we get a copy of that billing (Part 3, Page 863). The bill indicates the price at which the merchandise has been shipped. At the end of the month we take all of Moog's invoices and list them up on the form, together with other merchandise that we have purchased from the Cooperative and we send one check in to Metropolitan Automotive Wholesalers Cooperative less 2% discount. That is within thirty days. We remit to Metropolitan Automotive Wholesalers on the basis of the billing price from Moog. Moog bills to us at their distributors' price list, and we take off 2% for cash in remitting to the Cooperative Group. We receive back a dividend from the Group. The basis of this dividend I do not know. We have been receiving dividends from Metropolitan ever since we have been doing business with them. I have never questioned the amount, as we have no way of figuring it, because I don't know. As to our advantage in buying through the group, as contrasted with our other method of direct purchase, I am under the impression that in the long run we fare better by buying through the group. That is because we periodically get the dividend that is declared, which I presume is based upon our purchases from Moog Industries (Part 3, Pages 865, 866). The difference in the two methods of buying, one before the Group was organized and one after, is that before the group was in existence we placed our orders direct, subsequently we placed our orders with the Group. Under either method we received the merchandise direct from Moog (Part 3, Page 866).

Re-Direct Examination.

Q. Mr. Treitman, I call your attention here to Commission's Exhibit 64, and these (indicating) amounts here,

$600.71 for 1949, and $1,798.56 for 1948, and $607.91 cents, 1947.

Now, those amounts shown on this sheet were not received by American Automotive Specialties Company, were they?

A. Not direct.

Q. So that, from looking at this exhibit, it may be that you are actually getting a worse price than a best price, as shown on this exhibit?

Mr. Schrup: Just a moment. That is not proper redirect. We do not contend that these are the amounts actually received, because it is obvious that that amount would not be received on the basis of the group discount. We do admit that there are some operating expenses that have to be deducted. It is our point that whether they are taken up by the group before the group passes the money, or that the money is passed over and then repaid by Mr. Treitman, is immaterial. We are interested in the comparative price at which he buys this merchandise as compared with other purchasers.

By Mr. Butterfield:

Q. This net price, Mr. Treitman, doesn't it represent the (Part 3, Page 867) actual price that you paid for Moog merchandise?

A. No, I don't believe so. (Pause) I wouldn't know. I have no records with me to disprove it or to prove it.

Mr. Mayer: The answer was "I don't know."

The Witness: That's right.

By Mr. Butterfield:

Q. And you admit that these are not the prices at which you purchased these—

Mr. Schrup: These are the prices which this member of the group paid for his purchases. Now, the fact, as I said before, whether the group deducts the operating expenses and remits the balance to the witness, or whether the whole is turned over to the witness, and he deducts part of the operating expenses and remits the balance then to the group, is immaterial. The fact is, he gets the discrimination.

By Mr. Butterfield:

Q. Mr. Treitman, this American Motor Specialties, for instance, for 1949 shows $3,116.63. Then, on rebate is shown here $600.17. And this amount (indicating) $2,560.92. That figure does not represent what you paid over, but this figure (indicating) $3,161.63 represents the figure? That is the figure that you sent?

A. That's right.

Q. Since you have been a group member, have you paid anything direct to Moog Industries? (Part 3, Page 868.)

A. No.

Q. Have you ever gotten anything back direct from Moog Industries?

A. No (Part 3, Page 869).

Re-Cross Examination.

I have not examined our books and records to determine whether the figure Net Sales $3,395.97 on Commission's Exhibit 64 is correct. I have no personal knowledge of the figures existing under the net amount column of $3,116.63. I understand that on our purchases Metropolitan receives a rebate of some kind from Moog Industries. I do not know how much that rebate is. I understand that a proportion of that rebate which is declared is included in the settlement by the group, yearly.

By Mr. Butterfield:

Q. Do you know personally, from your own knowledge, that there is no figure on that sheet which correctly represents any amounts of purchases direct from Moog Industries, Inc., for the years 1947, 1948, and 1949?

Mr. Schrup: I object to that question. The chart was put in by the accountant based on the records of Moog Industries. If there is any question as to the correctness of that chart, the proper party to be examined on that chart is the accountant, or to bring in some evidence from Moog Industries to dispute the chart, which is in evidence, and not to ask this witness, who says he diesn't know anything about the records.

Mr. Butterfield: At the time that that chart was prepared, the accountant knew that the Moog records to

which he had access did not reflect any such thing as you show on that chart.

Hearing Examiner Kolb: All this exhibit shows, according to the testimony we have had, is, that certain rebates were paid to the association or the group.

Mr. Butterfield: It doesn't show that at all.

Hearing Examiner Kolb: The testimony shows that that was the situation, and the accountant figured out the (Part 3, Page 870) rebate which would come to your customer on the basis of the rebate received from the group.

Mr. Butterfield: Without any deductions for operating expenses.

Hearing Examiner Kolb: With no deductions for operating expenses with no deductions for operating expenses. Mr. Schrup's position, as I understand it, is that these are the correct amounts, exclusive of the costs of the operation of the group.

Mr. Butterfield: As I understand it, he is throwing the burden of the respondent to prove his case.

Hearing Examiner Kolb: The only question involved is whether or not the discount received by this man can be considered as a gross discount received by the group, or whether, in payment to the group, the expense is not to be considered as part of his rebate.

Mr. Butterfield: The Robinson-Patman Act, Section 13 thereof, provides that nothing in the Act shall prevent a cooperative association from returning to its members the whole or any part of the net earnings or surplus resulting from its trading operations in proportion to their purchases or sales through the association—

Hearing Examiner Kolb: Now, Mr. Butterfield, what has that got to do with the examination of this witness? Isn't that something that you want to argue at the close of the case? (Part 3, Page 871.)

Mr. Butterfield: You see, I have never been able to pin the Government down as to just what exactly they are charging us with in this case. I have never been able to pin them down. Now they are charging us with selling to a cooperative, where the cooperative is specifically exempt under the Act.

Mr. Schrup: Mr. Butterfield, the purchases in this case were purchases made by these members purchasing through this office, this buying office as an agent.

Mr. Butterfield: That would be true of any cooperative, as I see it (Part 3, Page 872).

January 13, 1953, New York, New York.

SAMUEL BUDOFF testified as a witness on behalf of Respondent as follows:

Direct Examination.

My name is Samuel Budoff. I was connected as a partner of Automotive Distributors in 1949.

Q. I show you Government's Exhibit 68, showing sales in Brooklyn, New York, and shipment by Moog Industries, Inc. to eight different wholesale distributors. This chart, Commission's Exhibit No. 68, shows the contract year and the year previous to it stated in this first column, and this column, the third column over, shows the net shipments, and (Part 3, Page 874) then the amount of the cash discount in the other column, and in the fifth column is the excise tax, and in the sixth column is the net amount, and in the seventh column is the rebate, with percentages in the eighth, and net payment received by Moog Industries in the ninth column, and then, in the last column, percentage of net amount.

Now, from these figures that are set up here, Mr. Budoff, with these differentials as shown here in these percentages and amounts received, and the differentials in the amounts shipped to these various parties, do you know whether or not by virtue of those differentials, your company was competitively injured in the year 1949?

Mr. Schrup: Objection. I don't believe there has been any proper foundation laid up to this time for any testimony on the part of this witness to that effect.

Hearing Examiner Kolb: Objection overruled.

Mr. Mayer: We also ask that the witness be instructed to answer yes or no.

Hearing Examiner Kolb: Answer yes or no.

By Mr. Butterfield:

Q. Do you know whether you were competitively injured?

A. No, I don't believe I have been.

Q. By that you mean that you have not been competitively injured?

A. No (Part 3, Page 875).

Cross Examination.

The first time I saw the chart, Commission's Exhibit 68, in this case was when the gentleman was over in the store —the man who left the subpoena. My partner told me about it. I was not there. I found out about the various buying prices, as shown on Commission's Exhibit 68, when my partner told me about the different discounts. I have been acquainted with the various buying prices of these various companies. I know that various companies, as shown on this exhibit, were receiving lower prices than I was in 1949, but they are bigger operators and I know they buy much more than I do (Part 3, Pages 876, 877). I know that they were buying lower than I was. I know they were buying at these precise figures in 1949 because I believe the figures are what I believe them to be because when you buy certain amounts you get a certain percentage and when you reach another bracket you get another percentage. I knew that and I was satisfied with the bracket that I was aiming for. I do not know how much these other various companies were purchasing. I only know from the amounts of contracts of merchandise that are to be bought.

I am familiar with K and G Auto Parts Company. I would not know what they purchased in 1949 (Part 3, Page 877). I cannot tell you approximately what I thought they purchased in 1949; I would not know.

Q. Now, Mr. Budoff, what do you understand competitive injury to mean?

A. I wouldn't know anything. All I was interested in was the contract that I had, and if I reached a certain amount, I was to get an extra 5 percent, and what the

other fellow did, or how much he bought, I wouldn't know, I wasn't interested. I didn't know whether I was being hurt or I wasn't being hurt. I was just minding—

* * *

(Part 3, Page 880.)

By Mr. Mayer:

Q. I believe you stated that you didn't believe that you were competitively injured. What I am trying to find out is what do you understand competitive injury to be?

A. I can't really tell you whether—what the injury might have been. All I know is that I have been satisfied with what I have been getting, and I don't believe, personally, that I was injured in any way at all.

Q. If you don't believe so, what would be an idea of injury you might suffer?

A. I don't think I suffered any injury.

Q. I realize that you say you didn't suffer any injury, but what would you consider injury? What do you mean by injury?

A. By financial injury. I know I have been satisfied with what I have, and that's all there is to it.

Q. Can you give me an example of what you might mean by injury?

A. When you talk "injury" you mean financial injury, right?

Q. Yes. Give me an example of what you mean by injury.

A. My business has been running profitably, and that's all I know. I don't know about the other fellow, whether he is making money or whether he is not making money, or buying for less or for more, I don't know. I'm only interested in what I am buying.

Q. Are you interested in buying your merchandise at the cheapest net price available? (Part 3, Page 881.)

A. Yes, we are.

Q. Why is that?

Mr. Butterfield: If your Honor please, I object to that question as being a question which contains within itself

its own answer. It is obvious that anyone would be willing to buy as cheaply as possible, and sell as the market would stand. I think that that is the business—

Hearing Examiner Kolb: Overruled.

By Mr. Mayer:

Q. Why is that, sir?

A. Why is what?

Q. Why would you like to buy at the cheapest net price available?

A. Every business man likes to buy as cheap as he possibly can, and I believe that the contract we have with Moog was at the cheapest price, and there's a scale there, that's all. The more you buy, the bigger the discount is.

Q. Do I understand, then, that you feel that if you buy as much as your competitors, that you are entitled to the same price that they receive? Is that correct, sir?

A. I assume that that would be the right thing, according to the contract. They have a scale of the purchases and the discounts. It's up to each individual man to try to sell as much as he can to attain the highest purchase.

Q. I direct your attention to Commission's Exhibit 68 which shows the net sales to Automotive Distributors in the amount (Part 3, Page 882) of $2,478.36, and the net sales to K & G Auto Parts, for example, of $1,228.13. Yet it shows the net buying price—

Mr. Butterfield: If your Honor please, at this time I wish to interpose an objection. Counsel knows that Moog Industries, in the year 1949, sold no products to K & G Auto Parts. They were sold to Metropolitan Automotive Wholesalers Cooperative, and that these figures on this are not the figures of sales to K & G, but are the figures of sales to Metropolitan Automotive Wholesalers Cooperative. Counsel knows that. The sheet does not show it. The sheet, at the time it was put in, was designed to be highly prejudicial to Moog Industries, Inc. It involves another respondent who is under complaint here, and it is an attempt to try that case within the confines of this case. Now, this figure on here (indicating) of sales to K & G—and I didn't ask him on direct examination of sales to K & G, it was shipments to K & G, and, I repeat,

that is an issue which is involved in another complaint. And these figures taken from here, like K & G, and A. Jacoby and Sons, I think those were combined purchases shipped to these people and charged and paid for by the Metropolitan Automotive Distributors, and those are the ones with whom Moog Industries had dealings, and therefore I think that asking a question like that is outside the scope of this direct examination that I made, and it is outside the scope of this inquiry, and it is highly prejudicial to the Moog Industries case, because it is untrue as shown on (Part 3, Page 883) this exhibit, and we shouldn't be bound by tactics of that kind. That is the reason why I am making this objection at this particular time.

Mr. Schrup: We take exception to counsel's statement. We have gone over this matter innumerable times, if your Honor please, and counsel still makes the same objections. We have established that K & G Auto Parts has purchased and handles Whitaker products, and did so during—

Mr. Butterfield: If your Honor please, I object to that statement. Counsel has not established any such thing in this case. This is an issue that is in the complaint which you have against Metropolitan Automotive Wholesalers, and you haven't even tried that case yet. • • •

This argument has nothing to do with the objection to the question. I will overrule the objection. Have you completed your question?

By Mr. Mayer:

Q. The chart shows the net buying prices of Automotive Distributors to be 95 percent of the list price of the Moog products. It shows the K & G Auto Parts Company to pay 11 percent of the list price of the Moog products.

Now, I ask you if you wouldn't like to have purchased (Part 3, Page 884) your Moog products in 1949 for 81 per cent of the list price as shown that the K & G Auto Parts Company purchased in that year?

Mr. Butterfield: I object to that question as carrying within itself its own answer. It is the same kind of question as to whether you would like to buy your merchandise cheaper.

Mr. Schrup: If your Honor please, Mr. Butterfield has been overruled time and time again on the specific ob-

jection that he has been making, and we cannot continue our examination.

Hearing Examiner Kolb: Objection overruled.

A. If those figures are correct, of course I would like to be receiving a lower discount, like this K & G, but from what I heard, just now, this K & G is a part of some kind of a group. I don't belong to that group, so therefore I couldn't very well expect the same kind of a discount.

By Mr. Mayer:

Q. Even though your own purchases almost double the purchases of this particular purchaser?

A. So I see. But, as I said before, I don't belong to that group, so therefore I couldn't see where I could get a discount like that.

Q. Directing your attention again, Mr. Budoff, to the purchases of Automotive Distributors, which is $2,478.36, 1949, and shows that you received a 5 per cent rebate upon (Part 3, Page 885) these purchases, I ask you would you rather have received the 19 per cent discount or rebate upon those purchases?

Mr. Butterfield: I object to that question on the same basis.

Hearing Examiner Kolb: Overruled.

A. Well, of course, I would rather receive it, if I were a member of that group. But I am not a member of the group.

Q. The question was, would you rather receive 19 per cent or 5 per cent?

A. Of course, the 19 per cent.

Q. Why would you rather receive 19 per cent.

A. It's more profitable to receive 19 per cent.

Q. Is that profit, your profit that you receive on those transactions important to you?

A. Very important.

Q. And isn't it important to you in your competitive scheme?

A. I imagine it would be, I imagine it would be.

Q. Why would you say that it was competitively important to you?

A. Well, of course, it's more profitable, more profit attached to each individual sale.

Q. And that enables you to stay competitive?

A. To stay competitive and to do good financially (Part 3, Page 886).

* * *

Hearing Examiner Kolb: On the record.

Do you have any further witnesses, Mr. Butterfield?

Mr. Butterfield: Not this morning.

Hearing Examiner Kolb: You have no witnesses for this afternoon?

Mr. Butterfield: None for this afternoon.

Hearing Examiner Kolb: I think we might as well take up, on the record, the question as to whether or not you intend to close your case tomorrow.

Mr. Butterfield: Can we take that up tomorrow, Judge?

Hearing Examiner Kolb: We can discuss that today, if you will.

Mr. Butterfield: I have been so busy on this thing that I haven't had any opportunity to go over that.

Mr. Schrup: I think we should have an answer to that problem. We have had some extensive hearings through Dallas and Denver, and other cities, including Memphis, and we have run into this situation, recurrently, of putting one witness or possibly two witnesses during a day, and then going on to the next, and then having it delayed before the next hearing, and I think we should be entitled to know Mr. Butterfield's position.

Mr. Butterfield: I am sorry that Mr. Schrup is accusing me. We have had in New York the last four or five days some of the most terrible weather conditions that I have (Page 887) ever encountered. We have a bus strike that is on here in New York at the present time, and it has been terrific for me to get around and serve these various subpoenas. I have been at this thing 16, 18 and 19 hours a day, getting around from hither to yon in this situation, and that is an abnormal thing here, that I have no control of. I am sorry it happened.

Mr. Schrup: I understand that in the other cities the Whitaker and Moog salesmen have already contacted these jobbers and prepared them for this.

Mr. Butterfield: They have not contacted these jobbers and prepared them for this district at all. The only thing that has been done here is myself serving these subpoenas. Nobody else had anything to do with it.

Hearing Examiner Kolb: Is it your intention to close tomorrow after you have completed the testimony of the several witnessses you are going to have tomorrow morning?

Mr. Butterfield: No, I don't intend to close tomorrow morning, because I have a section of the country that I haven't even touched, really two sections of the country that haven't been touched. There is the West Coast and the Mid-West Des Moines, Iowa, area.

Mr. Schrup: I would suggest that if the same type of testimony that you have put on in the matter here is the type of testimony that you will put on in these other areas, it is both a waste of your client's money and the Government's money, too, and I object on the part of the Government (Page 888).

Mr. Butterfield: Do you want to withdraw any of these exhibits?

Mr. Schrup: We certainly do not withdraw anything.

Mr. Butterfield: Do you want to enter into a stipulation that these people will all testify that they have not been injured?

Mr. Schrup: We will enter into a stipulation with you that the type of testimony that has been given so far by these jobbers, would be repeated by the other Jobbers, for what it is worth.

Mr. Butterfield: It is this question of injury. Could you stipulate that these people who have testified that they haven't been injured—

Mr. Schrup: Mr. Butterfield, we will stipulate to this effect: We will stipulate with you that if you called other jobbers to the witness stand, that on direct examination and cross-examination they would testify as they have been testifying in the past hearings.

Mr. Butterfield: That each and every one of them will testify that he has not been injured?

Mr. Schrup: I will certainly let the testimony stand, and let the Hearing Examiner, and not you, judge the value of the testimony, Mr. Butterfield. That is what you have been trying to do all along.

Mr. Butterfield: Oh, no. They have testified that they haven't been injured, and if you would stipulate (page 889) with me on that—

Mr. Schrup: I will stipulate with you, Mr. Butterfield, that the testimony that will be brought forward by any jobber witnesses that you put on the stand, would be the same type of testimony that the previous jobbers have given. I say it is a waste of time to go and just put cumulative testimony of this kind on the stand, because it is the same testimony we will get at any other hearing we will go to.

Mr. Butterfield: I am just trying to work out something.

Mr. Schrup: I don't think we should have all this time-wasting going on. I don't think the Government should be put to the expense of having these witnesses put on the stand to repeat the same kind of testimony. We are agreeable that the testimony to be forthcoming will be the same as the testimony in the past.

Mr. Butterfield: Will you stipulate that these people that I put on would testify that they have not been injured?

Mr. Schrup: Mr. Butterfield, I will stipulate with you that they would testify the same as they have testified, for whatever that testimony means. I will not stipulate with you as to a conclusion that is neither for you nor me to judge.

Mr. Butterfield: But every witness on this stand (page 889a) has testified that he has not been injured. Will you stipulate that?

Mr. Schrup: I repeat, I will not stipulate as to what the meaning of the testimony is. I will stipulate that the testimony will be the same. It is neither for you nor for me to decide what the meaning of that testimony is. That is the Hearing Examiner's province.

Mr. Butterfield: But they have testified that they haven't been injured.

Hearing Examiner Kolb: Mr. Butterfield, if you stipulate that the testimony will be the same, isn't that what you are talking about? As I understand it, counsel for the Commission is willing to stipulate that if further witnesses, jobber witnesses, are called, their testimony, both on direct and cross-examination, will be substantially the same as the testimony that has been introduced in the past several hearings, where jobber witnesses have been called.

Mr. Butterfield: Let me think that one over. Will you read that back for me, Mr. Reporter?

Hearing Examiner Kolb: Read my last comment, please.

(The reporter read the Hearing Examiner's comment as follows:

"Hearing Examiner Kolb: Mr. Butterfield, if you stipulate that the testimony will be the same, isn't that what you are talking about? As I understand it (Page 890) counsel for the Commission is willing to stipulate that if further witnesses, jobber witnesses, are called, their testimony, both on direct and cross-examination, will be substantially the same as the testimony that has been introduced in the past several hearings, where jobber witnesses have been called.")

Hearing Examiner Kolb: Off the record.

(Discussion off the record.)

Hearing Examiner Kolb: On the record.

Are you willing to accept a stipulation which has been offered by counsel for the Commission, that the testimony of additional jobbers, if called, would be substantially the same as the testimony of those jobbers who have already testified in this proceeding, both as to direct and cross-examination?

Mr. Butterfield: May I first consult with the principals in the case before I make that kind of an agreement?

Hearing Examiner Kolb: We will have a recess for a few minutes.

(A short recess was taken.)

Hearing Examiner Kolb: On the record.

Mr. Butterfield: I talked with Mr. Whitaker in Kansas City, and he is not satisfied with this testimony that we have had here, which excepts the West Coast. Now, he does want that West Coast situation in this record, and (Page 891) as long as he is paying for it, why, I suppose we will have to get it in there. He doesn't want to rest without this West Coast stuff in the record now.

Hearing Examiner Kolb: All that West Coast testimony will be exactly the same as we have been getting here, will it not?

Mr. Butterfield: No, there is a little different situation on the West Coast than here. Moog doesn't get across there at all because of the freight differentials out there, and they don't go beyond the mountains on their stuff. Whittaker does, because he has a lot of airplane material.

And that West Coast situation is a little peculiar, compared with the rest of the United States. There is a different kind of market out there. Now, it's that market that he wants to get testimony on, in this record. As you understand, Mr. Whitaker does not feel that he has done anything illegal or wrong in this thing, and, of course, I agree with him. And any conclusions that we might arrive at will have to be based on the record for these representative areas in the United States, and I have just got to spot-check these areas.

Hearing Examiner Kolb: We have covered several areas, and the testimony, so far, has been exactly the same in each one, including the witnesses here in New York. And it seems to me that any testimony of additional jobbers would be more or less cumulative and, if it is, others would be no (page 892) occasion for taking it, particularly when you have an offer of a stipulation which would eliminate the taking of that testimony. Now, I don't know about the West Coast or what the situation is there. If the situation there is similar, I assume that what you would do is put jobbers on the stand, show them the prices on the charts, and ask them if they have been competitively injured, and they would say no. Then we would go in on cross-examination to the question of competitive injury, and so forth, as they have done with all the rest of the witnesses, and it would be almost a complete record of what we have had in the past.

Mr. Butterfield: No. There are different aspects on the West Coast because marketing there is different on the West Coast than it is in this part of the country.

Hearing Examiner Kolb: In what way is the marketing different?

Mr. Butterfield: In the first place, you have, out on the West Coast—there have been many industries that have moved out there and established plants. The West Coast, as you know, is an area that has been tremendously built up in population in the last few years, and the whole—well, as you know, prices change west of the Rockies.

Hearing Examiner Kolb: Mr. Butterfield, suppose that you have made your defense on these areas which you have covered, then there would be nothing gained by making a further defense as to the West Coast. If you haven't made (page 893) your defense on the areas covered, it would be of no advantage to make a defense on the West Coast, would it?

Mr. Butterfield. Now, if the Government would want to withdraw that West Coast material, if they want to withdraw that material—but they have nothing to gain by the West Coast material if they have got everything that they want on this already, and they have nothing to lose by striking out this West Coast material.

Mr. Schrup: No, we stand on the record. As I understand it, what you are talking about is the Whitaker case, and as far as the Moog case is concerned, you are willing to enter into a stipulation.

Mr. Butterfield: No. On the Moog case, I want that Des Moines, Iowa, area, because that is an area that could be representative of the whole Mid-Western area. You see, we haven't taken the Middle Western area at all.

Mr. Schrup: Well, we have offered you a stipulation, and I think the Examiner has distinctly stated what it would be.

Mr. Butterfield: Depending on those two hearings. It may be that after the conclusion of those two hearings we could enter into a stipulation.

Mr. Schrup: We have had some considerable off-the-record discussions about these matters, and it always seems

like "Just one more time". That could go on interminably (page 894).

Mr. Butterfield: I have made my statement on those two areas on the record.

Hearing Examiner Kolb: We have discussed this at the last hearing.

Mr. Butterfield: There was no understanding that I knew of.

Hearing Examiner Kolb: Wait a minute. You said that you wanted to take a sample of the New-Jersey-New York area.

Mr. Butterfield: That is right.

Hearing Examiner Kolb: (Continuing) And I assumed, on that statement, that you planned to finish up. Now, this West Coast proposition comes as quite a surprise to me.

Mr. Butterfield: I distinctly talked to Mr. Schrup about this West Coast area.

Mr. Schrup: I don't recall, Mr. Butterfield. I seem to remember at the time that you wanted to go to Memphis and Birmingham, and then we could conclude. We had a hearing in Memphis, and then you come around with the fact that you want a New Jersey hearing, because that was an unusual situation. Now that we have had that, now we have another situation.

Mr. Butterfield: The first town that I wanted to go to was Birmingham. I never was able to get to Birmingham. I never was able to get a hearing down there. Then I told you in Memphis at the last hearing that Whitaker would (page 895) have to cover this West Coast area. I told you that distinctly at Memphis.

Mr. Schrup: I don't recall that. It was my impression that we would have the New Jersey area, Bronx and New York, because that was unusual, and that would probably be the last hearing. Now, something else comes up. It is up to the Examiner to rule on it. We made our offer as to what we would stipulate, and you do not seem to find it acceptable. It is up to the examiner to rule as he sees fit. Maybe we can go off the record for a minute (p. 896).

January 14, 1953, at New York, New York.

ALBERT SAPIRO testified as a witness on behalf of Respondent as follows:

Direct Examination.

My name is Albert Sapiro and I am connected with Sapiro Auto Parts Company, New Brunswick, New Jersey.

Q. Mr. Sapiro, I show you Government Exhibit No. 63, Moog Industries, Inc., being Coil Action Sales & Rebates to jobbers in Newark, New Jersey, for New Brunswick for the years 1947, 1948 and 1949, showing sales to Motor Parts & Machine Company, Sapiro Auto Parts Company, and it also has on the chart a distributor by the name of Clinton Square Auto (Part 3, Page 898) Parts Corporation. The testimony in the record heretofore is that Clinton Auto Square Parts Corporation pays for its material through the Automotive Wholesalers Cooperative, that is, Moog business is done through the Automotive Wholesalers Cooperative. The chart indicates differentials of sales made to Jobbers, as Motor Parts Machine Company, and it also indicates shipments to Clinton Square Auto Parts Company, Newark. I will ask you to examine this chart and tell me whether or not you know whether Sapiro Auto Parts Company was or was not competitively injured by virtue of the differentials in rebates shown on that chart?

Mr. Schrup: We have the same objection we have had heretofore.

Hearing Examiner Kolb: Objection overruled.

A. As far as I can say, we in Sapiro Auto Parts Company more or less mind our own business, and we are not interested in what Clinton Square Auto Parts gets, or what they do, because there seems to be enough business in the territory for all of us, and we all get our share of the business, and we all make our profit.

Q. Do you know whether or not you were injured competitively by virtue of these differentials?

A. Not as far as I know, no.

Q. By "not as far as you know" you mean that you were not injured competitively?

A. That is right (Part 3, Page 899).

Cross Examination.

Yes, I am interested in increasing my share of the business in my trade teritory. Yes, I would like to get more business and make more money. To get more business you have to take into consideration getting a better line, getting more national lines, putting on more salesmen, being able to sell more merchandise.

Q. Would an increased profit margin enable you to hire more salesmen and, for instance, enable you to be more aggressive in your territory?

A. Probably.

Certainly I am interested in buying merchandise at the cheapest net price available. I say that because the cheaper I can buy, the more competitive I become, and the more money I can make (Part 3, Page 900). We are furnished with a suggested re-sale price list by Moog. We follow that. As far as I know, my competitors who offer Moog products follow this suggested price list. To be injured competitively I imagine that if Clinton Square sold the merchandise below my price, that would be injuring me competitively. As long as they hold up the price the same as we do, I am not competitively injured (Part 3, Page 901).

ALFRED H. FEASTER testified as a witness on behalf of Respondent as follows:

My name is Alfred H. Feaster and I am connected with Wheels, Incorporated, who operate in Newark, New Jersey.

The witness was shown Commission's Exhibit Number 64, showing coil action sales and rebates to jobbers in Newark, New Jersey (Part 3, Page 902).

Q. I ask you whether or not, from the differentials that appear on this Government Exhibit 64, you know

whether Wheels, Inc., was competitively injured by reason of those differentials for the years 1947, 1948 and 1949.

Mr. Schrup: The same objection as heretofore.

Hearing Examiner Kolb: Overruled.

A. No, we were not competitively injured.

Q. Do you buy Coil Action Parts from any other company?

A. No.

Mr. Schrup: We have an objection on that, as immaterial.

Hearing Examiner Kolb: Overruled.

By Mr. Butterfield:

Q. Is there available to you in the market coil action parts from other companies?

A. Yes, sir.

Mr. Schrup: Objection. I object to that as being (Part 3, Page 904) entirely immaterial to this case. The charge is discrimination by Moog Industries, not of others, Mr. Butterfield.

Mr. Butterfield: The purpose of that, if your Honor please, is that there has been some question about not asking these questions on direct examination. I have been bringing this out on cross-examination, and it was in my mind that your Honor objected to asking these questions on re-direct after cross-examination by counsel. And I wanted to straighten it out by asking these questions on direct examination, because one of the charges in here is the tendency to create a monopoly in this particular line of commerce, and it is to meet this charge that I have asked these questions of this witness, as to whether or not there was available to this witness coil action parts from other sellers in the Newark area.

Hearing Examiner Kolb: The objection will be overruled. The witness may answer.

A. Yes.

By Mr. Butterfield:

Q. And at substantially the same prices that you were paying for the same parts—

Mr. Schrup: I object to that. In the first place, it is not proper examination of this witness. The best evidence of prices of competitors is to bring in the competitors.

Hearing Examiner Kolb: This witness should know whether or not this material is available at the same price, or approximately the same. The objection is overruled. The (Part 3, Page 905) witness may answer.

A. Quite honestly, that would be something we would have to investigate ourselves, if we found ourselves in that situation. But I will presume that the other manufacturers could be competitive, within the same price.

Mr. Schrup: I move that the witness' presumptions be stricken in the answer.

A. (Continuing) Well, then I would say they are.

Mr. Schrup: I move that any presumptions be stricken from the record.

Hearing Examiner Kolb: The witness first said it was based upon a presumption, and then said that they are competitive. Do you want to strike the presumption?

Mr. Schrup: If he stated of his own knowledge, it probably is satisfactory.

Hearing Examiner Kolb: What is your motion?

Mr. Schrup: When he said he presumed. I move that the presumptions be stricken out.

Hearing Examiner Kolb: That part of the answer?

Mr. Schrup: Yes.

Hearing Examiner Kolb: That part of the answer may be stricken.

By Mr. Butterfield:

Q. I ask you, Mr. Feaster, whether or not you know of your own knowledge whether Moog Industries are the largest sellers of these coil action parts, or comparatively small? (Part 3, Page 906.)

A. I frankly cannot answer the question.

Yes, of course, I would like to buy my merchandise at the best net price available. That would be true as to Moog Industries.

Q. I direct your attention to Commission's Exhibit 64, with particular reference to the year 1949, which shows

that your company, Wheels, Inc., was the largest purchaser of coil action parts from Moog Industries, Inc., in Newark, New Jersey. You received, or you paid 86 per cent of the net price to Moog for those parts. I also call your attention to two other customers, American Motor Specialties Company and Clinton Square Auto Parts Company.

Mr. Butterfield: I object to the characterization of those two as customers of Moog. That is one of the issues in this case.

Hearing Examiner Kolb: Overruled (Part 3, Page 907).

By Mr. Mayer:

Q. Those purchases show on the exhibit as, in round figures, $3,300 and $7,600, in comparison to your $9,300, both paying a net price of only 81 per cent of the net price for Moog parts, in 1949. I ask you, wouldn't you like to have paid 81 per cent of the net price for your parts, Mr. Feaster, from Moog?

A. Yes, of course, but—

Q. The question was, would you like to have paid?

A. Yes.

Q. Why do you say that, sir?

A. Why do I say yes?

Q. Yes, sir.

A. Because it would represent a better income for the company.

Q. And that income is important to you?

A. Yes.

Q. And helpful in the operation of your business?

A. Yes.

Q. Do you re-sell Moog parts at suggested re-sale prices?

A. Yes.

Q. Do your competitors re-sell at the same suggested prices?

A. So far as we know.

Q. A moment ago, in answer to a question of Mr. Butterfield, you said that you were not competitively injured.

What do you mean by competitively injured? (Part 3, Page 908.)

A. Well, something that would, let's say, reduce our sales, hurt us because we are strictly a sales organization.

Q. Would factors which tend to keep you from increasing your sales also amount to competitive injury to you?

A. I would say, yes.

Q. In your idea of competitive injury, would you say it would be more or less summed up in the idea of losing customers because of sales made at below the suggested re-sale price?

A. That would be competitive injury, yes (Part 3, Page 909).

Hearing Examiner Kolb: Mr. Butterfield, does that complete the witnesses for the present series of hearings?

Mr. Butterfield: Yes, for the present series of hearings.

Hearing Examiner Kolb: In New York?

Mr. Butterfield: Yes. But since I talked to Your Honor yesterday there is a question that comes up as to whether or not San Francisco and Los Angeles, on the Whitaker Cable Corporation case, would be the most advantageous for the Government and for the Whitaker Cable people (Page 910).

A colloquy ensued between the Hearing Examiner, Mr. Butterfield, Mr. Mayer, and Mr. Schrup. • • •

Hearing Examiner Kolb: Let the record show further that the hearing is set for Wednesday, February 18th, for three days, in Moog. I understand that there will be one additional hearing, possibly in Detroit, on the question of meeting competition, and another hearing on the cost justification, and that you are to have your cost justification ready by the latter part of April, and that you will then present that to the Commission's attorneys, and that they will then set the hearing on that, possibly at St. Louis for Moog, and for Whitaker Cable, at Kansas City.

Now, you are also to determine when that hearing on meeting competition is to be set, and let me know during the course of this hearing what date that will be, preferably prior to the cost justification defense being put in.

Hearing Examiner Kolb: On the record.

Let the record show that a hearing will be set for Des Moines, Iowa, Wednesday, February 18, 1953, for three days, and then either Los Angeles or San Francisco, beginning Tuesday, February 24, 1953, for four days. Let the record show further that the hearing is set for Wednesday, February 18th, for three days, in Moog. I understand that there will be one additional hearing, possibly in Detroit, on the question of meeting competition, and another hearing on the cost justification, and that you are to have your cost justification ready by the latter part of April, and that you will then present that to the Commission's attorneys, and that they will then set the hearing on that, possibly at St. Louis for Moog, and for Whitaker Cable, at Kansas City.

Now, you are also to determine when that hearing on meeting competition is to be set, and let me know during the course of this hearing what date that will be, preferably prior to the cost justification defense being put in (Part 3, Page 929).

* * * *

At Washington D. C.

This is a hearing in the matter of Whitaker Cable Corporation, Docket 5722, and Moog Industries, Inc., Docket 5723.

Hearing is being held in these cases pursuant to order of the Hearing Examiner to show cause why testimony should be taken at Wichita, Kansas, issued March 12, 1953. By agreement of counsel, these hearings will be held together and separate record made in each case.

Mr. Butterfield: If the Examiner please, in the Moog Industries case, 5723, and in the Whitaker Cable Corporation case, Docket 5722, a request was made by respondent for hearings in Wichita, Kansas, for the purpose of rebutting certain evidence that has heretofore been introduced into evidence on behalf of the Government on its case in chief.

In the Moog case, on the 8th of October, 1951, and and on March the 4th, 1952, there were introduced into evidence and received over the objection of counsel for

the respondent, Exhibits Nos. 61 to 79-G, 28 pages, 623 items purporting to show illegal price differences in the sale of commodities by the respondent to the purported purchasers named in those exhibits, in 236 communities in 23 States.

At the close of the case hearings were set in St. Louis (Part 3, Page 931), Denver, Dallas, New Orleans, Memphis and New York. Hearings had been requested for Birmingham and Des Moines, which hearings have not yet been set.

Trial Examiner Kolb: Mr. Butterfield, in reading your answer it appears in reading it that you are charging that I have refused to permit you to hold a hearing in Birmingham, Alabama. That is not true.

Mr. Butterfield: No, I didn't charge that.

The respondent's attorney had hoped by the means of these test hearings to persuade counsel for the Government to in some manner restrict their testimony in regard to these Exhibits 61 to 79-G and to try and persuade the Government to withdraw a part of those documents, it being the opinion of respondent's attorney that the evidence included in those exhibits was quite cumulative and that it placed an insurmountable task on the respondent in meeting the evidence.

In the Whitaker case, in 5722, request was made for hearings in Los Angeles and San Francisco, but respondent has been advised, and understands, that the Government attorneys have agreed not to take into consideration those exhibits covering that testimony, and at the proper time motions will be presented to strike from the record exhibits referring to the West Coast area.

Now, Wichita is the central location and sets in the heart of several communities in Kansas, among which are (Part 3, Page 932) Winfield, Wellington, El Dorado, McPherson, and Hutchinson.

There are quite a few communities revolving around that particular trade area and there are numerous jobbers whose names appear on these Government exhibits purporting to have made purchases from both the Moog Company and the Whitaker Company in that particular area.

The respondent finds that it is in this position: It must either rebut that evidence that the Government has put in or the Government will have to withdraw such evidence as respondent is not permitted to rebut, because to leave the evidence that the Government has already introduced in the record, without permitting respondent to rebut it and show what the facts are in regard to the issues of competitive injury of monopoly would be a denial of due process and would not result in a fair trial being afforded to the respondent.

Now the respondent has offered in the balance of the exhibits in both cases to stipulate that if the witnesses called in the remaining areas, these jobber witnesses, if these witnesses were called, that each of them, if taking the stand, would testify that he knew the facts surrounding his own business and that from such knowledge he would testify that in his opinion he had not been competitively injured and that they would testify on cross-examination substantially the same as they have testified in these other hearings that we have had (Part 3, Page 933).

Trial Examiner Kolb: Isn't that the same stipulation that you refused to enter into in New York?

Mr. Butterfield: No, the stipulation that the counsel in New York wanted me to enter into was that all the witnesses called would testify substantially the same on both direct and cross-examination as the other witnesses had testified.

Trial Examiner Kolb: Their testimony on direct examination was—

Mr. Butterfield: On direct examination they would testify substantially the same as these other witnesses had testified.

Now there is only one thing in common in that testimony and that is the question of competitive injury; all the other factors are different.

Now the other testimony that is in there in regard to the amount of purchases and the conditions of the area and what they deal in and what they do is all different, but the one thing that is common to those witnesses in the major is that they were not competitively injured. Now

that is a statement, a sworn statement of fact, given by these witnesses.

Now it would not be sufficient for the respondent to meet the case by merely stipulating that they would all testify substantially the same on direct and cross-examination because that would only confuse the record, and would resolve (Part 3, Page 934) into another argument.

There is one thing that cannot be argued, and that is a fact. Opinions can be, but not facts; and it was for the purpose of getting the facts in this record that respondent has asked for these hearings.

The respondent has put on various of these jobber witnesses as to dollar amounts shown, and particularly in regard to amounts received as rebates, and in many instances it has been shown that the amounts purported to have been received have not been received at all, but only a small fraction thereof has been received by these particular jobber witnesses.

Now the doubt that has been cast upon these exhibits when related to the facts as they appear in the field is sufficient, in my opinion, to cast doubt on all of the exhibits that are now in the record, and I think that a motion would well lie at this time to strike from the record all of those exhibits.

However respondent is still willing to stipulate in regard to those exhibits in order to save space both for the Government and for the respondent, that if these witnesses are called, that they will testify that they have knowledge of the facts in regard to their business, and that from such knowledge they are of the opinion and know that they were not competitively injured by virtue of the pricing practices of (Part 935) the respective respondents.

I have tried innumerable times throughout this hearing, both in the case in chief and in respondent's case, to see if some reasonable narrowing down of this matter could be arrived at so that we would get for decision a clear-cut issue.

It seems very foolish for both the Government and the respondent to deal with 50 or 100 thousand invoices and sales when 50 or 100 might do it, because it is a tremendously expensive thing, and certainly it does place an in-

surmountable burden on the respondent to attempt to meet evidence of this kind, unless there is some reasonable restriction, and therefore I have in both cases moved in my answer to strike the exhibits in the Whitaker case, 37-A to 53-B, and in the Moog case, Exhibits Nos. 61 to 79-G, and if that motion is denied, I have moved, the respondents move, that the Government be required to make an election as to on what facts and what area it tends to rely in support of the complaint, and upon failure to make a reasonable election in regard thereto that the complaint be dismissed, and if both such motions are denied, that the Hearing Examiner set such hearings at such reasonable times as will afford the respondent an opportunity to meet the complaint and rebut the evidence received herein on behalf of the Government over the respondent's objection.

Trial Examiner Kolb: Well, Mr. Butterfield, we (Part 3, Page 936) held hearings at Denver, Dallas and New Orleans, at which time you put on witnesses and showed them the different prices as appearing on the charts and asked them whether or not they had been competitively injured by reason of the difference in prices, to which they testified they had not been injured.

Then, on cross-examination these witnesses were asked if the fact that they had not been competitively injured was due to the fact that they were all selling at the same price, and to a great extent the witnesses so testified.

Now we spent quite a lot of time in Dallas, Denver and New Orleans on just that testimony, and nothing else. At New Orleans I suggested or stated I didn't see any occasion for spending any time at Memphis or Birmingham to ask witnesses whether or not they had been injured competitively because of differing prices which Whitaker and Moog may have allowed to their competitors. It seemed to me we were getting into a lot of testimony and wasting time.

At that time I suggested, would you be willing to stipulate that if these witnesses were called at Birmingham and Memphis their testimony in chief and cross-examination would be substantially the same as that of the witnesses who were called in New Orleans, Dallas and Den-

ver, and we had a discussion off the record and you wanted to take additional testimony, particularly in the New York area, stating that (Part 3, Page 937) that testimony would be different.

I then set a hearing for New York and we met the same situation that we had in the other cities, the same testimony that they were not competitively injured, and that they were all selling at the same price.

At that time counsel in support of the same complaint offered to stipulate at Page 923 of the Whitaker record, and I believe the same thing appears in the Moog record, Mr. Schrup stated:

> "Mr. Butterfield, we will stipulate to this effect. We will stipulate with you that if you called other jobbers to the witness stand, that on direct examination and cross-examination they would testify as they have been testifying in the past hearings."

You objected to that stipulation and would not enter into that stipulation. You stated that you were particularly interested in taking some testimony on the West Coast. I then set the hearing tentatively for the West Coast, for Los Angeles and San Francisco.

Subsequent to that time counsel for the Commission stated that we would consider as not applicable any portion of the exhibits which applied to the California jobbers, and I understand that that has been agreeable and that that is the way the record stands at the present time (Part 3, Page 938).

Now it looks to me now that we are just quibbling over words. You state in your answer that you are willing to stipulate that these witnesses know that the situation is and that they have not been competitively injured, and their cross-examination would be substantially the same as those of the other witnesses. There is nothing in here so far as I see as to why we should have a hearing at Wichita, Birmingham, or any other place in the country to take jobber testimony.

Mr. Butterfield: The reason that is stated in there, if the Examiner please, is that the Government exhibits that

are now in the record, refer by name, date and amount and also some extensions in regard to those exhibits in those communities. Now those exhibits are in the record.

Trial Examiner Kolb: But you go into these communities and get the same testimony. A man says he has not been competitively injured. On cross-examination he testifies the reason he hasn't is because there has been no change in price.

There is no difference in price at which the jobbers are selling. Now it seems to me foolish to go from one end of this country to the other to put a witness on the stand, spend about a half an hour at a hearing, and then spending some time going to other towns to take the same testimony for about a half an hour, or two hours at the most. That is what I am trying to avoid (Part 3, Page 939).

If we can stipulate that the testimony would be the same, or whatever wording you want to get into, it seems to me it is a quibbling on words between you and counsel for the Commission.

Mr. Butterfield: I think that we could.

Trial Examiner Kolb: That would dispose of the whole thing.

Mr. Butterfield: I think we could arrive at a stipulation. I think that we could arrive at a reasonable stipulation, and I will take this opportunity, being down here, to see if I can't work out a reasonable stipulation with the attorneys for the Government, because I am not too happy in going to this tremendous attempt and expense on the part of the respondents to try to meet these exhibits.

Trial Examiner Kolb: Well, now the additional places which you would want to go would be Birmingham, Wichita, Des Moines, and where else?

Mr. Butterfield: I will have to work out a schedule on that and send it to you, if your Honor please. I was not prepared this morning for those.

Trial Examiner Kolb: You can tell pretty quickly. How long have you been at this defense, a year? You can tell as to where you are going to go today, can't you, to get jobber testimony?

Mr. Butterfield: I will know by the time those hearings are over (Part 3, Page 940).

Trial Examiner Kolb: You have got to know that today.

Mr. Butterfield: I will try to get it to your Honor some time today.

Trial Examiner Kolb: When did you pose the case?

Mr. Butterfield: March 4th, 1952, I believe is the date.

Mr. Mayer: Yes, March the 2nd.

Trial Examiner Kolb: This is March the 20th, 1953. You don't know yet where you are going to put on your witnesses?

Mr. Butterfield: I will give your Honor a schedule of that some time today.

Trial Examiner Kolb: Those will be all jobber witnesses, I understand.

Mr. Butterfield: The witnesses shown in the exhibits in regard to those particular communities.

Trial Examiner Kolb: I believe it is the same in both answers. Counsel has stated:

> "Respondent has offered to stipulate that if the rest of the witnesses named in said exhibits were called, each would testify on direct examination that he knew whether or not competitive injury was suffered by his company by virtue of pricing practices (Part 3, Page 941) of Whitaker Cable Corporation and Moog in the other case and based upon such knowledge would testify that his company and himself were not competitively injured and that upon cross-examination he would testify substantially the same as the witnesses already called".

Now, what objection, if any, do you have to that stipulation? First, Mr. Butterfield, if that stipulation is entered into that will avoid the calling of any further jobber witnesses in this case, is that right?

Mr. Butterfield: That's right.

Mr. Mayer: Well, if your honor please, as we originally offered the stipulation as to generally what the witnesses would testify if they were called, we have I think come to the point of quibbling, perhaps, but it seems to me that

in the stipulation as he offers it here—and I just got a look at it this morning when it was filed—he wants to specify what they will testify to on direct, but make it substantially the same when it comes to cross-examination. I think in fairness we are perfectly willing to stipulate that the testimony of the witnesses would be substantially the same on both direct and cross-examination, which is the stipulation we originally offered in New York.

Mr. Butterfield: I think maybe we can iron it out, Judge. I think I can convince counsel that the stipulation which I have offered here is a fair and reasonable stipulation and is done to short-cut the case and save expense and time (Part 3, Page 942).

Trial Examiner Kolb: Let's take a recess of 15 minutes and see what you can work out.

(Short Recess.)

Trial Examiner Kolb: As the result of the discussion between counsel off the record during the recess, the following stipulation has been agreed upon:

"That future jobber witnesses if called in the various other areas listed in the Commission's charts would testify on direct examination that they had not suffered any competitive injury because of differing prices of the respondent, and on cross-examination their testimony would be the same as that of the witnesses previously called at Denver, Dallas, New Orleans, Memphis and New York".

Is that satisfactory, Mr. Butterfield?

Mr. Butterfield: Will you read it back, Mr. Reporter?

(The Reporter read the stipulation.)

Mr. Butterfield: That stipulation is all right.

Mr. Mayer: May we go off the record a moment?

(Discussion off the record.)

Trial Examiner Kolb: On the record.

Mr. Butterfield, is the stipulation as read into the record by the Hearing Examiner satisfactory? (Part 3; Page 943.)

Mr. Butterfield: It is.

Trial Examiner Kolb: Is it satisfactory, Mr. Mayer?

Mr. Mayer: It is.

Trial Examiner Kolb: I also understand that by reason of this stipulation there will be no necessity of striking any of the portion of the charts dealing with the West Coast area. Is that correct, Mr. Butterfield?

Mr. Butterfield: That is correct.

Trial Examiner Kolb: Is that correct, Mr. Mayer?

Mr. Mayer: Fine.

Trial Examiner Kolb: Off the record.

(Discussion off the record.)

Trial Examiner Kolb: All right, on the record.

Insofar as the answer of the respondent to the rule to show cause why hearings should not be held at Wichita, Kansas, renews a motion to strike the exhibits, this motion will be denied.

Mr. Butterfield: Exception.

Trial Examiner Kolb: Now, Mr. Butterfield, as I understand it, the stipulation will terminate the necessity of calling any further jobber witnesses in this proceeding on the question of injury.

Mr. Butterfield: Yes (Part 3, Page 944).

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Trial Examiner Kolb: The hearing will come to order.

Mr. Butterfield: If Your Honor please, the motion which I have just presented is a motion that the Hearing Examiner issue a rule for the attorneys in support of the complaint to make elections in the following respects (Part 3, Page 954):

First, of the many hundreds of commodities which are being sold by the respondents, which of those do the attorneys in support of the complaint maintain are or have been sold by the respondent in violation of Section 2(a) of the Clayton Act, Robinson-Patman Amendment, Title 15, Section 13, U. S. Code?

Which effect is it that the attorneys in support of the complaint maintain the respondent has been or is adversely

knowingly violating interstate commerce directly or indirectly, in which of the 235 communities in the 23 States shown on the tabulations offered over objection and received in evidence, showing dollar sales to purchasers in those communities? In which of those do the attorneys in support of the complaint maintain that the sales have been or are being made in violation of the Robinson-Patman Amendment?

Which of the following effects do the attorneys in support of the complaint maintain that sales made by the respondent have or are have been charged to be in violation of Title 15, Section 13, U. S. C.:

(a) Substantially to lessen competition?

(b) Is the charge tendency to create a monopoly?

(c) Is the charge an injury to competition?

(d) Is the charge destruction of competition?

(e) Is the charge a prevention of competition on the part of the respondent? (Part 3, Page 955.)

Which of the following persons do the attorneys in support of the complaint maintain that any one of the effects set forth in paragraph 4 above result in competitive injury, destruction, prevention or lessening of competition, or monopolizing or tendencies to monopolize in respect to commodities which have been or are being sold by the respondent:

(a) Is it competitive?

(b) Is it a customer knowingly receiving?

(c) Is it a customer of a competitor?

(d) Is it a customer of the respondent?

(e) Is it a knowing customer of respondent's customer?

(f) Is it a customer's customer of any of those?

In which of the many months shown on the exhibits offered by the attorneys in support of the complaint—and these exhibits cover periods from 1946 to 1950, inclusive—which of these months, or any of the months in that period

of time, shown on the exhibits, offered by the attorneys in support of the complaint and accepted in evidence over the objection of the respondent, do they maintain that the violations charged in the complaint occurred?

The respondent further moves that the attorneys in support of the complaint be required to answer this rule (Part 3, Page 956) upon the short date to be set for a hearing, upon the rule and answer, and that upon default of the answer thereto that the complaint against the respondent be dismissed forthwith.

As grounds for these motions, respondent respectfully submits that by virtue of the undue plurivation of the evidence by the attorneys in support of the complaint who have offered—and there have been received over the objection of respondent in evidence voluminous tabulations of dollar amounts and percentage extension of differences as small as 1/100 of 1 percent, without regard to the hundreds of commodities included in the single figure and involving many thousands of invoices in hundreds of communities in almost half of the United States, covering sales over many months and years.

There has been placed upon the respondent an almost insurmountable burden of analysis and proof, requiring the breakdown of thousands of invoices and cost allocations, requiring the addition of thousands of man-hours of time, extensive, exhorbitant and needless work, and causing such delay in the proper and judicious disposition of this matter on its merits, to the extent that a fair and impartial hearing is denied to the respondent, so as to amount to the denial of this respondent a fair and impartial hearing provided by Congress under the Administrative Procedure Act, Title 5, Sections 1004, 1006 and 1-11, and as guaranteed (Part 3, Page 957) by the Fifth Amendment of the Constitution of the United States of America, and so as to deny a hearing consistent with the fundamental principles which inhere in due process of law, and in denial and disparagement of those fundamental rights not enumerated in the Constitution but retained by the people, and guaranteed by the Ninth Amendment to the Constitution.

Now, the purpose of that motion, if Your Honor please,

is this: The Federal Trade Commission compiled from books and records of Moog Industries, Inc. figures and tabulations covering 75 percent of all of the invoices in the Moog place. Now, the bulk of those invoices were never examined by the accountants or the investigators for the F.T.C., and yet those invoices are represented in those tabular figures.

In order for the respondent to have a fair opportunity to defend itself against the charge in this case, the respondent cannot tell which of these transactions the attorneys in support of the complaint relied upon, and to require the respondent at this late date to have to go through, to avail itself of the defenses under the Act, each one of these invoices and break it down and analyze the commodity that was sold, and to show the effect of the sale of that commodity on the invoices to the particular person or persons shown, to show the effect of the sale, the cost of manufacture (Part 3, Page 958) sale or delivery is a task that will take many years and many, many thousands of dollars to accomplish, and it does not seem reasonable that several hundreds of thousands of invoices should be used by the attorneys in support of the complaint to make a position which could just as easily be made with a few invoices selected from the respondent's files.

It should not be necessary to go all over the United States and go into these out-of-the-way communities, to get witnesses to defend against the charges made in this complaint, and the respondent also is entitled to be advised as to what the nature of this complaint is, what it is that the attorneys in support of the complaint are driving at.

The respondent had no notice of any violation or any charge of any violation under the Robinson-Patman Amendment to Section 2 of the Clayton Act until the issuance of the complaint itself. It is true that for many years there were investigators in there, but those investigators came in under the guise of the car manufacturers' competitive effect on the small independent manufacturer, and the respondent cooperated with the investigators in every respect. They were in there from 1938 on, and it was consternation on the part of the respondent without

ever having been called down for a conference, without ever having been advised or even suspected of being charged with violation of the Robinson-Patman Act (Part 3, Page 959). The complaint has been issued and from the record made in this case it still cannot be determined in this maze of evidence what it is that the attorneys in support of the complaint are relying on to maintain the charges of violation of Section 2(a).

It is for that reason that if this issue can be reasonably narrowed down so that the respondent can be given an opportunity to present to the Federal Trade Commission an understandable and not exorbitantly expensive series of documents and evidence which they will have to get together to meet this case. It seems that the interests of fair play and justice require that the issues be stated simply and bluntly as to what it is that these respondents are doing that is charged to be in violation of the Act, and at least give them an opportunity to defend against it, because the refusal to narrow the issue down actually presents the respondents with an interminable lawsuit, and an expense which the—well, the respondent will not be in the automobile business, but will be in the business of defending itself against the Robinson-Patman violation, and the company is too small for that kind of a thing. A large company could possibly do it, such as Standard Oil or General Motors, and some of those. They could hire a group of experts. But, this is done all within the company itself. This company has only 250 employees (Part 3, Page 960).

Now, in the automobile industry 250 employees is a very, very small number, and they have neither the resources at their command, nor have they the personnel to meet a terrific case like this, unless they just go into the business of defending themselves against this charge, because Moog Industries cannot expect to defend against all the complex, economic and business theories that might be developed, that are applicable to a business leviathan, and be expected to carry that burden.

If there is something that is being done wrong, it seems to me the attorneys in support of the complaint should be

required to elect which thing it is, or which of 2 things it is, or maybe 3 things, but not 100 or 200 thousand things.

It is for that reason that this motion is made, because if we can't do that, then we are going to have to have an awful lot more time to prepare for our defense in this case.

Trial Examiner Kolb: Mr. Mayer?

Mr. Mayer: I think our record in this proceeding fairly well speaks for itself, and I think that the counsel for respondent well knows the issues which have been raised by this complaint, and which have been raised by the introduction that we have offered in support of the separate allegations under the complaint in this matter (Part 3, Page 961).

We have closed our case on March 2nd, I believe it was, in 1952, and it seems to me that the respondent has had ample time to elect whatever defense it intends to use to properly present that evidence for analysis in determining whether or not the issues of the complaint have been supported or whether they have been properly defended.

I think we have been more than fair in presenting the pricing pattern and scheme of Moog Industries, Inc., in a rather concise fashion in this complaint, and I don't feel that the counsel for respondent needs any further clarification in the first instance, of what the issues are that have been raised under this complaint, and certainly I do not feel at this date he is even entitled to it.

Trial Examiner Kolb: Is there anything further?

Mr. Butterfield: That is all, Your Honor.

Trial Examiner Kolb: Motion denied (Part 3, Page 962).

HUBERT C. MOOG testified on behalf of the Respondent as follows:

Direct Examination (Part 3, Page 962).

My name is Hubert C. Moog, residing in St. Louis Missouri, and I am Executive Vice-President of Moog Industries, Incorporated. I have been Executive Vice-

President since the death of Mr. Apple on approximately January 10, 1952. I began to assume Mr. Apple's responsibilities as time went on and I believe I can state, without fear of contradiction, that I do have full responsibility. I began working for the company on a full-time basis after graduation from college in 1935. My profession is really a metallurgical engineer (Part 3, Page 963).

Consistent with the many jobs I have held with the company, I believe I am familiar with the selling prices of Moog Industries. I have held jobs both in the manufacturing end and the sales end, and now, as Executive Vice-President, my responsibilities relate to the functions of manufacture, sales, and delivery.

At the present time Moog Industries has a practice of granting cash discounts for the prompt payment of bills on or before the 10th proximo. It is a cash discount of 2%. I am not familiar with what has been been shown as that in this record (Part 3, Page 694). Our competitors also offer a cash discount of 2% for prompt payment of bills. A cash discount of 2% is a standard practice in our industry, and that practice has been in effect generally since 1936 (Part 3, Page 965). We find it necessary to engage in the practice of granting this 2% cash discount for the prompt payment to us, in order to prevent our customers from buying products competitive to our products from our competitors. Our company has a practice of absorbing shipping charges on shipments of a certain size.

Q. Do your competitors also absorb shipping charges on shipments of a certain size?

A. I object to that question, unless he shows the materiality of it, or the relevancy of it.

Trial Examiner Kolb: In what way is that material?

Mr. Butterfield: The attorneys in support of the complaint have introduced in evidence in this case the matter of absorption of shipping charges by Moog Industries, Inc., and by the introduction of that evidence they have made relevant the question of the effect of the absorption of shipping charges on violations of the Robinson-Patman Act.

Trial Examiner Kolb: I don't see any materiality as to whether or not his competitors follow that practice. I will sustain the objection.

By Mr. Butterfield:

Q. Do you find it necessary at this time, Mr. Moog, to (Part 3, Page 966) engage in the competitive marketing practice of absorbing shipping charges on shipments of a certain size, as shown in the record in this case, in order to prevent your customers from buying products competitive to yours from your competitors?

Mr. Mayer: I object to that question, unless he proves the proper foundation for it.

Trial Examiner Kolb: The objection will be sustained unless proper foundation is made.

Mr. Butterfield: I have offered to Your Honor a man of two decades of experience with this company, a man who is Vice-President in charge of manufacture, sale and delivery of Moog products, a man who has been engaged in this business ever since he graduated from college as a professional metallurgical engineer, a man who since the death of Mr. A. A. Apple, one of the witnesses in this case is the only single qualified individual having complete knowledge to testify in connection with one of the most vital competitive practices in the automotive industry.

I believe, and submit, that this witness is fully qualified from his experience, his position, his responsibilities in this matter to answer a question as to whether or not he has to absorb shipping charges in order to prevent his customers from buying the products of his competitors (Part 3, Page 967).

Trial Examiner Kolb: Objection is still sustained.

Mr. Butterfield: At this time, if Your Honor please I wish to make an offer of proof, that the Executive Vice-President in charge of sales of Moog Industries, Inc., having had experience for 19 years with the single company, Moog Industries, Inc., having knowledge of the facts, and being actually charged with the responsibilities involved in the marketing problem of Moog Industries, Inc., would testify, if allowed to so testify, that it is necessary for Moog Industries, Inc., to absorb shipping charges on ship-

ments of a certain size, as shown in the record heretofore made in this case by the attorneys in support of the complaint, in order to prevent the customers of Moog Industries from buying their competitive products, products competitive to the products manufactured, sold and delivered by Moog Industries from competitors of Moog Industries.

The witness will also testify, upon examination, that it is necessary to do this in order to prevent Moog Industries, Inc., from losing its customers. The witness will also testify that if those shipping charges are not absorbed that the customers of Moog would go to the competitors. He would also testify that it is an industry-wide practice to absorb shipping charges on products competitive with the products manufactured and sold and (Part 3, Page 968) delivered by Moog Industries on shipments of the size shown in the record made in this case.

That is my offer of proof, Your Honor.

Trial Examiner Kolb: The offer of proof is refused.

By Mr. Butterfield:

Q. Mr. Moog, do you know that it is unlawful to discriminate in price between different purchasers of commodities of like grade and quality, in interstate commerce, where the effect of such discrimination may be substantially to lessen competition, or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with the customers of either of them, except where the differentials make only due allowance for differences from the cost of manufacture, sale or delivery, resulting from the different methods or quantities in which such commodities are to such purchasers sold or delivered, and except where the Federal Trade Commission, after investigation and hearing to all interested parties, fixes quantity limits, and when so fixed, differentials exceeding the quantities shall not be permitted, except that you may select your own customers, not in restraint of trade and except where price changes are made from time to time in response to changing marketing (Part 3, Page 969) conditions, and except where your lower price was

made in good faith to meet the equally low price of your competitors, or the services or facilities furnished by such competitors.

A. Mr. Butterfield, would you mind asking the question again?

Trial Examiner Kolb: Let the reporter read the question.

(The question was read by the reporter.)

By Mr. Butterfield:

Q. Do you understand that question, Mr. Moog?

A. Yes, as well as possibly anyone else, sir, can read, I do.

Q. What is your understanding of that law?

Trial Examiner Kolb: Is this man a qualified attorney?

Mr. Butterfield: This is the man that has to operate under the law. He is the man that has to make the contacts and the judgments every day.

Trial Examiner: Is it your position that he does not understand the law, or that he does understand it, or is operating without knowledge, or something of that sort? I can't see the purpose of this line of examination. I don't think it is material at all.

Mr. Butterfield: This is the law in which he is operating, if Your Honor please, and what he understands the (Part 3, Page 970) law to be in his operations determines how he conducts himself.

Trial Examiner Kolb: There being no objection, the witness may answer.

The Witness: It is difficult to understand exactly what the Congress had in mind in this law. That is the way I feel about it. However, I want to state that it is, with all of the qualifications and the variations in such an operation, it is tough under the law.

Now, we do not mean any injury to any competition. We certainly are not trying to put anyone out of business. That, I certainly feel I should state at this time. We do, however, have to face competition. We know that we have to keep competitive at all times.

By Mr. Butterfield:

Q. Are you at the present time injuring anybody?

Mr. Mayer: Mr. Examiner, I object to that question.

Trial Examiner Kolb: The objection is sustained.

By Mr. Butterfield:

Q. Mr. Moog, do you find it necessary to maintain your present pricing practices in order to exercise your statutorily recognized right to select your own customers in bona fide transactions, and not in restraint of trade?

Mr. Mayer: Mr. Examiner, could I have that question read? (Part 3, Page 971.)

Trial Examiner Kolb: Read the question.

(The reporter reads the question as follows:

"Question: Mr. Moog, do you find it necessary to maintain your present pricing practices in order to exercise your statutorily recognized right to select your own customers in bona fide transactions, and not in restraint of trade?")

Mr. Mayer: I don't see the relevance of that question to this proceeding.

Trial Examiner Kolb: I can't see how pricing practices have to do with the selection of customers, unless you mean he gives different prices to different customers on the basis of selecting them. Is that what you mean by that question?

Mr. Butterfield: Do you understand my question, Mr. Witness?

The Witness: I believe I do.

Mr. Butterfield: The witness says that he understands my question. I will try to explain it to Your Honor, if I may.

Mr. Mayer: Perhaps it would be better if Mr. Butterfield would explain the purport of the question.

Trial Examiner Kolb: That is what I would like to know, the purport of the question.

Mr. Butterfield: The purport of the question is (Part 3, Page 972) the Robinson-Patman Act allows—well, I will have to get the Act. I can read the exact language of the Act.

Examiner Kolb: They start out that a man has the right to select his own customers.

Mr. Butterfield: Yes, the man has the right to select his own customers.

* * *

Mr. Mayer: I still fail to see where a proper foundation is laid for that question in tying the pricing (Part 3, Page 973) practices to the selection of customers.

Examiner Kolb: I will sustain the objection (Part 3, Page 974).

At the present time we select our own customers in bona fide transactions that are not in restraint of trade (Part 3, Page 974).

A. We select our customers in bona fide transactions at the present time.

Q. Are those transactions in restraint of trade?

Mr. Mayer: That is a conclusion again from this witness. A description of the methods by which Moog selects its customers would then afford the Examiner, or anyone else, an opportunity to determine whether or not it is in restraint of trade.

Trial Examiner Kolb: Objection will be sustained (Part 3, Page 975).

I believe I understand what restraint of trade is. In my twenty years in business with this company I have never known it to engage in a practice which I believed to be in restraint of trade. As to what we find it necessary to do to select our customers, I would say the most necessary thing is to offer them a product of quality, to give them good service, and to price it competitively. We have to give our customers a product which is at least equal in quality to our competitors; we have to provide them with a service which is no worse than our competitors. We have to price it competitively with our competitors' pricing structure (Part 3, Page 976). Our competitors' pricing structures are similar to our own. Our pricing structure is similar to the pricing structures used by our competitors in the industry. I believe it is necessary for us to exercise our present pricing practices to meet our competitors' pricing structures and their method of doing business.

Trial Examiner Kolb: What do you mean by pricing practices, Mr. Moog? Is that your price list that you send out?

The Witness: Pricing, Judge, is a combination of many things. It ends up with the final result, at least in my mind, if I may state what I feel—it ends up with the final result of so many dollars. However, it is arrived at in a good many different ways and includes a good many different things.

Trial Examiner Kolb: But it all comes out with the price list which you issue on which you sell your commodities; is that correct? (Part 3, Page 977.)

The Witness: Not necessarily. Shall I expound on that?

Trial Examiner Kolb: Do you have prices other than your published price sheets?

The Witness: No, but we have other things that affect prices.

Trial Examiner Kolb: You mean such as freight, and so forth?

The Witness: That is right. It all comes down to dollars and cents.

Trial Examiner Kolb: You may proceed.

By Mr. Butterfield:

Q. Will you explain, Mr. Moog, how your pricing practices are related to your costs of manufacture, sale and delivery?

* * *

The Witness: I believe that our pricing practices are arrived at really more from a competitive standpoint and include also—from the competitive standpoint, that is included in your price of selling. We also have costs of manufacturing which must be added and costs of delivery which have to be added to that same thing in order to arrive at a functional price. I hope that I am being clear (Part 3, Page 978).

By Mr. Butterfield:

Q. There are differentials, of course, in your costs of sale, and are those reflected in your pricing schedules?

A. Yes, sir, I believe they are.

Mr. Mayer: May I ask you if those are the published pricing lists in the schedules—the regularly published price list with the schedules of the Moog Industries that we are talking about, in your last question?

Mr. Butterfield: Let me explain it this way: There is no requirement in any industry that I know of to publish prices.

Mr. Mayer: Let's just talk about Moog now. What about the last question? Was that only related to the published list of prices of Moog Industries?

Mr. Butterfield: What do you mean by "published"? There are no published tariffs like there are in a public utility.

Trial Examiner Kolb: Does Moog issue price lists?

Mr. Butterfield: Yes, sir.

Trial Examiner Kolb: It sells its merchandise on the basis of those price lists?

Mr. Butterfield: That is correct.

Trial Examiner Kolb: What do you mean, that you (Part 3, Page 979) don't understand what we are talking about?

Mr. Mayer: All right. * * *

Moog issues catalogs showing and describing the hundreds of commodities that we either manufacture or offer for sale. In connection with those catalogs we also issue price lists, a.d in connection with those price lists we also issue and publish discount schedules. I believe our differentials in cost of sales are reflected in the differentials in the pricing schedules. I believe that differentials in our cost of manufacture are also reflected in the differentials in the discount schedules which are published in connection with the price lists and the catalogs (Part 3, Page 980), and the differentials in our cost of delivery are also reflected in our discount schedules which are published in connection with the catalogs (Part 3, Page 981). I believe that we do have cost differentials in our costs of sales. These cost differentials are reflected in our published price schedules and our published discount schedules, as shown in connection with our catalog descriptions. To

the best of my knowledge, we have no prices which are not published to the trade generally (Part 3, Page 982). Our pricing practices are all reflected in our published distributors' agreements, including the discount schedule, the terms of sale as to freight absorption and as to cash discounts, in the published distributors' net price list, and the catalogs. All of the above embody our pricing practices. The pricing practices of our competitors are very similar to the pricing practices that we use (Part 3, Page 983).

Q. Do you believe the pricing practices of your competitors to be lawful?

Mr. Mayer: Mr. Examiner, I object to this question again on the basis of the foundation until we have the pricing practices of the competitors set for it specifically in this record.

Trial Examiner Kolb: The objection will be sustained.

Mr. Butterfield: Do you really want me to bring in as witnesses all of these competitors in this case?

Mr. Mayer: Mr. Butterfield has not yet announced what defense he is purporting to raise at this particular hearing, and I think we are at least entitled to find out what it is.

Mr. Butterfield: The statute announces the defense, does it not? It is embodied in the defense. You have never announced what the prosecution is except as announced in the statute.

Mr. Mayer: The statute gives the respondent several defenses.

Mr. Butterfield: And the statute gives the attorneys in support of the complaint several prosecutions, and I cannot seem to get an election out of you which of the prosecutions you are proceeding on, nor an expression from you (Part 3, Page 984) that we are guilty of all of the things charged in the Robinson-Patman Act as being unlawful. You make it very difficult for us to defend against a case in which we cannot find out what the charge is or what you are relying on.

Trial Examiner Kolb: Off the record.

(Discussion off the record.)

Trial Examiner Kolb: The objection will be sustained (Part 3, Page 985).

In the replacement field, to my knowledge, we have no prices that are not published. We have no prices to which all of our present customers do not have access. For the time that I have been actually in management of the company, all of our prices in the replacement field have been published and on paper for everyone to see. We have no prices in effect at the present time that are not available to all of our customers on proportional equal terms (Part 3, Page 986).

I have been in this business since 1935 and we are engaged principally in the automotive replacement field. As to original equipment, I would estimate that part of our business to be less than 1% of our total business, and that part of our business is principally in leaf springs on an emergency basis and not on a regular basis.

Q. Before World War II, about what was the dollar volume in consumer prices of the replacement field in which you were engaged?

A. I have seen figures published on the dollar volume at consumer prices, and it was estimated before World War II this figure was in the neighborhood of $500 million, or half a billion (Part 3, Page 987).

As to our pricing practices prior to World War II, and our reliance on those figures, they are called "Marketing Research Figures," which we used for quotas in determining what to aim at for our sales analysis work. We have to have something to pin our hat on and we do pay attention to those figures for that reason, and we use those figures in our marketing practices.

Q. And about how was that half a billion dollars split up between the replacement independent manufacturers, the car manufacturers, and chain stores? * * *

Hearing Examiner Kolb: The witness may answer.

The Witness: The figures which we have seen, which we have on file in St. Louis, indicate the pre-war replacement parts manufacturers were merchandising 60 per cent of this (Part 3, Page 988) volume; the car manufacturer merchandised 30 per cent of this volume; and the chain stores merchandised approximately 10 per cent.

By Mr. Butterfield:

Q. At the present time, Mr. Moog, what is the approximate size of this replacement market?

Mr. Mayer: I have the same objection, if the Examiner please.

Hearing Examiner Kolb: Overruled.

The Witness: Based on 1952 figures, and substantiated by such organizations as are able to supply us with information of this type, we find that the car manufacturer now merchandises 60 per cent of the total volume; the independent manufacturers now merchandise 30 per cent of this new volume, and the chain stores merchandise approximately the same 10 per cent they had pre-war.

The size of that market at the present time is now a 2½ billion dollar market. That is about five times what it was in pre-war times. Our sales during pre-war times were in the neighborhood of one-half of our present volume (Part 3, Page 989).

Q. Mr. Moog, calling your attention to springs at consumer prices, about what is the dollar value of the production that you manufacture that goes into the average automotive car?

Mr. Mayer: I object to that, Mr. Examiner, I don't see any relevance to this questioning.

Hearing Examiner Kolb: What is the purpose of that, Mr. Butterfield?

Mr. Butterfield: The purpose of this, if the Examiner please, is to show, Your Honor, the comparative size of Moog Industries, Inc., in the manufacture of leaf springs in the automobiles that are now in present use by the consuming public.

Hearing Examiner Kolb: Will you read the question, Mr. Reporter?

(Question read.)

Hearing Examiner Kolb: You mean by that the total value in dollars?

Mr. Butterfield: The total value in dollars of Moog springs.

Hearing Examiner Kolb: For what period of time?

Mr. Butterfield: At the present time.

Mr. Mayer: In springs?

Mr. Butterfield: Yes.

Hearing Examiner Kolb: By present time, do you mean for the past year? (Part 3, Page 990.)

Mr. Butterfield: Well, covering the period of time in which the automobiles that are now in use have been operating.

Hearing Examiner Kolb: The witness may answer.

The Witness: What is that?

Hearing Examiner Kolb: You may answer.

The Witness: In the popular price car today, which I won't name, but one that is the most popular, the leaf springs on the rear would be valued at $31 a pair, and the coil springs on the front would probably be valued at $15 a pair, making a total of all springs on the vehicle $46 at retail. Does that answer your question?

As to how many present American automobiles are on the highways, for which Moog manufactures parts which can be used in the operation of those cars, there are 52 million cars and trucks now on the highways. The parts that Moog manufactures, or can manufacture, can be used to replace some parts on or about 95 to 98% of those vehicles. Our catalog does not cover all of the applications involved in the possibilities of replacement. As to leaf springs and the percentage of those 50 million cars that are at present using springs competitively to those manufactured by Moog Industries, we have manufactured a few thousand springs in the past 34 years that this company has been in operation. It is very difficult to tell how many cars they have been installed on, but I do know that 52 million automobiles take 208 million springs, and the total of all the springs that we have ever manufactured, from the date of our inception up to the present time, would be a very small portion of that, much less than 1%, and probably 1/50 or 1/100 of one percent.

Hearing Examiner Kolb: As I understood the question, it was whether or not the springs would fit those cars.

Mr. Butterfield: 95 per cent is the answer.

The Witness: 95 to 98 per cent was my estimate.

Hearing Examiner Kolb: For springs as well as other parts?

The Witness: Yes. Of course I was referring mostly to springs, because we can possibly make a spring for any car.

Hearing Examiner Kolb: Of course, of the 50 million cars on the roads today, there would be a very small proportion of those that would have your springs, isn't that true?

The Witness: That is true. They are mostly on post-war cars. We, in our market analysis, realize the number of automobiles now on the road are approaching that age which requires a complete overhaul of getting more every year. However, in any period of large production, such as we have just been going through, you have mostly new cars on the road and, consequently, not too heavy a demand. We do not supply original equipment to a very great extent, and therefore we would miss that market (Part 3, Page 993). We have to wait until people wear them out and try to sell ours in competition with everyone else. At the present time the only springs we manufacture that go into original equipment are to trailer manufacturers, if they can be classed as original equipment. We do have some trailer equipment accounts and they are rather recent. In the last two years we have supplied no springs to any of the automobile or truck manufacturers.

Q. You stated, Mr. Moog, that about 60 per cent of that replacement business is now being marketed by the car manufacturer. That applies to springs, as well as other parts?

A. Yes, that is the average on all the parts. I was not referring particularly to springs. In fact, the percentage on springs may not be exactly equivalent, but it would fall generally within that category.

Q. Would it be within five or ten per cent of that amount?

A. I would assume so, Mr. Butterfield, since springs generally follow the pattern of most other parts, give or take a few per cent.

Q. Do you know from whom the car manufacturer secures the supplies that he is now marketing?

Mr. Mayer: I object (Part 3, Page 994).

Mr. Butterfield: I asked him if he knew.

Mr. Mayer: The question is purely irrelevant.

Hearing Examiner Kolb: That is irrelevant. I sustain the objection.

By Mr. Butterfield:

Q. Calling your attention to piston rings, Mr. Moog, what percentage of these 50 million cars do you make piston rings that can be used and are satisfactorily in use in those cars, piston rings manufactured by you?

A. We manufacture a line of piston rings that go up to a ring diameter of almost six inches, and therefore, we could produce for replacement, or for original equipment, rings for approximately 95 per cent to 98 per cent of all of the vehicles now on the road. We miss those very heavy vehicles usually known as off-the-road earth-moving equipment, where the diameters go up much higher.

Q. You don't mean you actually supply 90 to 95 per cent of the cars that are now on the road, do you?

A. No.

Q. What percentage of the cars that are now on the road do you supply piston ring replacements?

A. A very small percentage. We have been in the piston ring business since 1934, and in that time our ring operation has been relatively small. We are what is known as one of the minor ring companies, of which there are quite a few (Part 3, Page 995).

Q. How many employees do you have in your ring department?

A. I could not answer that exactly, Mr. Butterfield, but if you give me a moment, I think I can count them out. I believe there are between 35 and 40 in all phases of the ring division.

Q. Would you manufacture as many as 1-1/1000th of one per cent of the piston rings that are sold in any one year.

A. It would run a little higher than that, but I doubt if it would approach 1-100th of one per cent.

In pricing our piston rings, we have the same discount type of schedule that we have for our other articles as is published to the general trade.

Q. And is that discount schedule essentially the same discount schedule that the major piston ring manufacturing companies use at the present time?

Mr. Mayer: I object to that question. I think the best evidence of that would be the price list of the various piston ring manufacturers.

Hearing Examiner Kolb: Read the question, Mr. Reporter.

(Question read.)

Hearing Examiner Kolb: I will sustain the objection (Part 3, Page 996).

By Mr. Butterfield:

Q. Do you know what discount schedule on the published price list the major piston ring manufacturers are using at the present time? Do you know what they are using?

A. Yes, sir; I do.

Q. And in your pricing practices in piston rings, do you, in good faith, attempt to meet those prices?

Mr. Mayer: Mr. Examiner, I object to that question. He has got a conclusion right in the middle of it, which should be decided by the Examiner in this case.

Hearing Examiner Kolb: You have got to quit getting the witness to put in matters which have no relation to the question as a whole. The objection will be sustained.

By Mr. Butterfield:

Q. Mr. Moog, in pricing your piston rings, do you employ any discount schedule, published discount schedule relating to your published price list, other than those which you find necessary to meet the equally lawful prices of your competitors, in order to prevent your competitors from taking your customers away from you?

Mr. Mayer: I object to that question.

Hearing Examiner Kolb: Sustained (Part 3, Page 997).

As to what we do in connection with our pricing of piston rings, in chronological order, we do the following:

We determine to the best of our ability what the competitive situation is in regard to piston rings. We sell piston rings on a consignment basis, because our competitors do so. There is no difference between the way they sell piston rings on consignment and the way we sell them. We have a department which determines the makeup of each set of rings, and then, based on the competitive situation, cost of distribution, cost of manufacture, and cost of selling, we publish a price list. There is probably more detail to it than that, but I think that just about tells what we do. Yes, there is a discount schedule applicable to that price list (Part 3, Page 998). At the time we entered into the piston ring business, that was the general practice in the industry. I do not have with me now the price list or discount schedules of the major piston ring manufacturing companies, but I can furnish them.

At this point the Trial Examiner, in the absence of the schedules referred to, granted permission to defer the evidence of those to the next hearing (Part 3, Pages 999, 1,000).

During my experiences over many years in the automotive business, I believe our competitors' prices are lawful, because I have not been informed, nor have I seen anywhere that they have been declared unlawful; so there is no other course for us to pursue in the competitive situation.

Q. Have you any facts which would lead you reasonably to believe that your competitors' prices are made other than to meet competition in your industry?

Mr. Mayer: I object to that. That is a question as to what the competition prices were made to do. The competitors would be the only people competent to answer that question.

Hearing Examiner Kolb: The objection will be sustained.

Mr. Butterfield: At this time, Mr. Examiner, I would like to inquire of counsel if it is his intention, or his understanding, that in order to properly try the defense in this case it is necessary for us to try each and every competitor of ours in this same case? Is that what I under-

stand you to mean, that we must prove the lawfulness of our competitors' prices?

Mr. Mayer: You have the burden of the defense, Mr. Butterfield, you put it in.

Mr. Butterfield: Well, I would like to hold the case within some reasonable limits. I don't want to be forced to try a complaint case against each and every competitor within the confines of this case. If that is what you think I have to do in this case, in order to prove a lawful defense, I suppose there is nothing else for us to do, but I can see no end to this interminable litigation, if that is your attitude. There ought to be some shortcut method, or way of determining this without going through this with every competitor of ours, because there is nothing that we do that is different from that which our competitors do, and I am attempt- (Part 3, Page 1001) ing to show in this case that that is our situation, and that is the essence of the competition that we have to face. Now, there was nothing put in the case on direct which indicated that our competitors did anything other than what we do, because in the case in chief there was no showing of any injurious effect, or any showing of a substantial lessening of competition or any evidence of any intention to create a monopoly.

All that was done in the case in chief was to put in certain price differences. It put us at a terrific disadvantage to have to negatively prove something that isn't in the case on affirmative proof. If that is what you want us to do—

Hearing Examiner Kolb: Are you not trying a 2(f) case here this afternoon?

Mr. Butterfield: No, Your Honor, we are trying a 2(a) case.

Hearing Examiner Kolb: It sounds to me like you are putting in a 2(f) defense. I don't know. Maybe I am wrong. I don't see whether a competitor's prices are made to meet another competitor's prices, I don't see where that has anything to do with this case. If you feel it does have something to do with it; then you have to prove it.

Mr. Butterfield: A 2(f) case, as I understand it, is a case against a buyer for knowingly receiving an unlawful discriminatory price, proved to have been unlawfully discrim- (Part 3, Page 1002) inatory under section 2(a) of the Act. That is, as I understand, a 2(f) case. There has been no showing here of any unlawful prices yet. We are attempting to put in our defense. I made a motion at the close of the government's case, in effect, for a directed verdict, but I will have to cover these things blindly until I find what it is that the government is relying upon, or until the government will restrict its position to something that I can meet head-on.

Hearing Examiner Kolb: The case in chief has been put in showing differences in prices to certain customers.

Mr. Butterfield: Without any effect having been shown on competition or a tendency to create a monopoly, or any injury to, or the prevention or destruction of competition.

Hearing Examiner Kolb: If that is your position, and you feel you are correct on that, let us rest your case.

Mr. Butterfield: I would be willing to rest the case. I would be willing to do it, if the government would restrict some of the testimony to a reasonable number of these documents, instead of these hundreds of thousands of invoices and figures, and these hundreds of commodities.

Hearing Examiner Kolb: You are talking about hundreds of thousands of invoices in this record. Where are they? Let us get this thing straight.

Mr. Butterfield: I will show you, Your Honor.

Hearing Examiner Kolb: Anybody picking up this (Part 3, Page 1003) record would think there were hundreds of thousands of invoices involved in this case.

Mr. Butterfield: I don't know whether the record is up here or not, but in Birmingham, Alabama, which is in Exhibit 67, covering sales in the following amounts: $687.61, $870.27, $1,951.30, and $463.21, there are four dollar figures there, for a total of approximately $3,000.

Hearing Examiner Kolb: What are the invoices?

Mr. Butterfield: Now, the invoices, as I remember the record, there are 500-some-odd invoices in those $4,000. There are about 500 invoices in there.

Hearing Examiner Kolb: You mean the average invoices? $10 an invoice or less?

Mr. Butterfield: Just about. There are about 500. I think the record will show it. I am just quoting it from my memory.

Hearing Examiner Kolb: All right, let us go ahead.

Mr. Butterfield: Just a minute. Included in those 500 invoices there is another item of $436.27 and one of $417.52.

Hearing Examiner Kolb: We are just encumbering the record, Mr. Butterfield. I don't think there is any use going any further on that.

Mr. Butterfield: It is altogether about $700,000 worth of invoices there for that 500 invoices there (Part 3, Page 1004).

Hearing Examiner Kolb: And you were talking about hundreds of thousands of separate invoices.

Mr. Butterfield: Yes.

Hearing Examiner Kolb: I don't think your client does that amount of business in one year, in the period covered by the exhibits.

Mr. Butterfield: The period covered by the exhibits is from 1946 to 1950, if Your Honor please. There are four years of invoices in here.

Hearing Examiner Kolb: All right.

Mr. Mayer: I might add that does not apply to each and every exhibit. There are some exhibits which are outside the year 1949. The majority of the rather lengthy tabulations are confined to 1949, the majority of them.

Mr. Butterfield: I just wanted to call Your Honor's attention to the fact that here in one town there are—

Hearing Examiner Kolb: Do you agree, Mr. Mayer, that there are hundreds of thousands of invoices filed in this proceeding?

Mr. Mayer: I don't believe there are, if the Examiner please, but I fail to see the relevance of that, if there are. The tabulations were checked and cross-examined on by Mr. Butterfield. Obviously there was some check made

of the pure tabulation work done by the accountants, and I fail to see what the examination of the invoices in and of themselves (Part 3, Page 1005) is going to prove as a matter of defense.

Mr. Butterfield: The Commission accounts did not examine but a very, very insignificant number of invoices. Most invoices the Commission's accountants never examined at all, never looked at, to see what was contained in them.

Hearing Examiner Kolb: The invoices which were examined and used as a part of the tabulation were the only ones involved in this proceeding, are they not?

Mr. Butterfield: It is those invoices in the tabulations that the Commission's accountants never examined, they never examined the invoices at all.

Hearing Examiner Kolb: They accepted the figures you had.

Mr. Butterfield: They took the dollar figures off of the books.

Hearing Examiner Kolb: They accepted your books as correctly reflecting the invoices.

Mr. Butterfield: They did not take our books which reflected the commodities that were sold, they just took the dollar figures off of our books.

Mr. Mayer: That is not quite right, either. They were broken down by the lines as the Moog bookkeeping department breaks them down. I might add that the invoices that are actually a part of the record, hundreds of them, were put in by the respondent, not by the counsel supporting the com- (Part 3, Page 1007) plaint. There is a binder full of invoices already in this record, which we did not put in.

Mr. Butterfield: No, because your tabulations did not reflect commodities. For instance, in Alabama there was only one customer that bought piston rings down there, and your tabulation seems to indicate he was getting a different price than other customers who were buying piston rings, when they did not buy piston rings at all. That is in this record, and that is the reason for putting in the invoices, to show the dollar amounts do not reflect commodities of like grade and quality.

Mr. Mayer: I think we have been over this many times, if the Examiner please.

Mr. Butterfield: The piston ring is certainly not in competition with the leaf spring, or a tie rod end, or shackle, or coil spring.

Hearing Examiner Kolb: Do you have any further questions?

All of our customers do not buy our complete line. We have customers that are known as piston ring specialists (Part 3, Page 1007). These piston ring specialists generally buy only piston rings. We have customers who are leaf spring specialists. We call them spring service stations. I believe we also have customers known as wheel alignment specialists.

Hearing Examiner Kolb: Mr. Butterfield, is it your position that there are certain customers on these tabulations that are wheel alignment specialists?

Mr. Butterfield: Yes, Mr. Examiner.

Hearing Examiner Kolb: Don't you think the proper way to prove that is to have him point out the ones that are?

Referring to Commission's Exhibit 79-A, showing sales to Birmingham, Alabama, to three customers, in the approximate amount of $4,500.00, I know of the companies Alabama Auto Parts Company, C. E. Davey & Company, and Dixie Spring Service (Part 3, Pages 1008, 1009). Two of those three companies are specialists. C. E. Davey and Company are specialists in piston rings; Dixie Spring Company is a spring service station, that we refer to as a spring specialist; Alabama Auto Parts Company is what we term a full-line jobber. A spring specialist is one who specializes in that particular line of under-chassis work and repairs springs himself, and is usually known in his area as the best source of that particular product, and consequently sells a good many springs. A spring specialist distributor customer of ours will use some of the springs we sell him in the repair of cars himself (Part 3, Page 1009). A spring specialist uses a furnace and raw steel and manufactures springs from that raw steel if he has the furnace equipment. I know very few spring specialists that do not have furnace equipment.

We do not exercise any control over what our customer does with the merchandise after he buys it from us. He can sell it for whatever price he wants to sell it for, or in any manner in which he wants to sell it, or he can use it himself (Part 3, Page 1010).

In developing our pricing, the major thing that we bear in mind, I would say, would be our cost more than any one factor. As to whether we sell any of our products below cost of manufacture, it is quite possible some may be sold that way, although we try not to do so. We cease to make that item if we can't make a profit on it. Or, in other words, to close out an obsolete line, we might have to sell at below cost in order to competitively dispose of it. Yes, we do buy merchandise from other manufacturers which we re-sell. We sell coil springs and we also sell coil action parts (Part 3, Pages 1011, 1012).

On Commission's Exhibit 79-A, these coil springs are included in the tabulation of leaf springs, coil springs, and chassis parts. We do not manufacture coil springs. We have never manufactured coil springs. We do not buy any leaf springs for re-sale. We do buy some coil action parts for re-sale.

Q. Are there any coil action parts that you both manufacture (Part 3, Page 1013) and buy, the same item?

A. Yes, although that is not the normal method of doing business. If you want me to expound on that, I will.

Q. I wish you would.

A. We might run into an extreme shortage of some particular item and unable to get the raw steel, we will then proceed to try and buy the raw steel, if it is available, from some mill or other source, and if it is unavailable, then, in order to satisfy our customers, we will attempt to buy the item wherever we can get it, provided it meets our specifications and tolerances. That does not happen very often, that we are forced on the market for something that we normally produce ourselves.

Q. Are there other instances in which you may be forced to buy on the market things that you ordinarily produce yourself, besides the shortage of raw steel?

Mr. Mayer: I object to that question. That has no relevance at all to this proceeding.

Hearing Examiner Kolb: It will be sustained.

There have been periods during the pendency of this complaint when our company could not supply any of its products to its customers (Part 3, Page 1014). For instance, a strike in 1950 for eight weeks left us without manufacturing processes.

At this point, on motion of Commission's counsel to strike the last three questions and answers on the ground of irrelevancy, the Trial Examiner sustained the motion to strike the last three questions and answers.

Referring to Commission's Exhibit 79-A, Selma, Alabama, I am not familiar with the Selma Service and the Selma Auto Parts Company.

Referring to Commission's Exhibit 79-A and 79-B, I am not familiar with the names of the companies in the State of Arkansas that I recognize to be specialists in one line or another (Part 3, Page 1014-A).

With reference to Commission's Exhibit 79-A and 79-B, referring to the State of Florida, there are some specialists in Jacksonville, Consolidated Automotive Company which operates a spring service station; Horton & Company operates a spring service company; Southern Piston Ring Company is a piston ring specialist.

In Tampa, Tampa Piston Ring Supply Company is a piston ring specialist, to the best of my knowledge. I am not too familiar with the Tampa jobbers. I do not believe that Southern Piston Ring Company is in competition for the same parts manufactured by Moog as is the Consolidated Automotive Company and the Horton Company. I don't know about the Tampa specialists. I have been to Jacksonville recently and that is why I know about them. I haven't been in Arkansas for a good number of years. Where I have been I have had a chance to look at the customers and can give you some information on them.

I will look on this list of 23 States here and tell you those of my own knowledge who were specialists at the time these exhibits were prepared, covering the period and years stated in the exhibits (Part 3, Page 1015).

I do not know about those in Georgia. The Raleigh Drennon Axle and Spring Company is a spring specialist. I believe that the Auto Wheel and Axle Service in Louis-

ville is a spring specialist. The Auto Chassis and Spring Company is a specialist and, I believe Dealers Truckstell, a chain store out of Memphis, is a specialist. I know it is not a full-line jobber. I am not certain of the type of operation they have. They are not what is known as a full-line jobber. I do not believe that they are any longer located in New Orleans. They have a place in Memphis. I am not familiar enough with most of these accounts except places I have actually been, in order to be qualified to state exactly who specializes and in what. For the last eight or nine years I have been more of a front office man. It was only since Mr. Apple died that I have been traveling. You do not see a customer's place when he visits you, and I am only able to describe those that I have actually been in their town and called on them (Part 3, Page 1016).

McKee-Moog Spring Company is a specialist in Memphis.

Truett-Worrell Spring & Aligning Company is a spring specialist in Dallas.

Cole Spring Company is a spring specialist in Houston.

Odessa Spring and Axle is a spring service station in Odessa, Texas.

All of the items in that line are not interchangeable with other items in the same line, like salt or beans. They are a group of commodities which all have a special functional purpose of their own. For instance, leaf springs that fit various models of cars are of course different. They have to be. There is some interchangeability within certain makes on certain springs, but it is relatively small (Part 3, Page 1017). We receive orders for some leaf springs that we have to manufacture by hand. There is a difference in cost in manufacturing these various springs. We started manufacturing piston rings, I believe, in 1935 (Part 3, Page 1018).

Since we entered the piston ring field in 1935, there has been a general practice in the marketing of piston rings to grant a cumulative, retroactive rebate similar to the one that is now used, and that practice was in effect in the industry at the time we entered the piston ring business and is in effect now with a great many of our competitors

(Part 3, Page 1020). As to what was done in the marketing of piston rings when we went into that business: When I joined the company in 1935 my uncle was the operating head of the company. It was his practice to try and explain as much as possible his operational practices because he felt that some day it would be necessary for younger men to step in and help; and I feel I am fairly familiar with what went on, even though at that time I was not in management but was in the factory working at the end of a furnace. It was explained to me that in this new industry which we were entering, that it was necessary that we conduct ourselves in the same manner that other people who had experience in this industry were conducting themselves, and it was with that thought in mind that we took the step to meet competition on the same basis (Part 3, Page 1021).

Mr. Apple was sales manager of the company at that time. I was present at some conferences with the sales manager at that time and since that time, respecting granting of these cumulative retroactive annual rebates. We met the competitive situation in the best way we knew how. We evolved a contract every place which would not put us at a competitive disadvantage (Part 3, Page 1022). What we are now doing to meet the competitive pricing practice in the sale of our automotive products is to change our schedule wherever it is necessary to meet a situation that arises. All moves, naturally every move that we make is made in order to either prevent the loss of a certain group of our customers to our competition or in some way to protect ourselves in this competitive enterprise system (Part 3, Page 1024).

In 1946 there were approximately 6500 automotive jobbers that could have been potential customers of Moog Industries, and how many there were in 1947, I do not know. The only figures I have were after the war, when they were counted. There are now 11,000. In 1946, Moog had approximately 500 active jobbers (Part 3, Page 1025). As to how many active jobbers we have today, I can only estimate that the same way we estimated our 1946 jobbers who were active, and we have now in the neighborhood of approximately 775.

A good many of the companies in the Piston Ring Industries at the present time utilize a marketing practice of cumulative annual retroactive discounts.

Q. Are there any other lines that Moog manufactures that use that method of marketing, in other products? * * *

The Witness: Most of the rebates granted, I believe in the other industries are generally of the non-retroactive type (Part 3, Pages 1026, 1027).

As to the Regal Manufacturing Company, I am familiar with them only to the extent that they are a competitor of ours in Coil Action Parts. They are one of our lesser competitors. I am not as familiar with them as with some of the others (Part 3, Page 1027).

I am acquainted with the Geary-Hershey Company.

Q. I show you Respondent's Exhibit 6-A, Confidential Jobber Price Schedule 4. Is that the price list that corresponds to the price list that you use on commodities to sell your customers?

A. This is the confidential jobber price schedule. We have one of the same color.

Q. And these are published prices, are they not?

A. That is true.

Q. To jobbers and distributors?

A. Yes.

Q. Where they use the word "jobber" you use the word "distributor" which means the same thing?

A. Yes, distributor.

Q. And you translate these part numbers into part numbers on the Moog catalog, do you not?

A. That is right. In this particular instance, as most of (Part 3, Page 1028) the parts are similar to our own, they use a different prefix.

Q. Can you select an item there as an illustration?

A. Yes. G2521 is the Geary-Hershey equivalent to the Moog No. 521.

Q. Now, this jobber price of $13.73, do you know what discount schedules are applicable to that?

A. I believe the G-H organization have a discount from their jobber net, and I think it was 20 percent.

Q. On what quantities was that based?

A. It was based on all quantities.

Q. On all quantities?

A. Yes.

Q. Now, this distributor's price list, Exhibit No. 12-B, of Regal; is there a part comparable to 521 on that?

A. Moog No. 521. Their number on that would be our 521.

Q. Their price shown on here is $3.62, and Geary-Hershey shows $3.73. It is 3.62 on Regal's No. R521, and Respondent's Exhibit 12-B, $3.62 distributor's price, and the comparable price on Geary-Hershey, Respondent's Exhibit 6-A is $3.73. Now, do you know offhand, what the price is of Moog? We have got it shown here in these exhibits of Moog.

A. I haven't the slightest idea.

Mr. Butterfield: Have you got these price lists?

Mr. Mayer: Obviously these price lists are going to speak for themselves. The matter is printed on there, isn't it? (Part 3, Page 1029.)

Mr. Butterfield: Can I have just that one item?

Mr. Mayer: Yes, you can have it.

(Short interruption.)

Hearing Examiner Kolb: On the record.

By Mr. Butterfield:

Q. You haven't with you the 1951 price list on this item No. 521, have you?

A. No, I do not.

Mr. Butterfield: I am afraid, Your Honor, we will have to defer this, because the exhibit that is in the record here is the 1949 year. We will have to furnish that exhibit, then, for the year 1951, and I ask to defer that matter at this time.

Our principal competitors in the sale of Moog automotive products are as follows: All of the car manufacturers, including the various General Motors Division: Chrysler

Corporation, including its four divisions, which are generally grouped together for parts purposes under the name of Mopar; Ford Motor Company and its Lincoln and Mercury divisions; as well as the independents such as Studebaker, Nash, Kaiser-Frazer, Willys, Hudson, et cetera (Part 3, Page 1030). Then in addition to that there are manufacturers competing with us in the independent field; such as Thompson products and its associate Toledo Steel Products, Sealed Power Corporation, McQuay-Norris, and Aluminum industries. They are our major competitors.

Q. Yes, major competitors. Does the General Motors group have a competitor comparable to this Mopar of Chrysler as a competitor of yours?

A. Not exactly, yet they do compete with independent replacement manufacturers in the replacement field with their United Motors organization. However, I am happy to state that they do not sell within the United Motors organization any item that is directly competitive with our own manufactured item (Part 3, Page 1031).

United Motors group does not sell items competitive with the products that we manufacture, but General Motors does. General Motors sells only through their own facilities. They do not go through the independent jobber. They sell directly to their car dealers. That car dealer is an outlet that competes directly with customers of our customers.

It is very difficult to meet General Motors competition. We attempt to meet it in several ways: One is to provide a part of equal quality. The second, we try to have that particular part available to the trade for immediate use. And, third, we must price it so that it can be sold competitively against the pricing structure of General Motors (Part 3, Pages 1032, 1033).

As to your question, do we follow the General Motors prices, we are certainly guided by them and where we can we try to compete on a basis that is equivalent to theirs. We do not sell directly to any General Motors car dealer, but we hope that our customers, the automotive jobbers, will pursue that type of business and sell as much as possible through those outlets. He must do that or else he nor-

mally would not have enough volume to maintain his organization and pay himself a profit, unless he did sell to car dealers. It is my belief there is not sufficient volume in this industry, working only through the independents, to hold the independent jobbing organization together (Part 3, Page 1033). I would say that the jobber must sell to the car dealers in order to survive (Part 3, Page 1034).

June 24, 1953, Washington, D. C.

HUBERT C. MOOG resumed the witness stand and testified on behalf of Respondent as follows:

As to the General Motors' method of distributing automotive replacement products, practically all of them are made and distributed by the car manufacturer. They are sold directly to their dealer organization from the main factory parts division. As to how the General Motors determines the distribution through the car dealer or United Motor Service, I am not too familiar with the methods used, except certain lines made by certain of the subsidiary companies of the major motor car manufacturers are distributed through the independent jobbers, and this grouping together of these lines by the subsidiary companies, of, for instance, General Motors, is termed United Motors Corporation, which has its headquarters in Detroit (Part 3, Page 1036). Their other lines are distributed direct to the car dealer. As to Chrysler products, they are distributed through their Mopar set-up. It is a grouping together of all of the Chrysler divisions to distribute their parts to all of the various dealer-channels, and normally they maintain warehouses in each fairly large community, and distribute the Mopar line out of these warehouses. It is possible for a car dealer to order direct from the car manufacturer. However, the factory ships under the Mopar label, no matter how it is forwarded to him. In other words, the Mopar warehouse in each city is not their only means of distribution, it is just their local warehouse for immediate delivery. They also ship from their factory to the car dealer (Part 3, Page 1037).

Ford Motor Company, to the best of my knowledge, ships parts from their various warehouses and also from their home factory to their car dealers, without recourse to an organization such as Chrysler has set up. They merely term their parts "Fomoco," standing for "Ford Motor Company," and distribute in that manner.

I believe in general all of the motor car manufacturers distribute in practically the same way, whether it goes through one channel or another. It is really very similar, excepting in the one instance that the General Motors people have set up one little portion of their competitive situation to go through the independent jobber and they call it the United Motors line (Part 3, Page 1038), and I know of no other major car manufacturer who has deviated in a similar fashion, yet I believe that all the others can be classified as a very similar type of distribution.

We do not sell our products to car dealers. I believe that practically all of our customers sell to car dealers.

As to how we meet this competition of the car factory to the car dealer, we make an effort to place our distributors in a position to meet that competition, price-wise, quality-wise and service-wise, and our discount schedule applicable to our distributors net prices are designed with that object in mind (Part 3, Page 1039).

Q. Do you have available the car dealers' prices?

A. Yes, we have them on file.

Mr. Butterfield: If Your Honor please, I would like to defer that evidence, and I will put that in at the next hearing.

Hearing Examiner Kolb: I don't see what the car dealers' prices, at which he sells to his customer, has anything to do with this case at all.

Mr. Butterfield: The charge in this 2(a) complaint is injury to competitors, and the car manufacturer is one of the major—the three major car manufacturers are the major competition to Moog Industries, and it is for that reason that we have to meet the competitive injury to the car manufacturer, because that is the charge that has been made against us.

Hearing Examiner Kolb: Go ahead.

It would be far too difficult to give you a complete list of our other competitors in the automotive products field (Part 3, Page 1040).

We compete directly with a good number of people, and the ones I have mentioned heretofore are just those names familiar to everyone as being very large in the car field. There are also probably hundreds of competitors who are approximately our size and smaller. I can give you some breakdown on this and go as far as I can. For instance, in the leaf spring field our competition ranges from the large ones, such as Marmount Automotive Products of Chicago. Then there is Tuthill Spring Company, an organization of approximately our size, like that. I would say there are probably 16 or 18. Then we go all the way down to include those whose prominence is just of a local nature, or in one State, and there are at least 10 or 12 of that size. Then we go down to the lowest category of spring manufacturers and those include the larger spring service stations that do some manufacturing and distribution on their own in their cities, and are relatively limited as far as distribution goes, yet they are a factor at any one place at any one time. For instance, one example: We have an account, Western Spring Company, who buys from us those items which it is economical for them to buy from us, and they produce for themselves certain other items, for various reasons. Those reasons may be it might be cheaper for them to make one item in their area than it would be to buy that item from us and have it shipped (Part 3, Pages 1041, 1042). Then there is the factor of availability that enters into it. That covers the leaf spring line, I think, down to the lowest common denominator.

We then go into competition in our coil action line, which includes such people as Geary-Hershey, Regal, Bastin, and a considerable number that we just don't have a list of and it would be difficult for me to call all of them to your attention, but more or less as you go down the list they become only a smaller factor in a certain area.

Then in the coil spring line, some of the bigger competitors are Burton Auto Spring Corporation and Eaton Products of Cleveland, and then there are several others

who probably purchase their springs and do not manufacture them.

In the chassis parts field, such as tie rod ends, king bolts, and shackles, our competition ranges from Shefford-Master Corporation in Fairfield, Illinois, and a number of others. Most of the others, however, either manufacture or distribute multiple lines. It is difficult to separate them. When you get down to this category it is difficult to separate them into individual line of manufacturers (Part 3, Page 1042).

To my knowledge, none of our competitors duplicate exactly our lines of distribution. They may handle almost as many different lines of parts as we do, or they may handle more lines than we do, but they do not exactly duplicate our line. For instance, we are one of the few leaf spring manufacturers who also make and distribute other parts. We have a unique position in that respect.

As to consumer advertising on a national or local level, we do practically no such consumer advertising (Part 3, Page 1043). Our larger competitors do use consumer advertising. Depending upon the company, it may go to any media that is effective for them. It may be telephone; it may be radio; or it may be newspaper or magazine. Normally these major competitors that advertise do not advertise these parts to the consumer as parts. They advertise because when you go into the field of the major car manufacturers and their advertising, they play up the theme to the car owner, such as "Bring your car back home to the dealer," or "Don't use gyp parts" or "Only use genuine parts". Usually they try to hit upon some catch phrase—that of inferior quality (Part 3, Page 1044).

At this point, Commission's counsel moved to strike the latter answer as not relevant, and the Trial Examiner sustained the motion.

The witness was then asked if he manufactured any so-called gyp parts, which was objected to and objection sustained.

Q. Mr. Moog, how do you meet the competition which has, through the national consumer advertising of your major competitors been built up?

Mr. Mayer: I object to that question. It contains a conclusion in it, about how the competition is maintained by the competitors.

Hearing Examiner Kolb: Sustained.

We feel that national consumer advertising by any of our competitors is a factor in the competitive marketing picture which we must meet in the distribution and sale of our products (Part 3, Page 1045). We meet that factor in several ways. We first price the item so that it is attractive to the trade that we are aiming at. Second, we have to make it available, if possible in all levels of distribution. Third, we feel that it is necessary for us to place every bit of quality that we can in our own product, and speaking only for Moog Industries, we, in our trade advertising, make the statement, if I may quote it here, that Moog makes a part as good or better than the one it replaces.

Q. Do you use the expression in your advertising of "genuine parts"?

Mr. Mayer: I object to that. That is not relevant.

Hearing Examiner Kolb: Sustained.

Mr. Butterfield: Do I understand, Mr. Mayer, that you are not charging us, in 2(a), with injury to competition with our competitors?

Mr. Mayer: You are charged with injury to competition.

Mr. Butterfield: With competitors?

Mr. Mayer: Any injury to competition which results directly from your pricing practices, and you know it.

Mr. Butterfield: I would like to have you point out in the record one injurious competitive effect that you maintain has flowed from these charges, and the record which (Part 3, Page 1046) you have made, just one.

Mr. Mayer: We have been over this many, many times, Mr. Examiner. I move that this examination proceed.

Hearing Examiner Kolb: If you have any questions to ask the witness, go ahead.

With reference to Commission's Exhibit Number 66, coil action sales and rebates to jobbers in Denver, Colorado, on the last line, Western Spring Company, as to whether

he is a Moog jobber or a Moog competitor, actually I believe Western Spring Service Company can be termed as both. That is the same Western Spring Service Company that I referred to as a manufacturer a few moments ago. I know of no other similar organization (Part 3, Page 1047). They are located in Denver and their business is the manufacture of springs. They also manufacture some springs. As to what quantity, I cannot definitely determine, but I do know they order from us only the so-called popular items, which would, in effect leave someone in their own organization to produce some of the unpopular numbers.

Yes, we do have fluctations in the prices of our products (Part 3, Page 1048). That occurs as often as the competitive situation requires, consistent with the cost of raw material, cost of sales, and cost of shipping. Every time a competitor makes a move of some type, we have to take it into consideration in our over-all picture, and a good many times it does affect the price. That is why we publish price lists from time to time and why our picture is a constantly fluctuating type of thing. We are not able to meet all prices of our competitors. We try to be guided by the car manufacturers' prices, since those are the ones we must compete with at the consumer level (Part 3, Page 1049).

We are not able to successfully meet competition on leaf springs on the West Coast, the reason for that being high shipping costs. We feel that we can successfully meet competition in the East Coast area, the Atlantic Coast, since the average freight cost is not as excessive as shipments to the West Coast (Part 3, Page 1050).

I believe I know the difference between so-called hard competition and soft competition. That part of the industry dealing with products that we sell I would say is intensely hard competition.

Q. Mr. Moog, do you understand what is meant by an unlawful pricing practice?

A. It is difficult to understand exactly what is an unlawful pricing practice. I firmly believe that everything we have done in the business has been in good faith. I don't believe that we have ever operated in such a manner as to try to do any harm to anyone, except that we do want to

protect ourselves at all times, so we do not lose our customers, and our distribution. We have tried to act, at least since I have been actively engaged in this company, we have always tried to act in such a manner so that we could keep our heads (Part 3, Page 1051) up and look squarely at anyone, and, to my knowledge, we have not engaged in any, what I would call, unfair pricing practices.

Q. You have not, Mr. Moog, at any time, had any agreements with any of your competitors, have you, in respect to fixing prices?

Mr. Mayer: I object to that. That is not material.

Hearing Examiner Kolb: The objection will be sustained. That is not involved in this case.

I do not believe that at any time since I have been with the Moog organization have I known the company to do anything which would have the result of forcing any of our competitors out of business.

Q. Have you, since you have been with the Moog Industries, or has the company, either, during that period of time, done anything which you would consider to have the effect of injuring any customer of a customer of yours?

Mr. Mayer: I object to that question.

Hearing Examiner Kolb: The objection will be sustained.

By Mr. Butterfield:

Q. Have you, since you have been with the Moog Industries, have you or the company, to your knowledge, done anything (Part 3, Page 1052) which you would consider to have the effect of injuring a customer of yours?

Mr. Mayer: I object to that question.

Hearing Examiner Kolb: Objection sustained.

By Mr. Butterfield:

Q. From your many years in the automotive industry, have you an opinion as to whether or not there is any possibility at the present time, or in the future, of your company monopolizing any line of commerce in which you are engaged?

Mr. Mayer: I object to that question.

Hearing Examiner Kolb: Sustained.

By Mr. Butterfield:

Q. Mr. Moog, I ask you if you have an opinion, based upon your experience in the automotive industry, as to whether or not the present share of the market to which you testified yesterday Moog is manufacturing and distributing, there is any reasonable possibility of having any substantial effect on competition in any line of commerce in which you manufacture products for sale or distribution?

Mr. Mayer: I object.

Hearing Examiner Kolb: Sustained.

By Mr. Butterfield:

Q. Has there ever been brought to your knowledge, Mr. Moog, before the filing of this complaint by the Federal Trade Commission, or since the filing, any fact which would lead (Part 3, Page 1053) you reasonably to believe that there was an injury by virtue of any pricing practices that you have or are now engaged in, in injuring competition?

Mr. Mayer: I object to that.

Hearing Examiner Kolb: The witness may answer. Overruled.

The Witness: May I have that question again?

Hearing Examiner Kolb: Read the question, Mr. Reporter.

(Question read.)

The Witness: I don't believe I have seen any evidence of injury from our business.

By Mr. Butterfield:

Q. Has any fact been brought to your attention, either before the filing or since the filing of this complaint, any injury to any competitor of yours?

Hearing Examiner Kolb: That question has been answered in the previous answer.

By Mr. Butterfield:

Q. Has there been brought to your attention, either before the filing of this complaint, or since the filing of this complaint, any fact which would lead you to believe that there had been any destruction of competition by

virtue of Moog's pricing practices, which they have and are now engaged in? (Part 3, Page 1054).

Hearing Examiner Kolb: That question has been answered.

By Mr. Butterfield:

Q. Mr. Moog, has there been brought to your attention or knowledge any fact which would lead you reasonably to believe that Moog Industries, Inc., by its pricing practices, either before or since the filing of this complaint, had done anything to prevent competition with Moog Industries, with the customers of Moog Industries, or with the customer of a customer of Moog Industries?

The Witness: May I have that again?

(Question read.)

Hearing Examiner Kolb: The witness has answered that. There is nothing, to his knowledge, that would affect competition and injury to competition. I think all these questions are within that answer. I don't see any occasion for asking it again.

Mr. Butterfield: This last question embodies some factors that were not expressed in the other question. Will you read my last question, Mr. Reporter?

(Question read.)

Mr. Mayer: I wish to object to that question, upon its being re-read, Mr. Examiner. I don't see the relevance of this line of questioning.

Hearing Examiner Kolb: Objection sustained (Part 3, Page 1055).

Mr. Butterfield: May I ask you again, counsel, for the reason of your objection?

Hearing Examiner Kolb: Off the record.

(Discussion off the record.)

Hearing Examiner Kolb: On the record.

Mr. Butterfield: I would like to make an offer of proof, if Your Honor please, that H. C. Moog, the executive vice-president of Moog Industries, having had experience in Moog Industries for twenty years, would testify, if allowed to testify, in answer to the question as to whether there had been, to his knowledge, or to the company's knowledge, any fact brought to its or his attention

that would reasonably lead Moog Industries, Inc., or himself to reasonably believe that Moog Industries, Inc., prevented competition, either with a customer, a competitor, or a customer of a customer, and that if asked that question he would testify that there had not been any such fact ever brought to the attention of himself or the company.

Hearing Examiner Kolb: Mr. Butterfield, we have been seriously criticised by the court for the long records that we have in these cases. I have sustained the objection, and I refuse to permit you to ask certain questions, because that question has been answered and covered by the witness' previous answer. There is no occasion at this time for making any offer of proof or anything further on that proposition (Part 3, Page 1056).

The objections to any further questions on this line will be sustained, and no offer of proof will be accepted. Go on to something else.

Cross Examination.

Our published price lists, reflecting our distributors' net prices, are our regularly announced prices which are circulated to all of our customers, and sales are actually made as a matter of regular course according to the terms announced on those price lists (Part 3, Page 1057). The springs that we sell to the trailer accounts, that I have mentioned, are sold only for original equipment purposes. I do not know whether or not any of these sales include replacement springs, as I do not, myself, handle that particular part of our operation.

As to the question when did we first offer a rebate on any of our lines, to our customers, when I first joined the company on a full-time basis, we had at that time acquired a piston ring company, and the operation of that company was such that we accepted their policies when it was acquired, and their policy at that time was one of discounts. That is the beginning of my recollection of so-called volume discounts (Part 3, Pages 1058, 1059). I am not familiar from the beginning with the institution of rebates on the coil action line. At that time I was traveling on the road gaining sales experience. That was probably

the period of 1938, 1939, and 1940. The rebate plan on the leaf spring line was instituted when I was a member of the management of the company, and I was present during that period. As to which of our competitors in the leaf spring line also had a retroactive bonus plan at that time, I cannot answer that question because I don't know the situation that existed competitively at that time in that one industry (Part 3, Page 1059).

It is possible for our piston ring customers to re-distribute piston rings.

Q. Do you have any concrete knowledge, as a fact, of any piston ring specialist of yours who does not sell piston rings, redistributes them, let us say, to a garage customer who comes in to buy piston rings manufactured by Moog?

The Witness: I can't state that I have any knowledge of anyone who doesn't.

By Mr. Mayer: Well, as a matter of course, isn't it logical to assume that they do redistribute, to a certain extent.

A. I would suppose that it is.

Q. And that would be true as well in the leaf spring line, wouldn't it? (Part 3, Page 1060.)

The Witness: I cannot state that, Mr. Mayer. * * *

I am familiar with the McKee-Moog account in Memphis. Yes, I would say that McKee-Moog does redistribute.

While I denominated them as a leaf spring specialist, they probably overlap somewhat. He may distribute, but he also performs the other function at the same time.

Q. Now wouldn't this generally be true as well of the wheel alignment specialists, that they can redistribute certain Moog products to mechanics or garage customers who approach them to buy various Moog parts used in wheel alignment?

A. Well, I can't speak for them all, Mr. Mayer, nor do I know any specific one that I can refer to, because I am not familiar with those accounts, at their place of business, as to exactly their function. I have really tried to

keep my testimony down to those people that I actually know (Part 3, Page 1061).

Q. Well, as you have been characterized by your counsel as a man of twenty years' experience in this field, do you have any personal knowledge of, or have you ever known a single wheel alignment specialist customer, whom you have known as such, who has not redistributed?

A. Generally, Mr. Mayer, the wheel alignment specialist buys from our distributors, he does not buy directly from us.

Q. Generally speaking.

A. Well, it is very difficult to answer a general question with a specific answer.

Q. I think it has been cleared up a little bit by the fact that they purchase as a rule from your distributors instead of directly from the Moog plant itself.

A. If they perform the function of putting the piece on the car, that generally makes them a purchaser from our distributor, unless they also provide another function of stocking and distributing themselves.

Q. Now, Mr. Moog, you don't have any doubt, do you, that your customers, located in the same general area as, specifically, Memphis, Tennessee, compete with each other in the resale of your products, do you?

Mr. Butterfield: I object to that question, unless you relate it to a specific product.

Hearing Examiner Kolb: Objection overruled.

Mr. Butterfield: I take an exception (Part 3, Page 1062).

The Witness: I would state that they do not necessarily compete with each other on all products.

By Mr. Mayer:

Q. Well, let us perhaps put it this way: It would be possible, wouldn't it, for a ustomer to get the same part in Memphis, Tennessee, the same Moog part, from either J. B. Cook or McKee-Moog, or Ozburn-Abston, or Mills-Morris?

Mr. Butterfield: I object to that, as to the possibility of getting a part. The question is whether they did get a part.

Hearing Examiner Kolb: This is cross-examination, Mr. Butterfield. The objection is overruled.

Read the question, Mr. Reporter.

(Question read.)

The Witness: It would be possible under conditions where these distributors handle the same line of products for some of them to obtain similar products.

By Mr. Mayer:

Q. For instance, what I was driving at, you do not have any such thing as an exclusive franchise, as when you have three or four customers in one particular locality, and where (Part 3, Page 1063) one customer is only allowed to buy a certain portion of the leaf spring line and another customer is only allowed to buy the coil action portion, and another customer only buys a certain portion of the piston ring line, there is no such exclusive contract by Moog as to who can purchase such product within that line, is there?

Mr. Butterfield: I object, Mr. Examiner, because there is nothing in my examination, or there is nothing in the record, that refers to any exclusive contracts with Moog Industries.

Hearing Examiner Kolb: Overruled.

The Witness: I would say that if a distributor is authorized to purchase, he meets the qualification of the company to purchase, he may purchase within that line whatever he desires.

By Mr. Mayer:

Q. All right, sir; now, I believe in answer to one of Mr. Butterfield's questions you stated that sometimes price changes are made in individual prices, or the pricing structure of Moog Industries is changed sometimes to keep individuals as customers, or groups of individuals as (Part 3, Page 1064), customers, and I wondered, sir, if you can give me an example where Moog Industries has made a price change to keep a single customer, a one-line customer.

A. Yes, sir. I will have to recollect, though, because we recently made a change in the price of a certain overload extension, when we found it was not competitively

priced, and at the customer's request we reviewed the fact and changed the price. Actually, the customer was one of the first to notify us, but we acted as soon as we could, to retain his business.

Q. Was that pricing change made to all customers?

A. Yes, it was published, then, as a price change. It required the distribution of a complete set of blue sheets.

Q. Now, all right, sir. What was it about the competitive situation which brought it to your customer's attention to inform you that the overload spring was not competitively priced?

A. The price of our kit was far different than the price of several other competitors, and therefore we felt we were too far away to attract business and reduced it to somewhat within reason of a competitive price.

Q. What basic considerations did you take into account when you made the price originally on that overload spring? What part did your competitors' prices play in that determination?

We were the first one out with the set (Part 3, Page 1065).

I will try to name you the piston ring manufacturers who use an annual volume rebate in their system of pricing, to the best of my knowledge. I can say almost all of them do. Ramsey Corporation, Hastings Manufacturing Company, Sealed Power Corporation, McQuay-Norris, and Perfect Circle Corporation. All of those I know and some of them I have not paid much attention to. I can't answer as to how many of those have identical rebate schedules to the rebate schedules offered by Moog. I can only do that by comparing their schedule with ours, face to face. We don't ever try or want to have anything exactly like everybody else. We want to tailor our operation for our customers, ourselves, as well as we can. We meet objections, of course, and we try to get what is good for us and something that our customers can sell. I don't know whether I explained that very well.

Mr. Mayer: Mr. Examiner, I feel necessarily somewhat limited, in the absence of the actual price list, and so forth, of these competitors. I understand Mr. Butterfield is go-

ing to introduce them at a later hearing. I would like to then, perhaps, go into the cross examination more thoroughly about the competitors' practices and prices.

Hearing Examiner Kolb: All right (Part 3, Pages 1066, 1067).

As to whether any of our customers compete with any car dealer in an effort to re-sell Moog products, that is a very intricate situation. I believe I may state that our customer both sells to and competes with the car dealer. We do not sell direct to any car dealer. When I talk about competing with General Motors, I am talking about our customers' problem in selling Moog products.

There is no competition, as I understand it, between G. M. and Moog in the sale of Moog customers, is that correct?

Mr. Butterfield: I object to that question, because it—

Hearing Examiner Kolb: Just a minute, Mr. Butterfield. If you are going to give reasons which will lead the witness (Part 3, Page 1067) in making the answer, I will have to have the witness step outside. You can make your objection and he can come in again.

Mr. Butterfield: All right, I would like to have him step out, and I would like to discuss the objection to that question.

(Whereupon, the witness left the hearing room.)

Mr. Mayer: There is nothing wrong with that question.

Hearing Examiner Kolb: Off the record.

(Discussion off the record.)

Hearing Examiner Kolb: On the record.

Mr. Butterfield: I object to that question, if Your Honor please, because the competition of the car manufacturers to the car dealer is one of the major problems in this whole automotive industry, and that is a question that is deliberately put to mislead this witness. I wish to state this on the record in the absence of the witness. I wish to call Your Honor's attention to the complete unfairness of this type of question, and to allow this question to be asked is highly prejudicial to the position of the respondent in this case, and it is such a flagrant violation of due process to

allow such prejudicial question to be asked that it amounts to a denial of the process under the Fifth Amendment to the Constitution (Part 3, Page 1068).

Hearing Examiner Kolb: This is cross examination. The witness has been asked the question and, I suppose, is able to answer the question. He has been put on as an expert, and you said he is an expert.

Mr. Butterfield: He is an expert. It is his life.

Hearing Examiner Kolb: All right, I have ruled on it. Let us get the witness and let's go ahead.

Mr. Mayer: I might say I do not particularly appreciate the charges in that statement, but I refuse to answer.

(Whereupon, the witness returned to the hearing room.)

Hearing Examiner Kolb: Read the question to the witness.

(Question read.)

The Witness: I don't believe I can answer the question, based on the way it is stated.

Hearing Examiner Kolb: Read the question again to the witness, Mr. Reporter.

(Question again read.)

By Mr. Mayer:

Q. What I was trying to clear up, Mr. Moog, was your idea about the competition which Moog has to meet, or attempt to meet, from G. M., and on what level of distribution that competition is.

A. I can answer that, Mr. Mayer (Part 3, Page 1069).

Q. All right, sir, if you will.

A. All right. Our competition, competition with the car manufacturer, with G. M., I think you mentioned specifically—

Q. Well, if the answer can be related, I would like to have you relate it to all the car manufacturers, if possible.

A. It is the fiercest kind of competition in all phases met with by our distributors and we believe that this competition is one of the most important factors relating to our ability to sell.

Q. As I understand it, then, the competition is between the Moog distributor and the car dealer outlet for the car manufacturer, is that so, sir?

A. That is true.

Q. Now, when you talk about price competition, then, are you talking about the price at which you sell the Moog distributor or the suggested resale price which the Moog distributor in some instances, or many instances, follows in selling to his customer?

A. I was not referring to any schedule except our distributor schedule, because that is the only one that we would really have any hold of. That is the ony one that we ourselves can do anything about, or want to.

From the distributor out, that is his business, and it is up to him to compete, if he can. We do feel that we must put our distributor in a position to compete, though, because he cannot operate without a profit, that we know (Part 3, Page 1070).

Q. You must, of course, in the make-up of these prices, have detailed knowledge as to the prices which the G. M. factory charges the car dealer for competitive parts, is that so, sir?

A. Yes, sir; we have detailed knowledge of what the car manufacturer charges to his dealer for competitive parts.

Mr. Mayer: I would assume then, Mr. Examiner, if Mr. Butterfield will also supply those prices—

Mr. Butterfield: Yes, I said I would. I will do that at the next hearing. I said that yesterday.

By Mr. Mayer:

Q. And by the same token, then, the car manufacturer prices, which you testified concerning earlier, which must determine the Moog prices, are the prices from the car manufacturer to his dealer outlet?

Mr. Butterfield: I object to the use of the phrase "by the same token" unless it is explained.

Hearing Examiner Kolb: Overruled. * * *

The Witness: I can only answer that, Mr. Mayer by saying we have to take into consideration the car manufacturers' prices in setting the distributors' price.

By Mr. Mayer:

Q. My question was, which prices are those, the prices of (Part 3, Page 1071) the manufacturer to his dealer, or the prices at which the dealer offers his merchandise to be sold?

A. Well, we take into consideration all phases in setting up distributor prices. There is some consideration given to the factory price set to the dealers; there is some consideration given to the factory recommended price to the garage, and some consideration given to the factory-recommended list price, because all of those have to be taken into consideration.

Q. When you talk about intensively hard competition, that also applies to the ability of the Moog distributor to sell Moog parts, does it not, sir?

A. I don't believe I understand you, Mr. Mayer.

Q. Well, the competition existing, as I understand it, between Moog and its competition to sell its parts also exists down on the distributor level, of the Moog distributor in an effort to sell his Moog parts, does it not?

A. I can only answer as far as our own problems are concerned. I am not familiar enough with the distributor problems to be able to answer that.

Q. Will you give us an example, Mr. Moog, in your experience, of what you consider an unfair pricing practice?

Mr. Butterfield: If Your Honor please, I don't think that is quite fair, since all the questions I asked on that were sustained (Part 3, Page 1072). * * *

Mr. Butterfield: And, furthermore, the other objection that I wish to make to this is that the charge in this complaint is a violation of Section 2(a) of the Act, and there is no charge, as I understand it, under section 5 of the Federal Trade Commission Act of unfair competition. If that is an issue in this case, I would like to know it.

Hearing Examiner Kolb: If there are any additional statements you wish to make, Mr. Butterfield, let us put them in now and let us get them over with. The pending objection is overruled.

Mr. Butterfield: I take an exception to that ruling.

Hearing Examiner Kolb: Let the record show the objection and the exception to the Hearing Examiner's ruling.

Read the question, Mr. Reporter.

The Witness: I cannot answer that question.

By Mr. Mayer:

Q. You cannot answer that question? You mean it is physically impossible to recall?

A. It depends on what is called—what is it, unfair—(Part 3, Page 1073).

Q. Pricing practice.

A. What is the definition of an unfair pricing practice?

Q. That is precisely what I want to find out from you, sir. The answer to the question on direct examination was that you have not engaged in any unfair pricing practices, I understand.

Mr. Butterfield: No, "unlawful" was the word used on direct examination. If I used the word, "unfair," it was done merely inadvertently, because the word I intended to use was "unlawful."

Mr. Mayer: We are going to get to that. You used the word "unfair."

Mr. Butterfield: Well, I wish the record to be corrected, and I would like to have him re-answer the question, using the word "unlawful."

Hearing Examiner Kolb: As I understand it, Mr. Witness, you do not know what an unfair pricing practice is.

The Witness: No, sir.

Hearing Examiner Kolb: Is that your answer.

Mr. Butterfield: If Your Honor please, in reference to that question that you have asked this witness, the witness only asked the attorney to define what he meant by "unfair."

Hearing Examiner Kolb: He said he could not answer the question, that he did not know what "unfair" meant.

Mr. Butterfield: What the attorney meant by the use of the word "unfair" (Part 3, Page 1074).

Hearing Examiner Kolb: How much more do we get into this record? Read the question to the witness, and let him answer.

Read the original question, Mr. Reporter.

(Question read.)

The Witness: I asked the attorney to define the word "unfair", or at least to tell me what he means by that, and I will try to answer to the best of my ability.

Mr. Mayer: It seems obvious that the question is not going to be answered, so to clear this up, let us ask the witness to give us an example of an unlawful price. There won't need to be any question about whether that was answered on the direct examination.

The Witness: Well, I would like to also ask what Commission's definition of an unlawful price is, and perhaps I could—

By Mr. Mayer:

Q. That is precisely what I am trying to find out from you, Mr. Moog, as to what you think an unlawful price is, and to do that, I ask you to give me an example, in your experience, where you have seen or observed an unlawful price.

A. Sir, I haven't, to my knowledge, seen an unlawful price, because I understand from what you stated that that would injure competition (Part 3, Page 1075).

Q. Well, in your opinion, then, sir, since this was gone into on direct, is there such a thing as an unlawful price?

A. There may be, Mr. Mayer, but I don't believe that we have ever—

Q. The question was not directed to Moog, so just eliminate that from the answer. In your experience, I take it, you have never seen what you think is an unlawful price, is that correct?

Mr. Butterfield: I object, unless it is confined to the industry in which Mr. Moog engages.

Hearing Examiner Kolb: Overruled.

The Witness: May I have the last question read?

(Question read.)

The Witness: Without an exact definition, I would have to state I don't believe I have seen one.

There is not contained on our price lists any terms of sale. That is in our contract (Part 3, Page 1076).

By Mr. Butterfield:

Q. When you answered the first question that was asked by counsel, as to the Moog distributor price list, you understood and assumed that that included the distributors' contract in addition to the price list, did you not?

A. Since he was talking about terms, I had to, Mr. Butterfield, because that is where they appear.

Mr. Butterfield: That is all I have.

Mr. Mayer: Before we adjourn, or go off the record, I would like to make a statement.

Yesterday, in answer to Mr. Butterfield's motion, I think I made some statement about what the respondent was entitled to and what he was not entitled to, and I certainly did not want to be misinterpreted in the light of having had a discussion a good many times about what the complaint involved, both on and off the record. Certainly the respondent is entitled to know at all times what the complaint is directed to, and we are at all times willing to furnish that information. That is all I have (Part 3, Page 1077).

Mr. Butterfield: That is all I have today.

Hearing Examiner Kolb: What about further hearings?

Mr. Butterfield: I have got to put these price (Page 1077) lists in, and I had hoped that I could have selected one or more of these terms that we have been through, or selected one or more years than we have covered, to direct my cost studies towards, and that was the purpose of my motion. We are going to have to decide on whether or not it is worth while, from a financial standpoint, for the respondent to try to meet, in that respect, every item shown on these exhibits, or whether we are going to take our chances and select one or two of the communities, to put that in. It is a terrific risk, because we may go into a very expansive cost study, and then have that restricted strictly to the particular community and be held not to have attempted to defend against any of the other charges

in the complaint. Now, that is the decision that we are going to have to make.

Hearing Examiner Kolb: Mr. Butterfield, you had over a year to make that decision. How many more years will you need?

Mr. Butterfield: Well, we have called in cost accountants to make these studies, and based on what we can reasonably assume, it will cost us in the neighborhood of several hundreds of thousands of dollars, and perhaps, in the nature of a million dollars, to make the cost justification defense, such as has been made in these other cases, in order to meet all of the charges here in all these items (Page 1078), because it requires the taking of 75 per cent of all of our invoices for a period of six or more years, and it requires going through a period from 1936 to date.

Hearing Examiner Kolb: You advised the Hearing Examiner that you had whatever cost study you proposed to introduce ready and in the hands of the attorneys of the Commission by the latter part of April this year. That was several months ago. The case was continued for the purpose of giving you an opportunity to do that.

Today it appears this thing hasn't even been started.

Mr. Butterfield: We have made these tests, and samples. I had no idea what the enormity of these cost studies would be.

Hearing Examiner Kolb: You had in mind cost justification at the time this case was filed, did you not?

Mr. Butterfiel Oh, yes, very definitely.

Hearing Examiner Kolb: And yet you have done nothing about it, and you come here three years later to tell me you are thinking about whether you are going to have a cost study made or not. You are just making a farce out of the whole thing.

Mr. Butterfield: That is not my intention.

Hearing Examiner Kolb: I am trying to give you an opportunity to have a fair trial in this proceeding, and I am willing to go to any lengths to do it, but I cannot tie (Page 1079) this case up indefinitely for years while you make up your mind as to what you are going to do. You have got to make up your mind as to what you are going to do sooner or later in order to finish this case.

(Discussion off the record.)

Hearing Examiner Kolb: As the result of a discussion off the record as to the possibilities of further hearings, it is hereby ordered by the Hearing Examiner that a hearing be set for Thursday, August 6, 1953, to run for two days, at St. Louis, Missouri, for the purpose of completing the testimony by the Respondent, unless good cause is shown (Page 1080).

September 15, 1953, at St. Louis, Missouri.

HUBERT C. MOOG was recalled as a witness on behalf of Respondent, and testified as follows:

Direct Examination.

At the last hearing in Washington, I promised to bring in detailed lists of car dealers' prices, and I have brought them with me this morning. I also have brought in some of the price lists and schedules of our competitors.

At this point they were marked "Respondent's Exhibit Number 14," being the distributors' net cost, blue sheet Form 878, effective September 7, 1953, of Moog Industries, consisting of 12 pages.

Respondent's Exhibit Number 14 was offered and received in evidence.

Respondent's Exhibit 14 is our distributors' net cost sheet. I have compared the prices in part in this cost sheet with the net price list for Ford dealers, issued by Ford Motor Company (Part 3, Page 1083). As a comparison, for example, our kit Number K-32, was equivalent to a particular number listed in the Ford chassis parts catalog, No. 883049, entitled "Kit Front Suspension, Upper Spindle Support." Our price on that item is 96¢ net to the distributor. The Ford Motor Company does not have a distributor. They have a dealer and the dealer's price is listed in competition with our distributors' price to the dealer (Part 3, Page 1034). The Ford price to the dealer is listed as $1.20 if the Ford dealer uses it himself, and there is a 19¢ wholesale incentive if he re-sells it under the wholesale trade net

to the garage man or the filling station. The net cost to the Ford dealer, if he re-sold it, would be $1.01. Based on our blue sheet I know what the margin of operation of our customer is (Part 3, Page 1085). That margin would be the difference between his purchase price of 96¢ and a selling price to meet that competition of $1.01, which would be 5 cents, based on a $1.01 selling price, a little less than 5% (Part 3, Page 1086). I believe our suggested re-sale price lists, which are already in evidence, concern the situation about which we are now testifying. From Respondent's Exhibit 14 I will pick an item for comparison with the same item in the Chrysler catalog, our Item Number K-83, which has an equivalent in Mopar Chrysler Corporation Part No. 1326078. Our distributors' net cost on that item is $1.24; the Mopar price is $1.36. Mopar allows a discount from that price, depending upon the quantity purchased at one time by the dealer (Part 3, Page 1087). I believe that that discount is 10% if the order is over $1,000.00. I also believe there is an additional discount if the order is somewhat higher than that. I am not sure of this, but I believe it is $2,500.00. I believe also that the discount mentioned to me is 5%, and there is also an additional discount allowed by them of 2% for cash. They allow no redistribution discount that I know of.

I will select an item for comparison with our price list from the General Motors price list. There is a Chevrolet passenger parts book known as the Chevrolet price schedule. I have an item here listed as Moog's K-25, which is equivalent to a number listed in the Chevrolet Parts Book Number 603412, a steering knuckle support pivot pin replacement unit, Moog's net cost sheet shows a net of 65¢ to the distributor. The Chevrolet price to their dealer is 81¢ (Part 3, Page 1088). Chevrolet allows a 12½% rebate, based on, I believe, copies of invoices submitted to the manufacturer of sales of certain items of which these parts are included, when the sale is made to the wholesale market, such as garages, filling stations, et cetera. In answer to your question, does that 12½% rebate apply only to Chevrolet parts, my answer is "No." It applies to any part within that category that the Chevrolet dealers resell, whether they are Chevrolet parts or any other part.

I assume the dealer would get the rebate if it was a part manufactured by Moog, if he reported the re-sale, since I have been advised that they are so reported, and, to my own personal knowledge, I believe that to be the general practice.

These parts that I have selected from the Ford, Chrysler, and General Motors catalog and price list, have been selected by me at random (Part 3, Page 1089), and I have examined other prices of other parts and compared them with our prices. We keep these car manufacturers' catalogs and price lists in order to determine the price which we must offer to our distributor to allow him to be able to re-sell Moog parts.

At this point, Respondent's Exhibit Number 15 was marked for identification. Respondent's Exhibit 15 was then handed to the witness and asked him to identify it (Part 3, Page 1090). This document seems to be a supplementary jobber contract between Wausau Motor Parts Company and some unnamed jobber whose name is to be filled in, which in short states the amount of credit to be paid to a jobber seeking Wausau rings on the schedule from $1,200 and 2 percent up to $40,000 and a 25 per cent rebate. That rebate seems to be retroactive.

Respondent's Exhibit 15 was then offered and received in evidence (Part 3, Page 1091).

Wausau Motor Parts Company is one of our competitors. In constructing our prices and discounts schedule we must have taken this document into consideration.

At this point, Respondent's Exhibit 16, consisting of three pages in one sheet, Respondent's Exhibit Number 17-A-B and C, consisting of three pages, stapled together; Respondent's Exhibit 18-A and B, consisting of five pages on two sheets; Respondent's Exhibit 19-A-B and C, consisting of three pages, stapled together; Respondent's Exhibit 20-A and B, consisting of five pages on two sheets; and Respondent's Exhibit 21-A-B-C-D and E; were all marked for identification. Thereupon Respondent's Exhibits Number 16, Number 17-A-B and C, Number 18-A and B, Number 19-A-B and C, Numbers 20-A and B, and 21-A-B-C-D and E were offered and received in evidence (Part 3, Page 1094).

The witness was then shown all said exhibits and requested to identify them. These are Thompson Products, Inc., full line franchise agreements from 1949, 1950, 1952, and 1953; also Thompson's jobber franchise and Thompson's local distributor agreements, the last two being undated. Thompson Products is a competitor of ours. These documents indicate the items on which they are competitive with us. Those items, reading from the 1953 distributor's franchise, are Piston Rings, stabilizers and shock absorber links, independent front wheel suspension parts, spring shackles, Harris products, tie rod sockets, king bolt sets, chassis bolts, and bushings (Part 3, Pages 1094, 1095). All of these agreements that Thompson had with his jobbers were taken into consideration in framing our price lists and constructing our sales schedules and discounts. The purpose of that was to meet the competition of Thompson Products line. As to the relative size between our company and Thompson Products on these items in volume on the individual lines, I am not at all sure, but on the overall size of the company, according to the Thompson report, their sales were something over $400,000,000 last year and ours were less than $5,000,000, making a difference in size of eighty times.

On motion of counsel for Commission to strike the answer on the ground that it was irrelevant unless the comparison was made on the basis of the items sold by Moog in competition with items sold by Thompson Products, the Trial Examiner sustained the objection and the answer was stricken (Part 3, Page 1095).

Q. Mr. Moog, on those items which you refer to in the Exhibits 16 to 21 both inclusive, being manufactured by Thompson and manufactured by Moog, are those same items in the car manufacturers' list of parts which they manufacture?

A. They must be since all of these are replacement parts and as such they would have a corresponding number found in the car manufacturers' catalog and pice lists.

The car manufacturers sell all these parts to the car dealer. These car manufacturers' price lists and catalogs are extremely important to us in the operation of our business. We could hardly operate without the informa-

tion that is contained in them, consisting of the parts numbers and the prices of those part numbers (Part 3, Pages 1096, 1097). Those prices, as shown in the car manufacturers' catalog, in some cases include incentives or discounts and in some cases they do not. The car dealers do not sell to the Moog distributors, to the best of my knowledge. The car dealers sell to other car dealers, to garages, filling stations, specialty shops, such as brake shops, spring shops, and others, as well as to the car owner.

I have brought with me other price lists and price schedules of other competitors of Moog's. I have brought a series of price lists from Regal Tool and Manufacturing Company, Inc.; another set from Hirshey Metal Products, Incorporated; another set from Ramsay Products; another set from Hastings Manufacturing Company; another set from McQuay-Norris Company (Part 3, Pages 1097, 1098). I have the price lists which indicate therein the applicable discount or the net price of each, net prices recommended to each portion of their distribution. All of these companies I have just mentioned are also competitors of ours. Some of them employ discount schedules comparable to ours (Part 3, Page 1098).

At this point, Respondent's Exhibit Number 22, being a series of five price lists of McQuay-Norris Manufacturing Company; Respondent's Exhibit Number 23, a series of five price lists of Hastings Manufacturing Company; and Respondent's Exhibit 24, a series of four price lists of Ramco; were marked for identification (Part 3, Page 1099).

Thereupon Respondent's Exhibit 22, Pages 1 to 133, Respondent's Exhibit 23, Pages 1 to 92, and Respondent's Exhibit 24, Pages 1 to 37, were offered and received in evidence.

Respondent's Exhibit Number 22 is Price List Number 22 of the McQuay-Norris line, which became effective November 1, 1951, on all parts in the McQuay-Norris line, both the consumer price, the wholesale trade net, the preferred buyer franchise net prices—these are their recommended prices—the amount suggested, suggested volume buyer franchise net prices, and the confidential net prices on piston ring sets and parts. Besides volume or retroactive discounts, non-retroactive discounts from these price

lists, McQuay-Norris has rebate lists from their distributors' blue sheet schedule (Part 3, Page 1100). These rebates are not shown on this exhibit. The only commission shown on this exhibit is a supplemental commission which is given to a distributor of McQuay-Norris when he sells to a dealer a part for the dealer's own car on which McQuay-Norris allows a supplemental commission.

This enables a dealer to meet the competition of the car manufacturer, and enables the distributor to meet the competition of the car manufacturer with the dealer.

As to what the other discounts are, I am not familiar with their exact schedule, although I do know that there is a McQuay-Norris discount rebate which is non-retroactive. Yes, I believe I can get one of those discount rebate schedules of McQuay-Norris.

Respondent's Exhibit Number 23 is the price lists of Hastings Manufacturing Company, but all the discounts and allowances that Hastings gives to its distributors are not shown on these exhibits. Their rebate schedule is not attached. I probably can get a copy of one somewhere (Part 3, Page 1101).

Respondent's Exhibit Number 24 are the price lists of the Ramco line. These price lists do not reflect their discount schedules. I know they have a discount schedule, but I do not know from memory what it is. I probably can secure one.

All of these three named companies are competitive with Moog Industries in the manufacture and sale of automotive parts. We use all of these price lists in order to form our own prices and our suggested prices in order to compete with these people (Part 3, Page 1102); and in constructing our discount schedule we took into consideration the discount schedule of all of these companies in respect to these price lists.

Q. Are the items that are shown in those price lists also contained in the Ford, Chrysler and General Motors catalogs?

Mr. Mayer: I object to that on the grounds of irrelevance.

• • •

Hearing Examiner Kolb: The objection will be sustained.

Thereupon, Respondent's Exhibit Number 25-A, B, C, and D, being McQuay-Norris Manufacturing Company's discount schedules, consisting of four pages, were marked for identification (Part 3, Page 1104).

Thereupon, Respondent's Exhibit 26-A through 26-Z-14, and being Ramco contracts, consisting of forty pages, were marked for identification, and both of said exhibits were offered and received in evidence.

The witness was handed Respondent's Exhibit 25, and asked to describe how the discount schedule therein operated. This McQuay-Norris discount schedule is, as stated on the face of it, an earned premium discount from the distributors' prices, retroactive on piston rings and piston expanders and non-retroactive on all other products. It is retroactive from $3,000.00 at a 5% rate, up to $30,000.00 at a 20% rate, and non-retroactive from $5,000.00 at a 2% rate to $65,000.00, and over at a 10% rate (Part 3, Pages 1105, 1106).

The witness was then handed Respondent's Exhibit 26-A to Z-14 and asked to describe how the discount schedule therein operated. The Ramco discount schedule is actually similar to the others except that it is based on a time turnover of the stock consigned by the Ramco people or Ramsay Manufacturing Company to their distributor (Part 3, Page 1106). I am not completely familiar with how that time turnover works but it states in the jobber distributor agreement that Ramsay Corporation pays to the customer of their warehouse a compensation based on the number of times that the consigned material is turned over. It is a little different than the usual type of agreement between manufacturer and distributor and manufacturer and jobber. The greater the turnover that a jobber has, the greater will be the amount of compensation based on the average thousand dollar stock. In percentage, based on a thousand dollar investment unit, if there is a three-time turnover, the compensation to the jobber is $100.00 or 10%; if there is a ten-time turnover, the compensation is $1,050.00, based on $10,000.00 worth of volume, which is actually $50.00 better than 10%, making it 10½% (Part 3, Page 1107).

There are also a group of manufacturers that manufacture and distribute the same kind of parts that we do, other than the independent manufacturers and the car manufacturers that I have named and described above (Part 3, Pages 1108, 1109). This group of manufacturers operate in all different ways. For instance, Aluminum Industries in Cincinnati operate on a straight 20% discount from their blue sheet price. Actually we have to look at every phase of our competitve manufacturers and determine how best to enable the jobbers that we bid for to deal with, to pick us out of the group and deal with us. I could go on and name other manufacturers who operate somewhere in and between our picture and the other picture; some give 10% off; some give 20% off; some give various discount schedules, all of them attempting in their own way to service a certain segment of the independent field and the dealer field (Part 3, Page 1109).

As to whether there is available to all of our customers these various sources of supply that I have described, our customers are subject to the whims and caprices of any customer anywhere, they can walk into any manufacturer, any store anywhere they want and buy anything they want, and if you do not appeal to them, somebody else will. They have a great deal of choice and every day letters come across my desk telling me about customers who have left us and gone to other sources. Then there are new accounts which want to buy from us, and we have to check their credit. In my travels, part of my job is to find out why people have left us and I go to see these accounts that have left us, along with those who have joined us. I try to please those who have joined us and I try to find out why we have displeased those who have left us, and the reasons therefor are varied (Part 3, Page 1110). We have additional competition other than that which we have just described. First, after we have succeeded in combatting the competition at the distributor level, then of course we must combat the competition from that point on down, at least help our distributor to combat it by giving him the tools to work with and the profit necessary for him to compete against in getting our products away from his shelf down into the consumer's cart. In our competition picture

there is also a device by which groups of manufacturers combine to distribute their products, co-operatively (Part 3, Page 1111). One of them is NAPA organization. They operate by group together to sell to a selected combination of distributors several lines of parts, to the exclusion of all others and in offering complete lines from top to bottom that the distributor needs to operate on, so they have in that particular store all segments of the industry required to go out and service other people. That runs from ignition to batteries, to car parts, to accessories, through the whole gamut of auto repairs and replacement. We do not belong to any such organization.

Q. And what has been the effect upon your selling, by this full line of parts distribution set-up of NAPA?

Mr. Mayer: I am going to object before the witness answer, to see what defense the respondent is attempting to sustain by this line of testimony, otherwise I think it is irrelevant.

Hearing Examiner Kolb: What is the purpose of the question, Mr. Butterfield?

Mr. Butterfield: The purpose of the question is to show competitive effect, if Your Honor please (Part 3, Page 1112).

Mr. Mayer: The defense is limited to the competitive effect of Moog's pricing policies; certainly the NAPA set-up is no defense to that line of policy.

Hearing Examiner Kolb: The objection will be sustained.

Mr. Butterfield: If Your Honor please, I would like to submit at this time in order to properly appraise the gist of the subject matter of the complaint it is necessary for the respondent to show to the Examiner, in order that the full picture can be had, not only of the effect that Moog's pricing policies have had on its competitors but the effect that Moog's pricing policies have had on Moog, because that goes to the essence of this problem of competitive injury. In this line of questioning that I propose to show, I attempt to bring out—

Mr. Mayer: If he is going to tell what he proposes to show, let's exclude Mr. Moog.

Hearing Examiner Kolb: Will you step out in the hall, please?

(The witness Moog leaves the hearing room.)

Mr. Butterfield: I propose to show and I attempt to point out here that far from Moog adversely affecting its competitors, Moog is in effect being affected far more seriously by the practices of its competitors. Now, take for instance, this NAPA set-up alone. Now, here is a set-up of parts manufacturers of every item that goes into an automobile. They have combined together to select by a device called the NAPA ware- (Part 3, Page 1113) house, where they can offer to a distributor more than Moog's limited springs and front end parts, including these chassis parts, such as coil springs and tie rod ends and shackles, they can offer everything from battery cable to batteries, to tires, to windshield wipers, everything that goes into a car, a complete full line distribution; and it was that effect of these combined manufacturers on Moog that I want to show here, in order to demonstrate to the Hearing Examiner that Moog here is more sinned against than sinning in this thing; and it is the effect of this distribution, the effect of these methods of distribution—

Hearing Examiner Kolb: Well, I do not see how the fact that a particular competitor who sells the whole line while Moog sells a specialized line has any effect upon the issues in this particular proceeding.

Mr. Butterfield: Well, as I understand the issues in this proceeding, that Moog has a virtual monopoly on this particular product; that is the theory of the proceeding, and that if Moog varies or makes any difference in products between various customers they are in effect cut off from any source of supply and to that extent they are discriminated against.

Hearing Examiner Kolb: That is the first time I heard that in this case.

Mr. Mayer: May we go off the record in the interest of limiting the record, showing less argument than it has in the past (Part 3, Page 1114).

Hearing Examiner Kolb: Maybe we better stay on the record as long as we got an argument as to what the issues are.

Mr. Butterfield: As I had understood, I mean from the case that the Government put in and from the nature of the Cross-Examination, and from the remarks of the Trial Examiner, what was really involved here was price differences.

Hearing Examiner Kolb: It is not a question of the line of product. You never heard the Hearing Examiner make any such statement at any time, nor did you hear the attorneys make any such statement, nor does it appear in the complaint. That is not an issue in this case. There is no contention of any kind, any place, by anyone, written or oral, that Moog has a monopoly of a particular line. So that is an issue that is not in this case.

Call Mr. Moog back and let us proceed.

Mr. Butterfield: Well, I would like to make one explanation to indicate to the Trial Examiner what may solve some enigma in this case in as far as our defense is concerned, and that is this, that the issue of monopoly and competition are inextricably interwoven, that unless you have a monopoly pressure or some method by which the market has been corralled to a substantial degree, that you can't possibly have such a thing as an injury in competition because of the free choice of the various customers in going to the various sources of (Part 3, Page 1115) supply, and it is for that reason that I had thought that the attorneys in support of the complaint, the theory that they seem to have proceeded under, was that a mere price difference in and of itself was sufficient, and that it would seem to me would only follow where there was a substantial impact, substantial share of the market where a price difference would have that result and effect because there has been no evidence introduced in this case of any injurious effect, no one has been brought in here to testify that he has been injured adversely and that was the purpose of that examination. I did not want the record to show in any way that Moog had a dominant position in this market or even a substantial significant position in the automobile market compared with his com-

petitors, which we have this morning, Thompson Products, Ford, Chrysler, General Motors, Ramco, which are all organizations of very, very substantial size in direct competition with us, and it was because of this group of manufacturers who had combined to distribute their products co-operatively that has caused Moog and its competitors too, who are not members of the NAPA group to do the things that they have done in order to maintain their position on the market if they could maintain it. I think the evidence in the case will indicate they have not only not maintained it but actually lost.

Hearing Examiner Kolb: Let's save that for argument at the close of the case. There is no use arguing the case (Part 3, Page 1116) every time we have a hearing. Call you witness and let us proceed. Is there any objection pending?

(The reporter read the question as follows:)

"Question: And what has been the effect upon your selling, by this full line of parts distribution set-up of NAPA?"

Hearing Examiner Kolb: The objection to the line of testimony is sustained. • • •

Q. Mr. Moog, at the present time are you contemplating any changes in your pricing practices?

Mr. Mayer: I object. I do not see any relevancy of any contemplated changes to any defense of the charges under the complaint.

Hearing Examiner Kolb: Objection sustained.

By Mr. Butterfield:

Q. Mr. Moog, at the present time do you sell any mail-order houses?

A. We just recently started pursuing that type of account.

Mr. Mayer: I object to that question and answer, and move it be stricken on the basis he is attempting to do now what he could not do directly formerly (Part 3, Page 1117).

Hearing Examiner Kolb: The objection will be sustained and the answer stricken.

By Mr. Butterfield:

Q. Mr. Moog, based upon your years of experience with this organization and in your present position as executive vice-president with full responsibility, do you have an opinion as to what the effect will be upon your market in the event that you eleminate the pricing schedules which are complained of in the complaint filed against you by the Federal Trade Commission?

Mr. Mayer: I object. I do not think that is relevant at all to any defense by the respondent under this complaint.

Hearing Examiner Kolb: The objection will be sustained (Part 3, Page 1118).

Cross Examination.

Referring to Respondent's Exhibit 14, those are our distributors' net prices, effective September 7, 1953, and which are in effect at the present time. These prices are higher than the prices which were in effect in the period of 1949.

Q. And in the answer to Mr. Butterfield's questions of the comparison of the prices from the manuals of the three large automotive manufacturing distributing outlets, those prices were made on a comparative basis of their current 1953 prices, were they not?

A. 1953? This is the current price list. I do not know the date of this price list, I think this is also current. These are used quite a bit.

Q. Well, are those three volumes in current use by Moog now to ascertain the various cost of the items listed in them?

A. Yes, that is right. These I notice are marked July, 1952. This is all 1952, so these must be the ones we are using at the present time but there may be later ones out which we do not have (Part 3, Page 1119).

Q. Now, in the examination of these various documents which are not in the record and comparing them to the Moog distributors' price list which we have made part of the record, have you ever had occasion to make a tabulation or an over-all comparison showing the various prices for the Moog parts to its distributors as op-

posed to the various prices by the big three distributing divisions to its car dealers?

A. Yes, sir, we make comparison between all of our prices and all of the competitors' prices.

Q. And would you have such a document in evidence at your plant at this time?

A. I do not believe there is any one such document. There might be various sheets of various kinds pertaining to certain items. I am sure that they must be based on this new price list. There must be sheets of that type which are still there; some may have been destroyed, some still there.

Mr. Mayer: Well, if the Examiner please, I would like to ask Mr. Butterfield then to submit that to us because obviously there is no way of testing on the basis of one Moog part in each catalog the accuracy of the witness in characterizing that that is a normal part as distinguished from a part which is abnormal in the price structure.

Mr. Butterfield: I will have to find out what kind of working papers these are that the witness refers to.

By Mr. Mayer: (Part 3, Page 1120.)

Q. Well, obviously, they are in existence, aren't they, Mr. Moog?

A. I am sure that there are some.

Q. Because the Moog Company works with them and I am sure that could be done without too much expense or labor involved.

A. You will find that there are some there and these are average parts.

Mr. Mayer: We appreciate that. I think it is necessary to make a complete picture here because otherwise without that information available to us we would have absolutely no way of knowing whether or not any comparison of prices is a normal comparison of prices.

By Mr. Butterfield:

Q. You have employees who assist you in making these up, haven't you?

A. That is right.

Mr. Butterfield: You can bring that in, the working papers, put that evidence in the record.

Mr. Mayer: Well, I think that should at least be made available to us whether or not it should be made a matter of record.

Hearing Examiner Kolb: Do you have any tabulations to show that?

The Witness: Judge, there are a group of tabulations out there and they are all based on prices with all types of (Part 3, Page 1121) competition. They have to be so we can make up our prices, we have to know exactly what our competition is. There are some there, I can't guarantee what have been destroyed but what are there you are certainly welcome to, you can have either original or photostats, whatever you like.

Mr. Mayer: I think the photostats would be satisfactory.

By Mr. Mayer:

Q. Now, Mr. Moog, turning to the distributor prices which you used, for example, for your Moog part K32 as opposed to the equivalent part, the price with which you were comparing it in the Ford manual, isn't it true, sir, that that distributor's net price shown on there as 96 cents for the part might in many instances be subject to the maximum annual volume of rebate offered by Moog on a sale of that item, and in that instance the price might well be 20 percent less than the 96 cents, as it appears, 19 percent less than the 96 cents as it shows on the distributor price list there and also in the testimony concerning customer's margin in this particular instance, the 5 cents being the difference, 96 cents as I take it and $1.01, net cost to the Ford dealer, is that the 5 percent margin you were talking about?

A. That is right.

Q. Now, also in comparing your Moog part K83 as opposed to the Mopar part 1336078, I believe it was stated that the Moog (Part 3, Page 1122) distributor price is $1.24 Now, that price, too, would be subject to any annual volume discount which might apply on the sale of that part?

A. Yes.

Q. Therefore, it is possible that a volume rebate of 19 percent might apply to that particular part in the sale by Moog to its own distributor?

A. That is right.

The only discount which might be allowed by Mopar in some instances on the sale of its parts to its dealers is a discount based upon a single order size. To my knowledge there is no re-distribution discount granted by Mopar on any of its sales.

Q. Now, similarly in the presentation of the price as it appears on the Moog price list for its distributor of the part K25, that part which shows at 65 cents might well be subject to the annual volume rebate or the retroactive rebate offered by Moog, might it not?

A. That is true.

Q. And it could be that that part would be subject to the top rebate of 19 percent? (Part 3, Page 1123.)

A. True.

Q. Now, in the distribution by Chevrolet, I am not quite sure that the record is clear, is this distribution of the part the price which you were comparing in your direct testimony, was that the distribution of the part as it is sold by the Chevrolet Division of General Motors to the Chevrolet dealers, was that it?

A. The price I mentioned of 81 cents?

Q. Yes.

A. Is the price listed in the price list which refers to the price from the Chevrolet parts division to the Chevrolet dealer.

Q. And as I understand it, when the part is redistributed by the Chevrolet dealer to a customer who might be a potential of a Moog distributor, there is a rebate, too, on that sale, is that correct, sir?

A. That is my understanding.

Q. And what is the rebate?

A. According to several people that I have talked to, it is 12½ per cent.

Q. Have you ever seen that published, as a matter of published rebate, statement by the Chevrolet division?

A. I am almost positive that it is not published.

Q. Have you ever seen an invoice to indicate that the 12-1/2 percent has been paid or allowed? (Part 3, Page 1124.)

A. I have asked to see one but I have never been shown, yet everyone in our sales force is cognizant of the fact, and they cover the entire country.

Q. Now, Mr. Moog, if in the process of redistribution a 12-1/2 percent rebate is offered, what then is the actual price that Moog considers that Chevrolet division is selling that part to the Chevrolet car dealer for?

A. 81 cents, Mr. Mayer, because there is nothing we can do about that. We tried to.

Q. No. I am sorry. I did not ask what you do about it, Mr. Moog. What I wanted to know, what price it was you actually determined on, and it is obviously the 81 cents, that is the price you consider the part is being sold for to the Chevrolet dealer?

A. Yes (Part 3, Page 1125).

Referring to Respondent's Exhibit 15, I cannot tell you what the effective date of that document is, nor can I tell you if the document was ever effective (Part 3, Page 1125).

As to where Wausau Motor Parts Company competes with Moog Industries, in the distribution of its merchandise, the Wausau people sell two different lines of piston rings, and I assume they are worldwide. They are well known. Everywhere in my travels I constantly met with Wausau products distributed throughout the United States.

Q. Was this agreement or an agreement similar to this ever offered to one of your Moog customers, to your own knowledge?

A. Mr. Mayer, they printed it.

Q. No. The question was, was it ever offered specifically to one of your customers, to your knowledge, this particular thing?

A. I have never had a jobber tell me specifically it was offered.

Q. Do you know if the Wausau Motor Parts Company offers any other discount on its sales other than those appearing on this?

A. I don't know.

Q. And have you made a comparison of the list price of the Wausau Motor Parts Company to its distributors in comparison to the list price of Moog Industries to its distributors?

A. You say have I made one?

Q. Have you made one? (Part 3, Page 1126).

A. Only summarily.

Q. Now, as I understand it, this document to your knowledge at least, not to your positive recollection, might not have ever been in effect. Now, I would like to know, Mr. Moog, just exactly what part that document plays in the determination of the Moog pricing policy.

A. Well, Mr. Mayer, this was sent in to us by one of our salesmen obviously. We would examine it. We would try to evaluate the effect of Wausau on our market, how close we would have to come to meeting the competitive offer and how far away we should stay because of certain pitfalls which it may lead us into, and upon examination of this we would use our own good judgment and experience to try and work this thing in with all of the others and come out with a contract and a schedule which we feel would earn us the greatest amount of profit and lose use the smallest number of customers and attract the most. In effect, that is the closest I can come to it.

Q. In your recollection, just what part did this particular document play in the formation of Moog prices?

A. Mr. Mayer, I can't tell you that because I don't remember the date that that came in, therefore I can't tell you exactly the exact date.

Q. As I understand it from your testimony evidently there was no attempt to directly match or identically match the rebate plan as it shows on this particular document? (Part 3, Page 1127.)

A. No, sir.

Referring to Respondent's Exhibit 16 through 21-A, which are documents relating to Thompson Products Com-

pany, and as to how we were able to determine prices made by Thompson to its customers, we had available to us, first, Thompson's blue price sheet, and we take those blue prices and compare them to ours, just like we compare our blue prices to other prices all over the industries. These Thompson contracts that are in the record are valuable to us only insofar as they affect us in formulating our own prices.

Referring to Respondent's Exhibit 16 as to what class of customers that contract is offered, it states that it is a full-line franchise and it is offered to the distributor. In order to qualify, under the line there it says "Name of Distributor" (Part 3, Page 1128). I believe that I am familiar with the various classifications and customers within the Thompson sales structure. I believe those documents represent the entire grouping of Thompson contracts, as of the date shown.

Q. Now, sir, in the formulation as I understand it of the Moog prices as a result of your information concerning the Thompson Products method of distribution as well as others, to what individual customer, if any, of Moog was any price change made as a result of these particular agreements after you had weighed them and considered them along with the Thompson prices to its distributors?

A. I am not certain I can point out anyone right now, Mr. Mayer. I will have to go back over my sheets because, as you can see from the date, the effective date is 1949, we obviously formulated certain prices—that would be before the Korean War—and we had obviously formulated certain prices and had based those prices upon the competitive situation at the time trying to hold on to our distribution. Now, we just—if we at that time selected any one particular jobber I can't tell you offhand right at the moment. I might (Part 3, Page 1129) go back over my papers to check to see whether there was any particular complaint registered at the time concerning our prices because we are, we always recognize any justifiable complaint, and if we—

Q. Do you rectify that on an individual basis?

A. No, sir, never.

Q. It is never done on an individual basis?

A. We publish our prices.

Q. Now, sir, directing you to respondent's Exhibit 22, which seems to be some of the suggested prices and other prices of McQuay-Norris Manufacturing Company, would you direct me, sir, to that exhibit which would list comparable prices to the prices you offer to your distributors?

A. Comparable to the distributor's cost sheet?

Q. Yes.

A. It would be their blue sheet starting with page 109. This sheet is dated November 1, 1951, and those prices might still be in effect. I asked for the price list and I don't know whether there is a later McQuay-Norris price out now or not. I can check (Part 3, Page 1130).

Q. Do you recall, sir, whether or not as a result of the information acquired, through the information contained in this price list of McQuay-Norris to its customers, any change was made in the Moog prices offered to its distributors?

A. Would you repeat the question?

(The reporter read the question as follows:)

"Question: Do you recall, sir, whether or not as a result of the information acquired, through the information contained in this price list of McQuay-Norris to its customers, any change was made in the Moog prices offered to its distributors?"

A. I can't recall of any offer, Mr. Mayer.

By Mr. Mayer:

Q. Now, Mr. Moog, directing your attention to Respondent's Exhibits 25-A-B-C-D, could you tell me, sir, to what classes of McQuay-Norris customers those particular plans were offered?

A. It states distributors' schedule, warehouse distributor and distributor jobber on the face of the discounts.

Q. And is it your understanding then that these three schedules which appear—I am sorry, there are four schedules—which appear, went to four different types of customers within the McQuay-Norris distribution system?

A. Just which one would be a later form—this one—because there is only one distributor jobber set-up that I know of.

Q. Well, would this then, Mr. Moog, Respondent's Exhibit 25-A, be in fact the same rebate plan that was offered on the other three documents, I mean offered to the same customer?

A. No, they seem to be offered to different types of customers. This states warehouse distributor, this states (Part 3, Page 1131) distributor and this states distributor jobber. Therefore, I assume it is three different types of accounts. I don't know unless I talk with them and ask them.

Q. In determining the price of McQuay-Norris which one of those accounts, the price offer to which one of those accounts were you interested in?

A. First I would have to determine which type of accounts they have are equivalent to our type of accounts, then I could tell you which one of these was taken into consideration. These obviously are from, this is from 48, 46 and 46.

As to whether I am personally familiar with taking these various price lists and rebate plans that we have been discussing, and evaluating them and setting up Moog's price structure, I have messed with prices, but Mr. Apple, before he died, was the one who personally handled such things. Sometimes I sat in on them and sometimes I did not, but to the best of my ability, I will try to help you if I can.

Now, of your own personal knowledge, Mr. Moog, can you state if McQuay-Norris Company made one single sale during any period covered by the effective date stated on these documents to which this rebate was applied?

A. Are you asking whether I saw the check? (Part 3, Page 1132.)

Q. Whether you can state it of your own personal knowledge that the rebate was actually paid on any purchase under the plan set forth on these various documents, that is, Respondent's Exhibit 25-A through D?

A. Mr. Mayer, I have talked to a good many of their customers about it. They have told me they have received it. I have talked to McQuay-Norris people about it. They have told me they have given it. Now, how much further do I have to go, sir?

Although the first date on those McQuay-Norris documents is January 1, 1946, they have had a rebate plan for a goodly number of years. I do not know when they started the rebate system.

With reference to Respondent's Exhibit Number 23, Hastings Manufacturing Company, the blue price list on Page 65 are the prices offered by them to their distributors (Part 3, Page 1133).

The price list on there that we are concerned with is Price List Number 491-M. It is possible and probable, based on the information contained in that 491-M price list that Moog Industries made changes in the prices which it was offering to its distributors.

I did not personally handle the customer price schedule at that time. The people who made it up, if they do as they do today, would have to make changes in it. We do not make a price change every time that a competitor has a price change. Some times our prices are fixed by the Government and we cannot make a change of any kind upward but we may make one downward (Part 3, Page 1134). Government price freezing is not effective now, nor was it effective in 1949. The pertinent part of Respondent's Exhibit Number 24, which we take into consideration in the formulation of our distributor's prices, is the blue section catalog Number 1105. I do not know how long that price list was effective.

Ramco distributes its products world wide. They are a good many times larger than our piston ring sales, as Ramco handles only piston rings.

Respondent's Exhibit 24, Ramco prices, is confined only to piston ring prices, and that is true also of Respondent's Exhibit 23, Hastings Manufacturing Company's prices (Part 3, Page 1135).

As to whether there were any price changes made in the Moog pricing schedule to its distributors as a result of the Ramco prices, appearing in Respondent's Exhibit 24, there could have been. I would have to check our work sheets. As to whether there was a change made in the Moog pricing structure to distributors as a result of Ramco prices appearing on their December, 1951, price list, I am

quite sure that there was, but I cannot sit right here and tell you which one it was. When we set down all of these prices in any specific time, they must have some effect because we cannot put out a price or do anything else without taking in regard all of our competition. We do not put out a new price list every time a competitor puts out one, because its costs us a lot of money to print a price list and we have to have a good reason to do so.

Q. How can you say it must have been done when you say it is not done in some instances?

A. Because, when we find ourselves being discriminated against in the market, we find it necessary to print a new price list, that may be one reason; and at that time we accumulate all the current information we can possibly get to gain as much knowledge as we can of the competitive situation so that we remain competitive.

It is possible that if there had been no Moog price changes in December, 1951, that these new prices of Ramco are not as yet reflected in Moog prices.

With reference to Respondent's Exhibit 26-A, Ramco document, that was printed in May, 1944. I do not know the effective date it was used.

With reference to Respondent's Exhibit 26-E through H, that was printed in February, 1942, and was probably used after that date. Of course it was not in effect prior to that date.

With reference to Respondent's Exhibit 26-I through X, there is no date on there. However, I believe that these are now current and are used now (Part 3, Page 1137), and the same answer would apply to Respondent's Exhibit 26-Y through 26-Z-14.

Regarding the difference between Respondent's Exhibit 26-I through "X" and Respondent's Exhibit 26-Y through 26-Z-14, it appears that one is a jobber agreement for a new jobber just signing up with the Ramsay Corporation and the other appears to be a renewal form which they use to renew with an old jobber who has previously been under contract with them. I am not completely familiar with the Ramsay Corporation's distribution setup. I believe that Ramsay Corporation sells to warehouse distribu-

tors, or some form thereof, who, in turn, re-sell to the sub. As to what customer would sign this Ramco Jobber Agreement, I do not know. It could be the customer of the warehouse distributor and probably is (Part 3, Page 1138).

Q. Now, directing your attention in particular, Mr. Moog, to Respondent's Exhibit No. 26-J, I believe you mentioned something concerning the compensation. Would you again, if you (Part 3, Page 1138) will, sir, tell me what that part of 3 headed up "Compensation" means?

A. Well, I can only read here, Mr. Mayer, it says times turned, and refers evidently to the stock of merchandise, and then states compensation, and a figure there, from here, for three times turning the stock the compensation is $100. How they use it I am not at all certain.

Q. Does it tell us what amount of stock has to be turned?

A. Well, it states here, quotes a figure here of $1,000.

Q. And turning the $1,000 three times, and gaining compensation of $100, what percentage would that be?

A. I would say about three percent.

Q. Of merchandise turned over. Now, directing your attention, Mr. Moog, once again to Respondent's Exhibit 24, would you tell us the price list included in Respondent's Exhibit 24, according to the terms of which the man who signs the Ramco jobber agreement purchases from Ramco?

A. That I don't know, Mr. Mayer, that I don't know. I am not at all familiar with this schedule from that standpoint.

Q. I believe, Mr. Moog, in answering one of Mr. Butterfield's questions before, you mentioned something about the customers of the Ramsay warehouse. Would that be the regular direct Ramsay distributor purchasing from Ramsay?

A. How that is used, do you remember, because they may have more than one kind of warehouse, I don't know (Part 3, Page 1139).

Q. I don't recall in what connection it was said. What I was trying to determine whether the purchase in that instance would be through a warehouse distributor or

whether it was from a Ramsay warehouse, from the Ramsay Corporation.

A. I don't know. I will have to go back and read the sentence and find out.

Mr. Butterfield: I don't remember asking a question about Ramsay warehouse.

Mr. Mayer: Mr. Moog mentioned it in one of his answers.

The Witness: I don't remember how it was used. I am sorry. If you could find it in the record I would be glad to accommodate you.

Mr. Mayer: Mr. Examiner, I would like to have four or five minutes before I finish up with Mr. Moog, if I may (Part 3, Page 1140).

* * *

By Mr. Mayer:

Q. All right, sir. In attempting to determine what any individual customer pays for any particular part, take for example the McQuay-Norris line, it is necessary not only to know the price as appearing on the distributor's price list, but it is also necessary to know if that part is subject to a volume rebate, that particular customer's volume of purchases, in order to determine his net price for any item appearing on that price list subject to rebate.

Mr. Butterfield: I object to that question, Your Honor, on the ground that it calls for a conclusion of the witness and uses the word "Price"; and furthermore the question is drafted in such a way, given in such a way that it requires the witness to adopt the particular meaning which counsel is attributing to the word used in there.

Mr. Mayer: This is perfectly proper cross-examination.

Hearing Examiner Kolb: Overruled (Part 3, Page 1141).

A. McQuay-Norris' customer obviously buys on the McQuay-Norris sheet, whatever it is published. What their volume is I don't know, he must know and he must work from their volume rebate schedule. I don't know, Mr. Mayer, I don't know what the combination is, or anything else.

By Mr. Mayer:

Q. What I was trying to bring out, if you are attempting to show the net price of any individual customer, we would have to know the volume rebate which is applied to his purchases by McQuay-Norris to arrive at a net price for any single item purchased.

A. Well, the net price is printed. It says confidential net price.

Q. Well, sir, to make it more—

A. That is the blue sheet there.

Q. Perhaps more concrete and more familiar, to determine what any Moog customer pays as a net price for any single part, for instance, in the coil action line, it would be necessary to know not only the net price which is offered by Moog to its distributors but also the particular amount of retroactive rebate which was to be applied by Moog on his purchases, is that not correct, sir?

Mr. Butterfield: I object to the form of that question, if Your Honor please, because it seems to assume that all of the elements are taken in in that question as to (Part 3, Page 1142) net price, when the fact of the matter is it leaves out a great many important elements which go to net price.

Hearing Examiner Kolb: Overruled.

A. Mr. Mayer, on our price schedule we have a net cost. Any volume rebate that the customer earns based on his total volume is on an over-all picture. I have no idea how to fix any single individual part that we may produce.

By Mr. Mayer:

Q. You arrive at your over-all picture by an amalgamation of his orders of individual parts, do you not, sir?

A. There are a lot of other factors involved in there. There are certain things as freight discounts.

Q. The question was the net price.

A. This is a net price.

Q. Well, then, in determining the net price of any of your competitors, then do you ignore any volume rebates which might be applied to the net price?

A. The volume rebate is something aside from the blue sheet price which we calculate to arrive at those prices (Part 3, Page 1143).

Re-Direct Examination.

The last time that Moog issued a distributors' price list was just before the date shown there, and it became effective September 7, 1953 (Part 3, Pages 1143, 1144). That price list is Respondent's Exhibit Number 14. At the time that we issued that price list, we only took into account on this particular schedule the comparable schedules of our competitors. These are the last price lists published on the coil action and chassis parts line. January 15, 1952 is the date that this previous price list was published. We publish these price lists as often as the competitive situation calls for it. As to how often that arises, one was from January 15, 1952 to September 7, 1953, approximately a year and nine months. Before that, the only previous price change was prior to the outbreak of the Korean War, in 1950, sometime the early part of 1950, which is about two years (Part 3, Page 1144).

As to whether we made any changes in our published schedule of merchandise allowances, our rebate or discount schedule between the time of the last one and the September issue of 1953, I believe there was a change. I think our competitors also made changes in their comparative schedule of allowances, but I am not certain in which particular ones. There is a constant movement all of the time in that type of thing—a little shifting here and there—it goes on continually in this competitive field.

Hearing Examiner Kolb: Does your cost have anything to do with that?

The Witness: Cost of material has an effect, sure.

Hearing Examiner Kolb: It is not always what your competitors charge?

The Witness: No, but cost of material causes our competitors to increase and causes us to increase. We can't afford, for instance in the case of steel increase, to always add the percentage of the steel increase because perhaps our competitors did not. It is one of those situations which call for—(Part 3, Page 1145).

Hearing Examiner Kolb: Then when you raised your prices on this last sheet as compared to the previous sheet you were not meeting competitors' prices but taking care of the increased price because of the increased cost of material?

The Witness: No, we were doing both, Judge.

By Mr. Butterfield:

Q. If your competitors had not raised their prices you would still have raised your prices in accordance with the increased cost? * * *

A. No. Here is the key to whether we raise our prices or not, when it comes right down to it.

By Mr. Butterfield:

Q. That is the net price list of Ford dealers and General Motors and Chrysler?

A. That is right. When they go up we can, we are allowed—if we go up higher than they go up we hear a never-ending (Part 3, Page 1146) wail of anguish, if we don't raise as much as they do, sometimes we can't show a profit. It is one of those constant things, back and forth, trying to find a place where you can show a return on your investment and still keep your customers happy.

Q. Mr. Moog, what is your idea what the Federal Trade Commission wants you to do in this case?

Mr. Mayer: I object to that question.

Hearing Examiner Kolb: Sustained.

By Mr. Butterfield:

Q. Do you have any idea as to what the Federal Trade Commission wants you to do in respect to your pricing contracts?

Mr. Mayer: Objection. That is immaterial.

Hearing Examiner Kolb: Sustained.

By Mr. Butterfield:

Q. Mr. Moog, do you know what the issues in this case are, do you know what the case is about?

Mr. Mayer: I object to that. That is not relevant to the defense this respondent is trying to make.

Hearing Examiner Kolb: Sustained.

Mr. Butterfield: As I take it, whether the respondent knows what he is being asked to do is not relevant to any defense that he may make against a complaint issued against him by the Federal Trade Commission.

Mr. Mayer: It is no defense to the practices complained of in the complaint (Part 3, Page 1147).

September 16, 1953, at St. Louis, Missouri.

HERBERT M. RAMEL testified on behalf of Respondent as follows:

Direct Examination.

My name is Herbert M. Ramel and I am Vice-President of Moog Industries, in charge of piston rings. I have been in the piston ring business, directly and indirectly, since about 1922 (Part 3, Page 1150).

In 1922 I became indirectly connected with Ramsay, having charge of their books and making out tax returns until 1928 when I became permanently connected with them, and I was Vice-President of that company up to the first of this year. In my various executive capacities, I had occasion to study the marketing practices of the Ramco Company, and I helped formulate them for the Ramsay Company in the sale and distribution of piston rings. Other than executive duties with the Ramsay Manufacturing Company, I have been quite active publicly for a great number of years, acting somewhat as a public relations officer. I did accumulate and assume quite a number of responsibilities, both civicwise and through Government departments, and other things of that character. As to my experience in that respect, I will have to refer to the text to keep track of some of them.

I have been a member of the St. Louis Chamber of Commerce for about fifteen years, having been on their Executive Board and Chairman of a number of their committees (Part 3, Page 1151). I have been on the United States Chamber of Commerce on their Educational Committee and Labor Relations Committee. I have been on several of the committees on the Missouri State Chamber of Com-

merce, and am presently the Chairman of the Labor Relations Committee. I am past President of Associated Industries, a member of their Executive Board, and of several of their committees, and was Chairman of their self insurers' conference. I am presently on the administrative council of National Metal Products, and on their National Executive Board, and Past President of their local branch. I was formerly on the Board of Trustees of Veterans' Welfare Association, Inc. That association was abandoned this year. I am a member of the National Board of Education of Comptroller's Institute, and was on their local Board of Directors. I am a member of the Better Business Bureau Association, of Junior Achievement, Inc., and a member of their Executive Board and Board of Directors. I have just completed a four-year term on the Board of Directors of National Association of Manufacturers, and have been a member of their Industrial Committee, their Industrial Relations Committee, and their Public Relations Committee. I am a member of the Advisory Board of the Missouri Resource Development Committee; and Past Member of the Mid-West Manufacturers Association (Part 3, Page 1152).

At this point Commission's counsel interrupted the witness and conceded that Mr. Ramel had been very active in the business field.

I am familiar with Respondent's Exhibit 26-A to Z-14, (Part 3, Page 1153). In my executive capacity with Ramsay Manufacturing Company I sat in on some of the policy committees from which these contracts emanated. These contracts are developed over a period of years and during all the period I was with the company, I generally sat in on the Executive policy Committee from about 1928 up to the time of my resignation the first of this year. I am familiar with the present method by which Ramsay Manufacturing Company distributes its piston rings. Their present method is selling to warehouses. They consign to jobbers and then give jobbers a form of discount, based on turnover, paying them compensation based on the number of times they turn over. They have published price lists on the parts to which these contracts refer. There are no discounts, rebates or allowances in the present

Ramsay contract, other than I have referred to (Part 3, Page 1154). There are two of the present contracts here now. I don't know which one you are referring to.

I am familiar with the companies and their practices that are now engaged in marketing piston rings in the United States. The larger of these piston ring companies are Perfect Circle, Hastings, Ramsay, McQuay-Norris, and Seal Power. There are a number of smaller companies. The larger companies, in my estimation, produce between 85 to possibly 90% of the business, and the smaller companies produce about 5 to 8%. Some of the smaller ones, about 6 or 7, are Wausau, Superior, Pacific, Grant, White Machine Company, and Moog. There may be another one somewhere, but it is immaterial. Then there are a bunch of very small companies, more or less, one-man operation, and very insignificant as far as volume is concerned. They are too numerous to mention and some of them I don't even know (Part 3, Page 1155). About six companies manufacture the bulk of the piston rings. They are the first six that I named. Those six produce between 85 and 90% of the volume sold, and the next six produce about 5 to 8% of the volume sold. As to whether the last-named six in the distribution of the 5 to 8% are equal in distribution, I would say they are fairly comparable within maybe 1 or a fraction of a percent of each other. Of the second group that I have mentioned, probably Wausau is about the largest. As an executive of Moog Industries, I am on the Policy Committee of that company (Part 3, Page 1156).

Moog Industries meets competition in the piston ring market in the same way as they have always done, by allowing a certain declared policy of discount and rebates to the jobbing trade. Everybody receives the same contract.

Most all of the six large companies that I have named, that do 85 or 90% of the business at the present time, have either a retroactive or non-retroactive discount schedule, so I have been informed. As to what the difference is between a retroactive and non-retroactive discount schedule in its operation from a practical standpoint, there is none. You just average the thing out whether you make them retroactive or non-retroactive; it all comes out to the same

answer when you get through with it. There may be a few small piston ring manufacturers at the present time that do not operate on a rebate schedule of some kind off of their published price list, but all of the large ones do oper ate on such a rebate schedule (Part 3, Page 1157).

In order to meet the competition of these larger piston ring manufacturers, and what in my opinion it is necessary for a producer of piston rings to do to meet that competition, we just have to follow the leaders. We are helpless in the matter (Part 3, Page 1158).

As to what, in my opinion, it is necessary for us to do to successfully market piston rings in the present state of market competition, the only thing that you can do is, as I stated, to follow all the practices that are in vogue in the industry at the present time (Part 3, Page 1159).

My opinion on the necessity for following the practices that are now in vogue in the industries is that we must follow the rest of the industries or we are out of business. This testimony is confined to piston rings. At the present time Moog is in a secondary position in most jobbing establishments, and as such we must compete for that business, because we are definitely in a secondary position, and if we did not follow the same practices that have been established, we just could not do any business. The jobber would not handle them and therefore we would have no outlets for our merchandise (Part 3, Page 1161). I have made a study of the things that jobbers do in seeking sources of supply. That study has consisted of studying car distribution problems from the car owner through the car dealer, independent garage, through the jobbing distribution of both secondary and primary. By "secondary" and "primary" I mean warehousing and sub-jobbing into the manufacturing (Part 3, Page 1162).

I found that the car owner, as a rule, bought piston rings based upon the contentions and representations that were made by the independent garage man and car dealers and that they, in turn, bought from their closest and best sources of supply, which, as a rule, is what I would term the sub-jobbing distribution. Then he, in turn, generally worked through some larger source of distribution, some-

times the jobber worked directly with the manufacturer. In any case it went through some jobbing source of distribution, and all of them bought off of certain suggested price lists that had been furnished by the jobber, by the manufacturers, each receiving certain brackets of discounts based upon performance or volume, in that the result is the same, only that they have additional compensation, whether you call them discounts or whether you call them performance rebates or discounts. They virtually all mean the same thing, but each one of them is based on certain economic theories. That economic theory is a reward and incentive for effort. That is the whole basis of the Ramsay set-up, and the reason we arrive at that is it was a reward for effort and performance; and if you will read their contract, there are certain requirements that they have to do to get this type of franchise, but it is a reward that finally fits into the thing that has made this country great (Part 3, Page 1163).

Yes, I mentioned that the Ramsay method of distribution was to sell to warehouses (Part 3, Page 1164). They sell to warehouses at certain specific rebates off, the prices are certain net prices that are figured down on a percentage basis. That warehouse, in turn, re-sells to jobbers. Mopar consigns practically all—they have a ledger balance contract that sometimes is termed as consigned. It is really a ledger balance rather than an outright consignment of certain specific merchandise. They give them a ledger balance and then take back, you might say, a mortgage on the merchandise, if you want to get technical. A consignment is not a direct sale. On the consignment basis you allow him a consignment or ledger balance, and then he pays for the merchandise, he replaces it, and pays for it on open account (Part 3, Page 1165). Mopar's sub-jobber gets it direct from the warehouse, or perhaps it is shipped to him and charged to the warehouse if he is dealing through that warehouse. I think that either one of the contracts, which are part of Respondent's Exhibit 26, follow that method of distribution pretty closely. The job being contract definitely refers to ledger balance.

I am somewhat familiar with the rebate plan or the bonus plan, or the volume discount plan, in existence

to-day and being offered by Perfect Circle to its distributors. So far as piston rings are concerned, for all practical purposes there is no difference between their plan and the Moog rebate plan (Part 3, Page 1166). Perfect Circle sells piston rings exclusively. I can't say exactly whether their plan is identical to the retroactive rebate plan offered by Moog, but the results are the same. There may be a difference in the contracts and there may be a difference in percentage. When I say results are the same, I mean that there are rewards paid in both instances. I can't say the same amounts on the same amount of purchases because that differs, based on a list price from which the discounts are figured, which brings it down to a net price. In other words, you can raise your list and give larger discounts, or you can lower list and give lesser discounts, but the result is the reward.

No, the final result is not a net price so much as the amount of percentage of profit or unit of profit (Part 3, Page 1167).

As to whether Hastings and Ramsay, and McQuay-Norris and Seal Power all have plans identical with the Moog plans, in amounts and bonuses paid on amounts of purchases, I do not think I can answer that question, yes or no. The question is not a correct question (Part 3, Page 1168).

I am not too familiar with the present volume of manufacture in the Piston Ring line for the year 1952, but I would say it is somewhere between $300,000.00 and $350,000.00. Yes, I testified that I had made a study based on the various jobbing outlets and where they purchased, and exactly how various piston rings are purchased by various customers. As to whether that study is in written form, I have some substance. I would not know where to find them though. I have made some reports on it. As to whether I personally made this study, interviewing jobbers and buyers, periodically I would go out in the field, go out with salesmen and question the garage man, the independent garage man, the car dealers and the jobbers, and all the conclusions that I have drawn from my study, were based upon my personal inquiries in this field (Part 3, Page 1169).

You are correct in your statement that in my discussion relative to the various rebate plans and various bonuses offered by manufacturers, the basis for all of them was an incentive from the seller to the buyer to increase the sales of that particular seller's merchandise.

Q. Now, one thing further, Mr. Ramel. I can't quite understand the answer in which you made the statement that the retroactive and non-retroactive rebates work out the same. Was the basis for that answer that in working out the same they all come to the final ultimate goal which is the incentive from the manufacturer to the buyer; is that correct, sir?

A. I am an accountant by profession and I have worked and checked a number of these compensation systems, and as an accountant I was not interested in anything except what was the final result, and as such I always worked out to an average and whether I worked up one way or down to the other, I finally wound up with the net results, so I think the answer is "Yes" to your question (Part 3, Page 1170). * * *

Mr. Mayer: Mr. Examiner, as you know, we requested Mr. Moog to make available to us certain charts or tabulations which he has made concerning the comparison of certain Moog prices and the prices of equivalent items sold to the car dealer, and pending the receipt of that and the examination of it I would like to at that time notify the Examiner whether or not any rebuttal testimony will be taken.

Hearing Examiner Kolb: Do you understand you are to furnish some additional material, Mr. Butterfield?

Mr. Butterfield: Yes, make it available to Mr. Mayer.

Hearing Examiner Kolb: How soon will that be done?

Mr. Butterfield: You won't have a chance to look at it today, will you?

Mr. Mayer: Well, from Mr. Moog's discussion it seemed to me it would probably take him a couple of weeks. Didn't he say it was at various and sundry places?

Mr. Butterfield: They have to dig the stuff out.

Mr. Mayer: I would not want to put any unnecessary burden on the Moog Company.

Hearing Examiner Kolb: Is there any materiality to them?

Mr. Mayer: I believe there might be, sir.

Hearing Examiner Kolb: Well, say you could furnish that in ten days, Mr. Butterfield? (Part 3, Page 1171.)

Mr. Butterfield: I have one case which I have to finish up. I would like to concentrate on that and finish that up, and in the next ten days I will be pretty busy.

Hearing Examiner Kolb: It is just a matter of Mr. Moog gathering that stuff together and sending it to Mr. Mayer and he will decide whether he wants to hold any further hearings or not.

Mr. Butterfield: Well, I will ask Mr. Moog to get that stuff together and get it to Mr. Mayer as soon as possible.

Hearing Examiner Kolb: I do not think it will be necessary to photostat it at this time. It may be sent to Mr. Mayer or you can send it to me and I will turn it over to Mr. Mayer. I think you had better send it direct to Mr. Mayer and if he decides it will be photostated, and if not, he will return it, and the case is closed, as I understand it. Say that material will be made available to Mr. Mayer within ten days, or by September 28, Monday, September 28. And how long will it take you to advise me whether or not you wish to hold any rebuttal testimony?

Mr. Mayer: I would like to have a ten-day period after that, if the Examiner please. I would not want to be limited as to the consideration to taking rebuttal solely to that material which is being returned.

Hearing Examiner Kolb: You can determine in the next ten days if there is anything else (Part 3, Page 1172).

Mr. Mayer: I will have to make some type of comparison of several of the exhibits to find that out, sir.

Hearing Examiner Kolb: Well, say we set October 5 as the date as to when you will advise whether or not additional testimony is to be taken in rebuttal.

Mr. Mayer: All right.

Hearing Examiner Kolb: And if no rebuttal testimony is to be taken I will then set the date for proposed findings by formal order, probably thirty days (Part 3, Page 1173).

[fol. 507] IN UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,370

Moog Industries, Inc., Petitioner,

v.

Federal Trade Commission, Respondent.

Petition to Review Order of Federal Trade Commission.

Malcolm I. Frank (Bernard Mellitz, James W. Cassedy and Mellitz & Frank were with him on the brief), for Petitioner.

James E. Corkey, Attorney, Federal Trade Commission (Earl W. Kintner, General Counsel, and Robert B. Dawkins, Assistant General Counsel, and Janet D. Saxon, Attorney, for Federal Trade Commission, were with him on the brief), for Respondent.

OPINION—November 5, 1956

Before Sanborn, Johnsen and Whittaker, Circuit Judges.

Whittaker, Circuit Judge.

The Federal Trade Commission, after hearings, found that petitioner, which manufactures and sells automobile repair or replacement parts in interstate commerce, has [fol. 508] granted to its customers, at the end of each annual period, a retroactive volume rebate consisting of a flat, graded, percentage of the aggregate dollar volume of their respective purchases in the preceding year, and that this practice has discriminated in price between different purchasers of like grades and qualities of its products, and that the effect "may be to substantially lessen, injure, destroy or prevent competition between customers receiving the benefit of said discriminations and the customers who do not receive the benefit of such discriminations", and it concluded that such discriminations violated Section

2(a) of the Clayton Act, 38 Stat. 730, as amended by Section 1 of the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C., Section 13, which, in pertinent part, provides:

> "(a) It shall be unlawful for any person engaged in commerce * * *, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * *, where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them; *Provided,* That nothing contained in Sections 12, 13, 14-21, and 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *."

The Commission accordingly issued an order prohibiting petitioner from discriminating in price:

> "By selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who, in fact, competes with the purchaser paying a higher price in the resale and distribution of (respondent's) petitioner's products."

[fol. 509] Aggrieved by that order, petitioner has brought the matter here upon its petition for review, and seeks reversal upon the grounds (1) that the Commission's findings and conclusions are erroneous, and are not supported by any substantial evidence, (2) that the Commission's order is broader than its powers to make, and (3) of claimed procedural errors of the Commission.

It is conceded by the parties that (a) petitioner sold and distributed its products in interstate commerce, (b) they were sold for resale within the United States, (c) petitioner's *base price* for its products has been the same to all its customers, (d) petitioner promulgated, years ago, and has since universally used, the questioned annual

retroactive volume rebate plan, and (e) the plan allows a volume discount, or rebate, to petitioner's customers, computed, at the end of each annual period of purchases, upon a flat, graded, percentage of the aggregate dollar volume of their respective purchases made in the preceding year. Petitioner practically concedes, at least does not seriously dispute, as, indeed, it could not, that its rebate plan has resulted in higher prices to some than to others of its customers—the extent of the differentials depending upon the aggregate dollar volume of their respective purchases in the preceding year.

The essential facts found by the Commission are that petitioner manufactures at St. Louis, and sells to jobbers, whom it calls distributors, and to "group buying" associations throughout the country, thousands of different types and sizes of replacement parts—all of the same high or first grade and quality—for many makes, models and ages of automobiles and trucks. These jobbers and "group" buyers are not granted exclusive territories by petitioner, and two or more of them do business in each trade area, and, in turn, sell these products to the same [fol. 510] types of customers—repair shops, garages, service stations, fleet accounts, car dealers, other jobbers, and over-the-counter—as competitors. For pricing and volume rebate purposes, petitioner has classified its products into three lines, namely (1) leaf spring line, including coil springs and chassis parts, (2) coil action line, and (3) piston ring line. It enters into contracts, which it calls franchise agreements, with its jobber and "group buying" purchasers. Those contracts contain an annual cumulative rebate schedule, for each of the three lines of products, as set forth in the margin.[1] It will be seen from those

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[1] These rebate schedules were applicable to the sample year 1949.

Coil Action Line

Net Purchases During Each Fiscal Year	Retroactive Rebate (Percent)	Net Purchases During Each Fiscal Year	Retroactive Rebate (Percent)
Under $1,000	None	$15,000 to $17,499	14
$1,000 to $4,999	5	$17,500 to $19,999	15
$5,000 to $7 499	7½	$20,000 to $22,499	16
$7,500 to $9,999	9	$22,500 to $24,999	17
$10,000 to $12,499	10	$25,000 to $27,499	18
$12,500 to $14,999	12	$27,500 and over	19

(Continued)

[fol. 511] schedules that a different volume rebate is applicable to each line; that the coil action line rebate ranged from 5% on annual net purchases of $1,000, to 19% on annual net purchases of $27,500 or more; that the piston ring line rebate ranged from 2% on annual net purchases of $2,000, to 20% on annual net purchases of $30,000 or more, and the leaf spring line rebate ranged from 3% on annual net purchases of $2,000, to 13% on annual net purchases of $35,000 or more.

In addition to those rebates, petitioner allowed a 10% warehousing commission to those of its customers who resold its products to other jobbers whom it had approved, provided the combined earnings from the volume rebate and the redistributing commission could not exceed the maximum volume rebate for that line. Petitioner also allowed its customers a cash discount of 2% if payment be made by the 10th day of the month following order.

Piston Ring Line

Net Purchases During Each Fiscal Year	Retroactive Rebate (Percent)	Net Purchases During Each Fiscal Year	Retroactive Rebate (Percent)
Under $2,000	None	$9,000 to $9,999	13
$2,000 to $2,999	2	$10,000 to $11,999	14
$3,000 to $3,999	5	$12,000 to $14,999	15
$4,000 to $4,999	7	$15,000 to $17,999	16
$5,000 to $5,999	9	$18,000 to $20,999	17
$6,000 to $6,999	10	$21,000 to $24,999	18
$7,000 to $7,999	11	$25,000 to $29,999	19
$8,000 to $8,999	12	$30,000 and over	20

Beginning July 1, 1949, petitioner introduced the following schedule applicable to its leaf spring line.

Net Purchases During Each Fiscal Year	Retroactive Rebate (Percent)	Net Purchases During Each Fiscal Year	Retroactive Rebate (Percent)
Under $2,000	None	$8,000 to $9,999	8
$2,000 to $2,999	3	$10,000 to $14,999	9
$3,000 to $3,999	4	$15,000 to $19,999	10
$4,000 to $4,999	5	$20,000 to $27,499	11
$5,000 to $5,999	6	$27,500 to $34,999	12
$6,000 to $7,999	7	$35,000 and over	13

In the sample year 1949, petitioner had franchise agreements with 15 group buying organizations or associations having numerous members, many of whom operated in the same trading area. The group buying was done substantially as follows: A member of a group would forward his orders directly to petitioner, with a copy to the group's office, or through the group's office. Petitioner would then ship the goods directly to the member, but would bill the group's office which would pay the bills and the member would later reimburse the group's office. At the end of each year, petitioner totaled the combined purchases by all members of the group and paid a rebate, in the scheduled percentage applicable to the total of those combined purchases, to the group's office, which, in turn, distributed the rebate to its members on the basis of the amount of their respective purchases.

[fol. 512] The Commission found that these group buying associations were "in reality bookkeeping devices for the collection of rebates, discounts and allowances received from sellers on purchases made by its jobber members", and that such jobber members "in fact, purchased their requirements of petitioner's products directly from petitioner, and at the same time received a more favorable price or higher rebate based upon the combined purchases of all the members." This finding is not here challenged by petitioner.

Though the fact that petitioner's rebate plan has resulted in price differentials between its customers is not here, and, we think, could not be, in serious dispute, two simple illustrations—typical of many shown by the evidence—will demonstrate how, and to what extent, it has done so, and may aid general understanding of points to follow.

First, the Commission found that in 1949 petitioner had approximately 1,200 purchasers of its coil action line, but 793, or nearly two thirds of them, received no rebate and only 407, or about one third of them, received a rebate, and 352 of those 407 received a rebate of only 5%, while others, in smaller numbers, received rebates ranging from

7½% to 19%, as illustrated by the tabulation in the margin.[2]

[fol. 513] Second, the evidence shows, and the Commission found that petitioner sold its leaf spring line to six customers in Dallas, all of whom were in competition with each other in the resale of those products, four of whom purchased through group buying organizations and received rebates from petitioner ranging from 12% to 15%, but the fifth, who was not a member of a "group", received no rebate, because his aggregate annual purchases were not sufficient, and the sixth, who was the largest purchaser of the six, but not a member of a group, received a rebate of 7.29%, of the dollar amount of its purchases in the preceding year.

That these rebates were substantial is shown by the Commission's finding that they amounted, on the coil action line, to $163,392.66 in 1947, to $203,478.53 in 1948, and to $106,255.91 in 1949, and, on the piston ring line, they amounted to $57,561.89 in 1947, to $21,011.19 in 1948, and to $22,380.88 in 1949, and on the leaf spring line, they amounted to in excess of $81,000 in 1950.

These illustrations demonstrate that petitioner's cumulative annual rebate plan has resulted in general, widespread and substantial price differentials between its customers.

We have no issue here respecting justification of these price differentials, as petitioner does not contend on this review that it has justified the different prices by any showing of "differences in the cost of manufacture, sale

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[2]

Net Purchases	Rebate	Number of Customers	Average Annual Purchases
Under $1,000	None	793	
$ 1,000 to 4,999	5%	352	$ 1,911
5,000 to 7,499	7½%	27	5,499
7,500 to 9,999	9%	4	8,372
10,000 to 12,499	10%	6	10,660
12,500 to 14,999	12%	4	13,667
15,000 to 17,499	14%	5	9,277
17,500 to 19,999	15%	2	18,735
20,000 to 22,499	16%	0	.....
22,500 to 24,999	17%	1	23,444
25,000 to 27,499	18%	1	26,887
27,500 and over	19%	5	33,471

or delivery", as indeed it could not, because their source is its rebate system, based, not on the quantities or other factors involved in any particular sale, but, rather, upon the combined dollar amount of all sales to a purchaser, or to a "group" of which he is a member, made in the preceding year (without any prior commitment to pur-
[fol. 514] chase any particular amount), and that system results "inevitably in systematic price discriminations, since the prices * * * bear relation to factors other than actual costs of production or delivery." *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U.S. 726, 732. Cf. *Federal Trade Commission* v. *Morton Salt Co.,* 334 U.S. 37.

Petitioner says that its rebates are equally available to all. "Theoretically these discounts are equally available to all, but functionally they are not", because they embrace the "evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability." *Federal Trade Commission* v. *Morton Salt Co.,* 334 U.S. 37, 42.

It has been many times held by the Supreme Court that price differentials, not justified by a showing of differences in the cost of manufacture, sale or delivery, become price discriminations and are prohibited by the Robinson-Patman Act if they may substantially lessen, injure, destroy or prevent competition, *Federal Trade Commission* v. *Morton Salt Co.,* 334 U.S. 37, 44, *Federal Trade Commission* v. *Staley Co.,* 324 U.S. 746, 751, *Corn Products Refining Co.,* v. *Federal Trade Commission,* 324 U.S. 726.

Petitioner's contentions, on the subject of injury to competition, get down to this: That the Commission failed to adduce any evidence that the price discriminations injured its competing purchasers, because it did not show that competing purchasers bought exactly the same, or interchangeable, items at different net prices; and that the Commission merely inferred competitive injury, and that there was no room for such an inference because such would be contrary to the positive testimony of a number of its purchasers, categorically denying that they were injured, and also to the stipulation that all others would so testify if called.

[fol. 515] It is true that the evidence did not identify,

item by item, the exact parts in any line sold by petitioner to particular purchasers, but only dealt with them by the same lines as they were sold by petitioner. Thus, for example, the evidence does not specifically show whether leaf springs, coil action parts or piston rings sold to a particular purchaser were designed for the same make, model and age automobile as the like products sold to his competitor. On this basis, petitioner argues there is no evidence that it sold the same items to competing purchasers at different net prices. And it argues that although its products "may all be of one grade and quality" the Commission must prove that it sold "interchangeable" items to competing purchasers at different net prices, otherwise they will not "compete", and could not properly be regarded as of "like grade and quality" within the meaning of the act.

Nothing in the statute suggests this, in a case like the present, and petitioner points to no reason or authority that supports it. The cited case of *Package Closure Corp.* v. *Seal Right Co.*, 2 Cir., 141 F. 2d 972, does not involve the point, and the other cited case, from this circuit, of *Boss Manufacturing Co.* v. *Payne Glove Co.*, 71 F. 2d 768, compared second grade cloth gloves of inferior materials and workmanship with first grade ones of superior materials and workmanship, and, naturally, held them to be of different grade and quality.

We agree with the statement set out at page 157 of the "Report of the Attorney General's National Committee to Study the Anti-Trust Laws", issued March 31, 1955, that "The 'like grade and quality' concept * * * was designed to serve as one of the necessary rough guides for separating out those commercial transactions insufficiently comparable for price regulation by the statute", and while [fol. 516] leaf springs, coil springs or piston rings may not be interchangeable and usable in all makes, models and ages of automobiles, we believe that when such items are sold to competitors in lines, as petitioner has sold them, and when, as here, a discriminatory rebate is paid upon all items in a line, the Commission may properly find that such items are "sufficiently comparable for price regulation by the statute."

The real and substantive answer is that, while leaf springs, coil action parts or piston rings for a Ford sedan of 1947 may be sufficiently different from those for a Chevrolet coach of 1950 that the former could lawfully be sold for *uniform* higher or lower prices than the latter, the question here is not related to uniform different prices for different items, nor, hence, to the like grade and quality concept, because the price discriminations here did not arise from uniform different prices for particular items, but, rather, they arose solely from the cumulative annual rebate plan, which applied to the aggregate dollar volume of all sales in a particular line to a particular purchaser in the preceding year, and, therefore, necessarily discriminated in price as to all items in the line, whether exactly alike and interchangeable or not.

While all purchasers did not handle all three of petitioner's complete lines, some of them did, and numerous ones handled two of the lines; and it was shown and found that two or more of petitioner's purchasers did business in each trade area and were, consequently, competitors therein. Through operation of the applicable cumulative annual rebate schedule, some were charged higher prices than others. This constitutes an adequate evidentiary basis to support the Commission's finding that the price discriminations may substantially injure competition.

[fol. 517] Petitioner sought to offer detailed evidence, on an item by item basis, to show that the leaf springs, coil action parts and piston rings bought by particular purchasers, doing business in the same trade area, were not uniformly for the same make, model and age of automobile, and not exactly alike and interchangeable. Objection was made and sustained on the ground of immateriality, since the parts, though in part for different makes, models and ages of automobiles, were catalogued, priced and sold, and were subject to rebate, as lines. Petitioner complains that this was prejudicial error. We believe that it was not, for all the reasons above stated.

Petitioner put on a number of its customers as witnesses, and asked them whether they had been competitively injured by its cumulative annual rebate plan, and each said that he had not been injured, and it was later

stipulated by the parties that all of petitioner's other customers would so testify, if called.

Petitioner argues, in connection with its contention that the Commission's findings were based only on nonpermissible inferences, that this uncontradicted testimony by "hardheaded practical businessmen" shows the complete absence of competitive injury to petitioner's customers by its discriminatory prices.

The answers are, first, that the Commission's findings were not based upon nonpermissible inferences, but upon proven facts and inferences properly to be drawn therefrom, and, second, a number of these witnesses were large buyers or members of groups, and thus received high rebates and were benefitted by the plan, and, third, their answers were conclusions contrary to simple mathematics, which may be illustrated by the example of two competing purchasers in a given trade area, buying petitioner's coil [fol. 518] action line. Through one or more orders in a given year, one buys $4,999 worth of those products, and the other buys $27,500 worth (or even $4,999 worth, if through a "group" whose combined purchases in the year aggregate $27,500 or more). At the end of the year, petitioner will pay the former a rebate of 5% of the aggregate dollar amount of his purchases of $4,999, but will pay the latter a rebate of 19% of the aggregate dollar amount of his (or of his "group's") purchases of $27,500 (which, in either case, of course, includes the first $4,999 of his purchases) and, thus, on the first $4,999 of the purchases, the former gets a rebate of $249.81, while the latter gets a rebate of $949.81. A witness cannot be allowed by conclusion to deny a mathematical fact, and all the testimony of these jobbers, on this score, amounts to—if they understood the facts—is that they are not objecting.

The Commission was not required to show that petitioner's rebate system has, in fact, adversely affected competition. The language—in the "effect" clause of the statute—is "*may be* substantially to lessen competition * * *." (Italics supplied). The Supreme Court has repeatedly held that Section 2(a) of the Act does not require a finding that the discriminations in price *have in fact* had an adverse effect on competition. *Corn Products Refining*

Co. v. *Federal Trade Commission*, 324 U.S. 726, 738, 742; *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 46; *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 356, 357. It has also held that "The statute is designed to reach such discriminations 'in their incipience' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect." *Corn Products* case, 324 U.S. at 738.

The proper test of injury to competition has been phrased in various ways. In the *Corn Products* case, at [fol. 519] page 738, the Court stated, following the *Standard Fashion* case, "The use of the word 'may' was not to prohibit discriminations having 'the mere possibility' of those consequences, but to reach those which would probably have the defined effect on competition." Later, in the *Corn Products* case, at page 742, the Court declared, "As we have said, the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable *possibility* that they 'may' have such an effect." (Italics supplied.) The latter passage was repeated in the *Morton Salt* case, at page 46, although with the qualification that it "is to be read also in the light of" the statement on page 738 of the *Corn Products* case (334 U.S. at 46n.).

Many of petitioner's customers testified that their business is keenly competitive and consists of the sale of thousands of items at small margins of profit, and that it is necessary to acquire goods at the lowest available price to be competitive, and those who received these rebates testified that these rebates were very important to them, and some testified that the rebates were more important than the 2% cash discount allowed by petitioner, of which all of petitioner's customers consistently took advantage. One, who ranked third or fourth in size in the city of Dallas, testified that his over-all net profit ran less than 4%.

With competition so keen, margins so small and over-all net profits so low, it was clearly open to the Commission to find that rebates denied to some purchasers (well more than half in all lines) but granted to others, ranging up to 19%, may probably result in substantial injury to competition.

While many of petitioner's customers handled numerous lines, and were not dependent for financial success upon [fol. 520] profits from petitioner's lines alone, yet the Commission, in determining the reasonable probability of injury to competition, was entitled to take account of the effect of rebates from petitioner's products upon their businesses, for the Supreme Court points out in the *Morton Salt* case, at page 49:

> "There are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. Congress intended to protect the merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock. Since a grocery stock consists of many comparatively small articles, there is no possible way to effectively protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store."

For all of the foregoing reasons, we hold that the Commission's finding that petitioner has discriminated in price between different purchasers of like grades and qualities of products and that the effect may be substantially to lessen, injure, destroy or prevent competition, was supported by substantial evidence.

Petitioner's next contention is that the Commission's order was too broad, in that it prohibits all price differences and, hence, prohibits conduct which is not unlawful, and, in consequence, denies petitioner the right to participate in lawful competition; and in that it is not, but should be, limited to the secondary level of competition, and in that it should not have included the phrase "piston rings and other related items."

This order is substantially the same as the one approved by the Supreme Court in *Federal Trade Commission* v. [fol. 521] *Ruberoid Co.*, 343 U.S. 470. It was argued in that case that the failure to include in the order provisos excepting from its prohibitions those differentials which merely make allowances for differences in cost of manu-

facture, sale and delivery, or which are made in good faith to meet an equally low price of a competitor, amounted, in effect, to a prohibition against lawful competitive conduct. But the Supreme Court rejected this contention, saying:

> "* * * we think the provisos are necessarily implicit in every order under the authority of the Act, just as if the order set them out *in extenso*. Although previous Commission orders have included these provisos, they gained no force by that inclusion. Their absence cannot preclude the seller from differentiating in price in a new competitive situation involving different circumstances where it can justify the discriminations in accordance with the statutory provisos."

Thus, the provisos which petitioner would insert are implicitly contained in the order as it stands.

The contention that the order should be limited to the secondary level of competition, overlooks the fact that the order is so limited. By its terms, the order covers only sales to those who, in fact, compete "in the resale and distribution of respondent's products." This language limits the order to the secondary line of competition.

As to petitioner's contention that the order should not have contained the phrase "piston rings and other related items", there was evidence that piston rings were sold to the same type of accounts as petitioner's other lines, and that cumulative annual rebates were paid to their purchasers in accordance with the schedule applicable to those products, and that, under the applicable schedule, rebates were paid to some, but not to other, purchasers of those products, but it is true that the Commission did not [fol. 522] segregate piston ring sales and develop the evidence respecting them with the same completeness as in the coil action and leaf spring lines. But the Commission's power is not limited to prohibiting the identical practices which have resulted in illegal price discriminations. It has the authority to prohibit acts of the same type or class as those committed in the past. This was made clear in the *Ruberoid* case by the statement, at page 473, reading:

> "In carrying out this function the Commission is not limited to prohibiting the illegal practice in the

precise form in which it is found to have existed in the past. If the Commission is to attain the objective Congress envisioned, it cannot be required to confine its roadblock to the narrow lane the transgressor has travelled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity."

We cannot say that inclusion of the questioned phrase was beyond the Commission's power in these circumstances.

Petitioner's final contentions are that the Commission erred in overruling its motion for a bill of particulars, filed in the pleading stage and renewed at the close of the Commission's evidence, and that the Commission erred in overruling petitioner's motion, made at the conclusion of the Commission's case, for an order requiring the Commission to elect, from the mass of evidence adduced, typical transactions, and areas involved, upon which it would rely, and that the action of the Commission in overruling these motions constitutes a denial of due process, within the meaning of the Fifth Amendment.

The answer is that, while the complaint was in the general terms of the statute, it was made apparent on the first day of the hearing that the Commission was relying [fol. 523] upon the price discriminatory effect of petitioner's cumulative annual rebate plan as the sole source of the price discriminations found, and petitioner admitted, and still admits, the existence of that rebate plan, and, therefore, and in these circumstances, the denial of petitioner's motions for a bill of particulars was not prejudicial and cannot be said to have constituted a denial of due process. The foregoing is equally applicable to, and conclusive upon, petitioner's contention respecting the overruling of its motion to elect.

There being no prejudicial error, the order of the Commission must be, and it is hereby, affirmed.

Affirmed.

[fol. 527] Motion for rehearing covering 8 pages filed November 19, 1956 omitted from this print.

It was denied, and nothing more by order November 29, 1956.

[fol. 529] [File endorsement omitted]

[fol. 532] IN UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[Title omitted]

PETITIONER'S MOTION TO HOLD JUDGMENT AND ORDER IN ABEYANCE--Filed November 19, 1956

In the event that the Court should see fit to overrule petitioner's Motion for Rehearing filed concurrently herewith, then Moog Industries, Inc., petitioner herein, moves and requests the Court to set aside the opinion and judgment herein for the time being and hold the same in abeyance until the entire automotive replacement parts industry [fol. 533] can be subjected to similar judgments and orders, and for grounds therefor, respectfully states:

1. That the entry of judgment at this time would subject petitioner to price discrimination and unfair competition and cause certain financial loss as well as loss of customers by permitting the competitors of petitioner to continue to use quantity discount pricing systems.

2. That the entry of judgment at this time is unjust to petitioner until all of petitioner's competitors using similar quantity discount pricing systems are subjected to similar judgments, as the quantity discount pricing system is part and parcel of the whole automotive replacement parts industry.

3. That the entry of judgment at this time denies petitioner the equal protection of the laws and defeats the very purpose of the enactment of the Robinson-Patman Amendment to the Clayton Act which is to protect the small competitor from the large competitor.

Wherefore, petitioner prays that this motion be granted.

Respectfully submitted,

Bernard Mellitz, Malcolm I. Frank, 418 Olive Street, St. Louis 2, Missouri.
James W. Cassedy, 1001 Fifteenth Street, N. W., Washington 5, D. C.
Attorneys for Petitioner.

Mellitz & Frank, Of Counsel.

[fol. 534] CERTIFICATE OF COUNSEL

The undersigned counsel for petitioner herein, certify that the foregoing motion to hold judgment and order in abeyance is filed in good faith and is believed by counsel to be meritorious.

Bernard Mellitz,

Malcolm I. Frank,

James W. Cassedy.

[fol. 535] IN UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Title omitted]

ORDER DENYING MOTIONS OF PETITIONER FOR REHEARING AND TO HOLD IN ABEYANCE ENTRY OF JUDGMENT—November 29, 1956

Motion of petitioner for a rehearing of this cause has been considered by this Court, and, It is now here Ordered that said motion be, and hereby is, denied.

Motion of petitioner, filed concurrently with motion for a rehearing, to hold in abeyance entry of judgment in this cause has also been considered by the Court, and, It is now here Ordered that the said motion be, and hereby is, denied.

[fol. 537] IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15370—September Term, 1956.

MOOG INDUSTRIES, INC., Petitioner,

v.

FEDERAL TRADE COMMISSION, Respondent.

FINAL DECREE AFFIRMING ORDER TO CEASE AND DESIST—November 29, 1956

Moog Industries, Inc., a corporation, petitioner herein, having filed in the Court on June 27, 1955, its petition to review and set aside an order to cease and desist issued on April 29, 1955, by the Federal Trade Commission, respondent herein, in a proceeding before said Commission entitled "In the Matter of Moog Industries, Inc., F. T. C. Docket No. 5723"; and the cause having been heard by the Court on briefs and oral argument; and the Court having rendered its decision on November 5, 1956, and having denied said petition to review:

Now, therefore, It is Hereby Ordered, Adjudged and Decreed that the aforesaid petition to review be, and the same is hereby dismissed, and that the said order to cease and desist be, and it hereby is, affirmed:

And It is Hereby Further Ordered, Adjudged and Decreed that within sixty days from date of issuance of certified copy of this decree to the Federal Trade Commission the petitioner file with the Federal Trade Commission a [fol. 539] report in writing setting forth in detail the manner and form in which it has complied with said order to cease and desist.

[fol. 541] IN UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[Title omitted]

ORDER STAYING ISSUANCE OF CERTIFIED COPY OF DECREE, ETC.—December 17, 1956

Upon consideration of motion of counsel for petitioner for an order withholding transmittal of the decree to the Federal Trade Commission and to stay enforcement thereof, pending application to the Supreme Court of the United States for a writ of certiorari, It is now here Ordered by this Court that said motion be granted and that issuance of certified copy of the decree in this case be, and the same is withheld for transmittal to the Federal Trade Commission for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

[fol. 543] IN UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[Title omitted]

ORDER FURTHER STAYING ISSUANCE OF CERTIFIED COPY OF DECREE, ETC.—January 14, 1957

Motion has been filed by petitioner for further extension of twenty days from January 16, 1957, in which to apply to the Supreme Court of the United States for a writ of certiorari, and counsel for respondent consenting, It is Ordered by the Court that said extension of time be, and is hereby, allowed, and if within that time there is filed with the Clerk of this Court a certificate of said Supreme Court that a petition for writ of certiorari and record have been filed, the stay of issuance and transmittal of a

certified copy of the decree of this Court to the respondent Federal Trade Commission shall continue until the final disposition of the case by the Supreme Court.

[fol. 545] Clerk's Certificate to Foregoing Transcript (omitted in printing).

[fol. 547] Supreme Court of the United States

[Title omitted]

Order Allowing Certiorari—Filed March 25, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted limited to question 4 presented by the petition for the writ which reads as follows:

> "4. Another question presented is that of the denial by the Court of Appeals of petitioner's Motion to Hold Its Judgment and Order in Abeyance or to exercise its equitable powers and original jurisdiction, until its various numerous competitors who are using similar forms of volume discounts, which are standard in the industry, can be subjected to similar judgments and orders, since only two of its many competitors have been proceeded against similarly by the Federal Trade Commission; whether such denial by the Court of Appeals is inequitable, unjust and unfair when petitioner is subjected to the judgment and decree of the Court while its numerous competitors may still continue to offer volume discounts inevitably causing petitioner to suffer loss of business and consequent financial loss; and whether under such circumstances the Court should exercise its original equitable jurisdiction to protect the rights of petitioner."

The case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accom-

panied the petition shall be treated as though filed in response to such writ.

Mr. Justice Whittaker took no part in the consideration or decision of this application.

[fol. 549] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

EXHIBITS—Filed August 31, 1956

[fol. 550] RESPONDENT'S EXHIBIT 10-B

TELEPHONE
HUMBOLDT 5 4398-4399

CABLE ADDRESS
"REGAL"

REGAL TOOL & MFG. CO., INC.
MANUFACTURERS
AUTOMOTIVE REPLACEMENT PARTS.
35-39 CENTRAL AVENUE
EAST NEWARK, NEW JERSEY

SCHEDULE OF DISCOUNTS ON REGAL COIL SUSPENSION PARTS

SCHEDULE D

All Schedule D Jobbers will be invoiced at regular distributor net prices as shown on current pink sheet. Any jobber maintaining a $500.00 stock of Regal Coil Action Parts, will be granted a 5% discount on all invoices submitted, subject to payment on 10th, prox., — less 2%.

SCHEDULE C

Any jobber who will contract to purchase and maintain a 1000 unit stock with a yearly expectancy of from $8 to $10,000.00 volume will be granted a 10% discount from each invoice, plus the usual 2%, 10th-prox. If the state-

ment is not paid promptly by the 10th of the month following date of purchase the above discounts do not apply. And it is also understood by the purchaser that his monthly purchases are to be maintained at a volume rate that will amount to a minimum average of $2,000.00 or more quarterly, any excess volume in any one quarter will be accumulative and can be applied to the following quarter to bring it up to the average minimum quarterly average of $2,000.00. If the purchaser fails to reach this minimum volume in any one quarter, this agreement of the extra 10% discount from the invoice will become void, and purchaser will revert ba k to a lower discount bracket.

SCHEDULE B

Any distributor who will contract to stock and maintain a 2000 unit stock, with an expectancy of from $18 to $20,000.00 yearly volume, will be granted a 15% discount from each invoice, and the usual 2% 10th-prox. These discounts not allowed if statement is not paid promptly by 10th of the month following date of purchase. It is also to be understood by the purchaser that his monthly purchases are to be maintained at a volume rate that will amount to an average minimum quarterly volume of $4,500.00 or more. Any excess volume in any one quarter will be accumulative and can be applied to the following quarter to bring it up to the minimum quarterly average of $4,500.00. If the purchaser fails to reach the minimum volume in any one quarter this agreement of the extra 15% discount from the invoice will become void, and purchaser will revert back to a lower discount bracket.

An extra 5% retroactive discount will be granted if yearly purchases exceed $25,000.00.

[fol. 551] RESPONDENT'S EXHIBIT 10-C

TELEPHONE
HUMBOLDT 5-4398-4399

CABLE ADDRESS
"REGAL"

REGAL TOOL & MFG. CO., INC.
MANUFACTURERS
AUTOMOTIVE REPLACEMENT PARTS
35-39 CENTRAL AVENUE
EAST NEWARK, NEW JERSEY

SCHEDULE A

Any distributor or warehousing group, operating as a warehouse and performing the functions of a warehouse by soliciting business and selling jobbers, whose yearly purchases will exceed $25,000.00 will be granted a 20% discount from each invoice, to compensate for their warehouse service. These subject to 2%-10th prox., unless otherwise contracted. All delinquent accounts are subject to loss of any previously allowed discounts.

OBSOLESCENCE POLICY

Any item declared obsolete may be returned to Regal Tool & Mfg. Co. Inc. by the original purchaser, for full credit at the original (accounts) purchase price. Freight to be prepaid to Regal Tool & Mfg. Co., Inc. by account returning any obsolete merchandise.

Respondent's Exhibit 16.

[fol. 552]

Thompson Products, Inc.

Full Line Franchise—1949

In order to qualify as a FULL LINE DISTRIBUTOR of THOMPSON PRODUCTS, INC. merchandise for the period commencing January 1, 1949 and continuing through December 31, 1949 and to establish the rights and obligations of the parties hereto, the DISTRIBUTOR and THOMPSON PRODUCTS, INC. hereinafter called THOMPSON enter into the following agreement.

FULL LINE DISTRIBUTOR ACCOUNT

THOMPSON will sell and the DISTRIBUTOR will purchase THOMPSON merchandise listed in the Thompson Catalog during the period of this franchise.

LOWEST PRICES

The DISTRIBUTOR's orders will be placed at the prices set forth in Thompson Products Distributor's Confidential Net Price List in effect at the time of shipment.

TERMS:

The DISTRIBUTOR will be extended credit terms of 2% 10th Prox. and net 30 days. No printed or other matter on any Distributor's purchase order which is either an extension of or in contradiction to any of the terms and provisions of this franchise shall have any force or effect.

All orders shall be subject to acceptance by the Thompson Products, Inc. at its home office at Cleveland, Ohio.

FREIGHT ALLOWANCE

Shipment of all lines covered by this franchise exceeding 100 lbs. net weight made from the factory will be F. O. B. factory. Full freight prepaid. Thompson reserves the right to choose the method and route of transportation employed. Parcel post and express shipments and freight shipments less than 100 lbs. F. O. B. factory transportation collect.

All branch shipments will be made F. O. B. the branch point transportation collect.

WAREHOUSE SERVICE

THOMPSON will maintain branch service, unless conditions require otherwise, in Atlanta, Ga., Boston, Mass., Chicago, Ill., Cincinnati, Ohio, Cleveland, Ohio, Dallas, Texas, Denver, Colo., Detroit, Mich., Indianapolis, Ind., Jacksonville, Fla., Kansas City, Mo., Los Angeles, Calif., Memphis, Tenn., Minneapolis, Minn., New York, N. Y., Oklahoma City, Okla., Omaha, Nebr., Philadelphia, Pa., Pittsburgh, Pa., Portland, Ore., Richmond, Va., St. Louis, Mo., San Francisco, Calif., Seattle, Wash., Toronto, Ont., and Wichita, Kans.

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Respondent's Exhibit 16.

[fol. 553]

ADVERTISING AND MERCHANDISING ASSISTANCE

THOMPSON will furnish the DISTRIBUTOR with a supply of catalogs, display material, mailing matter and other merchandising assistance to help the DISTRIBUTOR promote the sale of THOMPSON merchandise

THOMPSON JOBBER SALES

With the consent of THOMPSON, DISTRIBUTOR may designate Jobbers as THOMPSON Jobbers for the period of this Franchise No Jobber shall be entitled to be a THOMPSON Jobber until such Jobber has signed a THOMPSON Jobber's Franchise and such Franchise has been accepted in writing by THOMPSON To qualify as a THOMPSON Jobber, a Jobber must carry at all times an adequate stock of all manufactures of THOMPSON merchandise under THOMPSON S numbers averaging not less than $1[illegible] in value of inventory Either party hereto with or without cause may cancel this agreement by giving the other party 30 days written notice

The DISTRIBUTOR will receive a credit in the amount of 10% of his cost of merchandise in not to exceed 5% of his net purchases from THOMPSON during the period of this Franchise if said merchandise is sold by the DISTRIBUTOR to a THOMPSON Jobber at THOMPSON S Local Distributor net prices less 10%, or at a lower price, and if such sales are reported MONTHLY on the special monthly report forms provided for this purpose by THOMPSON, and the reports are received by THOMPSON within 30 days from the last day of the month in which the sales were made by the DISTRIBUTOR To eliminate the need for the DISTRIBUTOR to attach invoice copies to his report forms, THOMPSON reserves the right to make periodic inspection of the invoices issued by the DISTRIBUTOR to THOMPSON Jobbers

The DISTRIBUTOR agrees to supply the requirements of his authorized THOMPSON Jobbers from his stock excepting the original stock order which must be shipped from Cleveland including catalogs, price lists and advertising material

Sales to persons, firms or corporations owned in whole or in part by or managed by the DISTRIBUTOR are not Jobber Sales within the meaning of this Franchise

OBSOLESCENCE

The sales representatives of THOMPSON will be supplied with Warning Lists showing parts which THOMPSON S inventory records show are becoming slow moving After the representative has advised the DISTRIBUTOR of the items set forth on said list, the DISTRIBUTOR will have the privilege of returning such items for full credit or retaining them in stock until they appear on the Obsolescence List hereinafter described

At regular intervals the DISTRIBUTOR will receive an Obsolescence List showing parts that are being declared obsolete and will be allowed a period of four weeks to return any of these parts in his stock for full credit After the time allowed for such return has expired, these parts will not be accepted for return under any condition

In each instance freight must be prepaid by the DISTRIBUTOR

EXCHANGE POLICY

If the DISTRIBUTOR wishes to exchange merchandise, he must write the main office of THOMPSON, giving his reasons for wanting to make the exchange, accompanying the letter with a list of the parts he wishes to return Should such return be approved by THOMPSON it will be sent to a representative who will help the DISTRIBUTOR make up an order of equal size to offset the return and give the DISTRIBUTOR an official "Return Goods Tag" for making the return This tag must be used in making the return shipment Freight must be prepaid to Cleveland, Ohio and the DISTRIBUTOR S account will be credited at the current price less 10% for handling All inventory adjustments must be made prior to November first, 1949

[Tol. 554].

Respondent's Exhibit 16.

LINES

[illegible] THOMPSON [illegible] the franchise consist of the following:

[illegible]	[illegible]	[illegible] Gear Pumps & Parts
[illegible] Iron Pins	[illegible] Valve Springs	Spring Washers
[illegible] Iron Pin Bushings	[illegible] Valve Stems	Hydraulic Products
[illegible] Connecting Rods	[illegible] Valve Seat Inserts	Tie Rod Ends
[illegible] Crankshaft Gears	[illegible] Valve Guides	Arma Ball Joints
[illegible] Camshaft Gears	Bushings	[illegible] Rod Ends & Bearings
[illegible] Bushings	Independent Front Suspension Parts	Tie Rod Ends

PURCHASE BONUS

[illegible] in the part of the DISTRIBUTOR THOMPSON agrees to [illegible] rebates on his net purchases on the following schedule:

Purchases during the franchise period of	Rebate of	Purchases during the franchise period of	Rebate of
$ [illegible] to $ [illegible]	[illegible]	$ [illegible] to $ 30,000.00	7%
[illegible] to [illegible]	[illegible]	30,000.00 to 45,000.00	8%
[illegible] to [illegible]	[illegible]	45,000.00 to 60,000.00	9%
[illegible] to [illegible]	[illegible]	60,000.00 to 100,000.00	10%
[illegible] to [illegible]	[illegible]	100,000.00 to 200,000.00	11%
over $200,000.00		12%	

These rebates are not retroactive.

The rebate will be allowed to the DISTRIBUTOR at the end of each calendar quarter during the franchise period.

TERM OF FRANCHISE

This agreement shall remain in force until December 31, 1949. In view of the existing unsettled general conditions, THOMPSON reserves the right to terminate the agreement at any earlier time upon giving to the DISTRIBUTOR at least 30 days written notice but without affecting any rights or obligations of either party accrued prior to such termination.

IN WITNESS WHEREOF the parties hereto have executed this contract in duplicate, at Cleveland, Ohio.

Corporation
Partnership
Individual

DISTRIBUTOR'S NAME

By _____

Title _____

Thompson Products, Inc.

Date Signed _____, 19[illegible]

By _____

Assistant Manager Sales Division

This franchise shall not become effective until accepted by Thompson Products, Inc., Cleveland, Ohio.

Respondent's Exhibits 18-A ans 18-B

[fol. 555]

Thompson Products, Inc.

Full Line Distributor's Franchise—1950

In Order to Qualify

5723
9/15/53
Moog
Moog
18-a
ofa

LITHO IN U.S.A.

Respondent's Exhibits 18-A and 18-B.

FULL LINE DISTRIBUTOR ACCOUNT

THOMPSON will sell and the DISTRIBUTOR will purchase THOMPSON merchandise listed in the THOMPSON catalog during the period of this franchise

LOWEST PRICES

The DISTRIBUTOR's orders will be billed at the prices set forth in Thompson Products Distributor's Confidential Net Price List in effect at the time of shipment

TERMS

The DISTRIBUTOR will be extended credit terms of 2% 10th Prox and net 30 days No printed or other matter on any Distributor's purchase order which is either an extension of or in contradiction to any of the terms and provisions of this franchise shall have any force or effect

All orders shall be subject to acceptance by Thompson Products, Inc., at its home office at Cleveland, Ohio

FREIGHT ALLOWANCE

Shipment of all lines covered by this franchise exceeding 100 lbs net weight made from the factory at Cleveland, Ohio, will be made F O B factory, with a freight allowance equivalent to the lowest freight rates in effect December 31, 1948 Thompson reserves the right to choose the method and route of transportation employed Parcel post, express shipments, and freight shipments less than 100 lbs F O B factory transportation collect All branch shipments will be made F O B the branch point transportation collect

WAREHOUSE SERVICE

THOMPSON will maintain branch service, unless conditions require otherwise, in Atlanta, Ga., Boston, Mass., Chicago, Ill., Cincinnati, Ohio, Cleveland, Ohio, Dallas, Texas, Denver, Colo., Detroit, Mich., Houston, Texas, Indianapolis, Ind., Jacksonville, Fla., Kansas City, Mo., Los Angeles, Calif., Memphis, Tenn., Minneapolis, Minn., New York, N Y., Oklahoma City, Okla., Omaha, Nebr., Philadelphia, Pa., Pittsburgh, Pa., Portland, Ore., Richmond, Va., St Louis, Mo., San Francisco, Calif., Seattle, Wash., and Toronto, Ont

ADVERTISING AND MERCHANDISING ASSISTANCE

THOMPSON will furnish the DISTRIBUTOR with a supply of catalogs, display material, mailing matter and other merchandising assistance to help the DISTRIBUTOR promote the sale of THOMPSON merchandise

OBSOLESCENCE AND EXCHANGE POLICY

At regular intervals, the DISTRIBUTOR will receive an "Obsolescence List" showing parts that are being declared obsolete and will be allowed a period of four weeks to return any

Respondent's Exhibits 18-A and 18-B.

[fol. 557]

[*Attachment to the Thompson Distributor Franchise cover the Distributor rates to Authorized Thompson Jobbers.*]

In regards to sales to Thompson Jobbers, the Thompson Distributor must be in a position to serve the Jobber's requirements on the Thompson Lines enumerated below

LINES

The THOMPSON lines covered by this franchise consist of the following

Pistons	*Valves*	*Water Pumps & Parts*
Piston Pins	*Valve Guides*	*Spring Washers*
Piston Pin Bushings	*Valve Springs*	*Hame Products*
Connecting Rods	*Valve Stem Keys*	*Tie Rod Sockets*
Cylinder Sleeves	*Valve Seat Inserts*	*Body Bolt Sets*
Cylinder Sleeve Assemblies	*Rotocap*	*Crankpin Bolts & Bushings*
Engine Bearings	*Independent Front Wheel Suspension Parts*	
	Oil Attachment Deals	

With the consent of Thompson, Distributor may designate Jobbers as Thompson Jobbers for the period of this Franchise No Jobber shall be entitled to be a Thompson Jobber until such Jobber has signed a Thompson Jobber's Franchise and such Franchise has been accepted in writing by Thompson To qualify as a Thompson Jobber a Jobber must carry at all times an adequate stock of all lines of Thompson merchandise under Thompson's numbers totalling not less than $1,000 00 in value of inventory Furthermore, the Thompson Jobber's annual purchases of Thompson Products must total a minimum of $1,000 00 to entitle him to renewal of Thompson Jobber Franchise for ensuing year Either party hereto with or without cause may cancel this agreement by giving the other party 30 days notice

The DISTRIBUTOR will receive a credit in the amount of 10% of his cost of merchandise on not to exceed 50% of his net purchases from THOMPSON during the period of this Franchise If said merchandise is sold by the DISTRIBUTOR to a THOMPSON Jobber at Thompson's Local Distributor net prices less 10% or at a lower price, and if such sales are reported MONTHLY on the special monthly report forms provided for this purpose by THOMPSON and the reports are received by THOMPSON within 30 days from the last day of the month in which the sales were made by the DISTRIBUTOR To eliminate the need for the DISTRIBUTOR to attach invoice copies to his report forms, THOMPSON reserves the right to make periodic inspections of the invoices issued by the DISTRIBUTOR to THOMPSON Jobbers

The DISTRIBUTOR agrees to supply the requirements of his authorized THOMPSON Jobber from his stock excepting the original stock order, and one freight shipment per month, if so desired, which may be shipped from Cleveland, Ohio On these shipments the regular Thompson freight allowance policy will apply Distributor will also furnish catalogs, price lists and regular Thompson advertising material to the Thompson Jobber

Returns of items declared Obsolete by Thompson shall be returned by the Jobber direct to Thompson at Cleveland, Ohio, via freight prepaid Credit will be issued to Distributor by Thompson, and in turn to Jobber by Distributor, in line with our regular Obsolescence Policy

Sales to persons, firms or corporations owned in whole or in part by, or managed by the DISTRIBUTOR, are not Jobber Sales within the meaning of this Franchise

5723 18-B

Moog 2nd

9/15/53 Moog

UTHO IN U.S.A.

[fol. 558]

Respondent's Exhibits 18-A and 18-B.

of these parts on this stock for full credit. After the time allowed for such return has expired these parts will not be accepted for return under any condition.

If the DISTRIBUTOR wishes to exchange slow moving merchandise for more popular items, he must write the main office of THOMPSON giving his reasons for wanting to make the exchange, accompanying the letter with a list of the parts he wishes to return. Should such return be approved by THOMPSON it will be sent to a representative who will help the DISTRIBUTOR make up an order of equal size to offset the return, and give the DISTRIBUTOR an official Return Goods Tag for making the return. This tag must be used on making any return shipment. Freight must be prepaid to Cleveland, Ohio, and the DISTRIBUTOR's account will be credited at the current price less 10% for handling. All inventory adjustments must be made between March 1, and October 31, 1950.

Finished pistons are not returnable for credit at any time. Any necessary refinishing charges on returned goods will be deducted from the value of credit memorandum.

SPOT BUYING

Spot Buying by DISTRIBUTOR of all or any part of the products covered by this FRANCHISE voids the obsolescence protection on the product line or lines of which such product or products are a part.

LINES

The THOMPSON lines covered by this franchise consist of the following:

Pistons
Piston Pins
Piston Pin Bushings
Connecting Rods
Cylinder Sleeves
Cylinder Sleeve Assemblies
Engine Bearings
Valves
Valve Guides
Valve Springs
Valve Stem Keys
Valve Seat Inserts
Rotocaps
Independent Front Wheel Suspension Parts
All Assortment Deals
Water Pumps & Parts
Spring Shackles
Harris Products
Tie Rod Sockets
King Bolt Sets
Chassis Bolts & Bushings

PURCHASE BONUS

In consideration of this support on the part of the DISTRIBUTOR, THOMPSON agrees to allow him an additional rebate, on his net purchases, on the following schedule:

Purchases during the franchise period of:	Rebate of:	Purchases during the franchise period of:	Rebate of:
$ 4,000 to $ 7,000	2%	$ 30,000 to $ 36,000	7%
7,000 to 12,000	3%	36,000 to 48,000	8%
12,000 to 18,000	4%	48,000 to 60,000	9%
18,000 to 24,000	5%	60,000 to 100,000	10%
24,000 to 30,000	6%	100,000 to 200,000	11%
Over $200,000		12%	

The rebate will be allowed to the DISTRIBUTOR in the form of a merchandise credit as soon as possible after the end of the calendar year of 1950. If the DISTRIBUTOR ceases to stock and represent the THOMPSON LINE prior to December 31st, 1950, all benefits for the total year under this plan are automatically cancelled.

[fol. 559] **Respondent's Exhibits 18-A and 18-B.**

TERM OF FRANCHISE

The agreement shall remain in force until December 31st, 1950. THOMPSON reserves the right to terminate the agreement at any earlier time upon giving to the DISTRIBUTOR at least 30 days notice but without affecting any rights or obligations of either party accrued prior to such termination.

IN WITNESS WHEREOF the parties hereto have executed this contract in duplicate, at Cleveland, Ohio.

_____ {Corporation / Partnership / Individual}
(DISTRIBUTOR'S NAME)

By _____
(Show Title)

Thompson Products, Inc.

_____ 1950 By _____
Date Signed — General Manager, Service Division

This franchise shall not become effective until accepted by Thompson Products, Inc., Cleveland, Ohio.

Respondent's Exhibit 25-A.

[fol. 560]

McQUAY-NORRIS MANUFACTURING CO.

5/23 25-a Moog 2nd 9/15/53 Moog

By CPA

EARNED PREMIUM DISCOUNT
DISTRIBUTOR SCHEDULE

1. Superseding past schedules, effective January 1st, 1946, and for the calendar year, for special effort and cooperation for volume purchases, McQuay-Norris will pay an Earned Premium Discount to their Distributors on the following scale:—

Piston Rings and Piston Expanders

RETROACTIVE

Net Purchases	*Rate*
$3,000—$4,000	5%
4,000— 5,000	7%
5,000— 6,000	9%
6,000— 7,000	10%
7,000— 8,000	11%
8,000— 9,000	12%
9,000—10,000	13%
10,000—12,000	14%
12,000—15,000	15%
15,000—18,000	16%
18,000—21,000	17%
21,000—25,000	18%
25,000—30,000	19%
30,000—Over	20%

All other Products—Except Piston Rings and Piston Expanders*

NON-RETROACTIVE

Net Purchases	*Rate*
$5,000—$10,000	2%
10,000— 15,000	3%
15,000— 20,000	4%
20,000— 25,000	5%
25,000— 35,000	6%
35,000— 45,000	7%
45,000— 55,000	8%
55,000— 65,000	9%
65,000— Over	10%

*Except on items in Paragraph 2.

2. Purchases of Mechanical Equipment—Compression-Vacuum Testers, Valve Guide Tool, Bearing Oil Leak Tester, Piston Resizing Machine, Centromatic Cylinder Gauge, etc.,—will not be included in figuring Earned Premium Discount.

3. The Earned Premium Discount; as set forth above, is based on the complete calendar year. If the distributor ceases to handle the McQuay-Norris line prior to December 31st of that year, all benefits for the total year under this plan are automatically cancelled, and any Earned Premium Discount which has been paid by McQuay-Norris to the distributor is to be refunded within thirty days.

4. Payment will be made by check semi-annually—in July and January. In computing the Earned Premium Discount on Piston Rings and Piston Expanders, the July payment shall be a sum equal to the total net purchases during the preceding six months or the portion thereof, during which this Agreement is in effect, multiplied by the Earned Premium Discount rate applicable to the *net* annual purchases of the distributor as estimated by the manufacturer.

The January payment shall be a sum equal to the total net purchases for the preceding twelve calendar months, or the portion thereof during which this Agreement has been in effect, multiplied by the Earned Premium rate applicable to the total net purchases for such twelve months (or the total net purchases for one year as estimated by the manufacturer, if this Agreement has been in effect for less than a year,) less the July Earned Premium Discount payment made during such year.

Distributor .....

Signed by .....

Jan. 2, 1946.
(1 Copy to be retained for your files.)
(1 Copy to be sent to St. Louis Office as receipt.)

In the

United States Court of Appeals

For the Seventh Circuit

No. 11526

C. E. NIEHOFF & CO.,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Petition for Review of Order of the Federal Trade Commission.

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1 UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION, SS:

In the matter of
C. E. Niehoff & Co. } Docket 5768.

I, Robert M. Parrish, Secretary of the Federal Trade Commission, and official custodian of its records, do hereby certify that transmitted herewith is a full, true, and complete transcript of proceedings had before the Federal Trade Commission in the above-entitled matter in five parts, as follows:

Part 1—Pleadings
Part 2—Testimony—Pages 1 to 859, incl.
Part 3—Testimony—Pages 860 to 1746, incl.
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Part 4—Exhibits—Documentary—Commission 1 to 97, incl.

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2-1
5768-1

except sealed exhibits, Commission Exhibits 47(A-E), 48, 92 (A-B), 93(A-D), and Respondent Exhibits 3, 11(A-B), 12, 13, 14 and 15, certified separately.

That this transcript is certified to the United States Court of Appeals for the Seventh Circuit, pursuant to the filing in said Court of a petition for review of a Final Order (affirming Hearing Examiner's Initial Decision as modified, and order to cease and desist) and Order to file Report of Compliance, issued by the Federal Trade Commission May 17, 1955, in the above-indicated proceeding.

In witness whereof I hereunto subscribe my name, and affix the seal of the said Federal Trade Commission, at its office in the City of Washington, D. C., this 29th day of August, A.D. 1955.

(Seal)

/s/ Robert M. Parrish,
Secretary.

2 UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

In the matter of
C. E. Niehoff & Co., a corporation. } Docket No. 5768.

COMPLAINT.

The Federal Trade Commission having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described, since June 19, 1936, has violated and is now violating the provisions of Subsection (a), Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C., Title 15, Section 13), hereby issues its complaint, stating its charges with respect thereto as follows:

Paragraph One: Respondent C. E. Niehoff & Co. is a corporation organized and doing business under and by virtue of the laws of the State of Illinois, with principal office and place of business located at 4925 Lawrence Ave., Chicago, Illinois.

Paragraph Two: Respondent is now, and for several years last past has been, engaged in the business of the manufacture, sale and distribution of automotive products and supplies to different purchasers of the same located in the various States of the United States and in the District of Columbia. Said products and supplies are sold by the respondent for use, consumption or resale within the United States and the District of Columbia, and respondent causes said products and supplies so sold to be shipped and transported from the State or States of location of its places of business to the purchasers thereof located in States other than the State or States wherein said shipment or transportation originated. Respondent maintains, and at all times mentioned herein has maintained, a course of trade and commerce in said products and supplies among and between the States of the United States and in the District of Columbia.

Paragraph Three: Respondent, in the course and conduct of its business as aforesaid, is now, and since June 19, 1936, has been, engaged in active and substantial com-

petition with other corporations, partnerships, firms, and individuals manufacturing, selling, and distributing comparable automotive products and supplies in commerce to purchasers of the same in manner and method, and for purposes as aforestated. Many of said purchasers and many of the aforesaid purchasers from the respondent are competitively engaged each with the other.

3 Paragraph Four: Respondent, in the course and conduct of its business as aforesaid, is now, and since June 19, 1936, has been, directly or indirectly discriminating in price between the aforesaid different purchasers of its said automotive products and supplies of like grade and quality sold and distributed in manner and method and for purposes as aforestated, by selling said products and supplies at higher and less favorable prices to numerous small businessmen purchasers than said products and supplies are sold to various larger purchasers, some of which are competitively engaged with some of said less-favored purchasers and with some of said purchasers from respondent's competitors.

Paragraph Five: The effect of respondent's aforesaid discriminations in price between the said different purchasers of its said automotive products and supplies of like grade and quality sold in manner and method and for purposes as aforestated, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and the aforesaid favored purchasers are engaged, or to injure, destroy, or prevent competition with said respondent, said favored purchasers, or with customers of either of them.

Paragraph Six: The aforesaid acts and practices of respondent constitute violations of the provisions of Subsection (a) of Section 2 of the Clayton Act (U.S.C., Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936.

Wherefore, The Premises Considered, the Federal Trade Commission on this 1st day of May, A. D., 1950, issues its complaint against said respondent.

Notice.

Notice is hereby given you, C. E. Niehoff & Co., respondent herein, that the 16th day of June, A. D., 1950, at 2 o'clock in the afternoon, is hereby fixed as the time, and the offices of the Federal Trade Commission in the

City of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you will have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violations of the law charged in the complaint.

You are notified and required, on or before the twentieth day after service upon you of this complaint, to file with the Commission an answer to the complaint. If answer is filed, and if your appearance at the place and on the date above stated be not required, due notice to that effect will be given you. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule VIII) provide as follows:

4 In case of desire to contest the proceeding the respondent shall, within twenty (20) days from the service of the complaint, file with the Commission an answer to the complaint. Such answer shall contain a concise statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state.

* * * * *

Failure of the respondent to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission, without further notice to respondent, to proceed in regular course on the charges set forth in the complaint.

If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent admits all the material allegations of fact charged in the complaint to be true. Such answer will constitute a waiver of any hearing as to the facts alleged in the complaint and the Commission may proceed to make its findings as to the facts and conclusions based upon such answer and enter its order disposing of the matter without any intervening procedure. The respondent may, however, reserve in such answer the right to other intervening procedure, including a hearing upon proposed conclusions of fact or law, in which event he may

in accordance with Rule XXIV file his brief directed solely to the questions reserved.

Upon request made within fifteen (15) days after service of the complaint, any party shall be afforded opportunity for the submission of facts, arguments, offers of settlement or proposals of adjustment where time, the nature of the proceeding and the public interest permit, and due consideration shall be given to the same. Such submission shall be in writing. The filing of such request shall not operate to delay the filing of the answer.

5 In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D. C., this 1st day of May, A. D., 1950.

By the Commission.

/s/ D. C. Daniel,
Secretary.

(Seal)

21 UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

In the matter of
C. E. Niehoff & Co., a corporation. } Docket No. 5768.

RULING REFUSING RESPONDENT'S EXHIBITS 26, 27 AND 28 ADMISSION INTO THE RECORD AND STRIKING TESTIMONY ANENT THERETO.

At the last hearing in this proceeding held November 7, 1951, respondent, through its president, identified and explained certain exhibits, numbered for identification purposes as Respondent's Exhibits 26, 27 and 28, which purport to show respondent's current actual cost of doing business through or with three "factory representatives" in the New England states, metropolitan New York City and the West Coast, as contrasted with respondent's estimate of what it would cost it to solicit and do business in these areas through its own salesmen and its own facilities. Various objections were made on the record by counsel supporting the complaint, on all of which ruling was reserved. This evidence was tendered as a cost justification defense under the first proviso of Section 2(a) of the Clayton Act.

From an examination of the record herein so far made,

the hearing examiner is of the opinion that there is no substantial evidence of competition between these "factory representatives" to whom respondent in these three areas sells its products at 20 or 21% off list, and purchasers at any other price from respondent. There is at most an inference of competition between several direct buying warehouse distributors in the West Coast area and respondent's factory representative there but the testimony
22 from which the inference must stem is vague, indefinite and incomplete. There being no such satisfactory evidence, there is likewise no evidence of the required effect thereon, nor, as to these three "factory representatives", whose commercial relations with respondent are completely different from respondent's distribution throughout the rest of the nation, is there any present substantial evidence of violation of the statute's proscribed effects at respondent's level in commerce.

Respondent's attempt therefore to justify, under the first proviso of Section 2(a) of the Clayton Act, a price differential, which has not, in the examiner's opinion, yet been developed as to these three situations into a statutory discrimination by substantial evidence, is anticipatory and unnecessary at this time.

It is therefore unnecessary at this time to rule on the objections made to this evidence, one of which was that the first proviso of Section 2(a) of the Clayton Act does not admit of a cost justification by estimate or opinion of what some method of operation may or will cost, but requires a showing of what different methods actually did cost. No opinion or ruling is expressed or made on this point at this time. When and if evidence now absent, as pointed out above, is offered and received into this record, respondent will be given full opportunity to present again the tendered exhibits and testimony and any other evidence tending to rebut such evidence offered by counsel for the complaint. Accordingly,

It Is Ordered that Respondent's Exhibits 26, 27 and 28 be and they are rejected and that all testimony of the witness C. E. Niehoff in relation thereto be stricken from the record. This ruling will be copied into the record at the next hearing in this proceeding. Exceptions of all counsel to this ruling are expressly noted and preserved.

/s/ Frank Hier,
Hearing Examiner.

November 15, 1951.

25 UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

In the matter of
C. E. Niehoff & Co.,
a corporation. } Docket No. 5768

ORDER DIRECTING FILING OF AMENDED ANSWER.

(Received June 20, 1952.)

Counsel for respondent having requested on the record permission to file amended answer setting up additional defense to that contained in its original answer, and it appearing to the undersigned Hearing Examiner that such request should be granted,

It Is Ordered that amended answer tendered by respondent be filed and treated as the answer in this proceeding.

/s/ Frank Hier,
Hearing Examiner.

June 19, 1952.

26 UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

In the matter of
C. E. Niehoff & Co.,
a corporation. } Docket No. 5768

AMENDED ANSWER OF RESPONDENT, C. E. NIEHOFF & CO.

(Received June 20, 1952.)

The respondent, C. E. Niehoff & Co., by James J. Magner, Whitney Campbell and Charles R. Sprowl, its attorneys, makes the following answer to the complaint of the Federal Trade Commission, dated the 1st day of May, 1950:

Paragraph One: In answer to Paragraph One of said complaint respondent admits that it is a corporation organized and doing business under and by virtue of the

laws of the State of Illinois, and that its principal office and place of business is located at 4925 Lawrence Avenue, Chicago, Illinois.

Paragraph Two: In answer to Paragraph Two of said complaint respondent admits that it is now, and for several years last past has been, engaged in the business of the manufacture, sale and distribution of automotive products and supplies to different purchasers of the same
27 located in the various states of the United States and in the District of Columbia.

Respondent admits that said products and supplies are sold by the respondent for use, consumption or resale within the United States and the District of Columbia, and that respondent causes said products and supplies so sold to be shipped and transported from its place of business at Chicago, Illinois, to the purchasers thereof located in Illinois and in states other than Illinois.

Respondent admits that it maintains a course of trade and commerce in said products and supplies among and between the States of the United States and in the District of Columbia.

Paragraph Three: In answer to Paragraph Three of said complaint, respondent admits that in the course and conduct of its business it is now, and since June 19, 1936, has been, engaged in active and substantial competition with other corporations, partnerships, firms, and individuals manufacturing, selling, and distributing automotive products and supplies in commerce to purchasers of the same.

Respondent denies that many of the purchasers from the respondent are competitively engaged with each other, and respondent alleges that virtually all of its cus-
28 tomers resell said products and supplies in local or intrastate commerce only and that few of such customers are in competition with each other and that those of such customers who are in competition with each other are in almost every instance located and conduct their business wholly within the same state.

Except as thus admitted, respondent denies all the allegations of Paragraph Three of said complaint.

Paragraph Four: Respondent denies that in the course and conduct of its business it is now, or since June 19, 1936, has been, directly or indirectly discriminating in price between different purchasers of its automotive products and supplies of like grade and quality, by selling

said products and supplies at higher and less favorable prices to numerous small businessmen purchasers than said products and supplies are sold to various larger purchasers.

In further answer to Paragraph Four repondent states that substantially all of its sales are made to its jobbers and distributors, that under its pricing program it makes available to all of its jobbers and distributors price differentials on certain but not all of its products, that such differentials are based on the quantity of products purchased by a jobber or distributor in each calendar year, that such differentials range from 5% to approximately 17% dependent upon the volume of products purchased in each calendar year. Respondent further states that such differentials are openly available to all jobbers and distributors of respondent and are not discriminatory.

In further answer to Paragraph Four respondent states that such differentials make only due allowance for differences in the cost of sale or delivery resulting from the differing methods or quantities in which such products and supplies are to such customers sold or delivered.

In further answer to paragraph Four respondent states that all such price differentials as were granted by it as aforesaid, were granted in good faith to meet an equally low price of a competitor, or were granted in good faith to meet the equally low prices of various of its competitors.

Respondent denies all the allegations of Paragraph Four of said complaint.

Paragraph Five: Respondent denies all the allegations in Paragraph Five of the complaint.

Paragraph Six: Respondent denies all the allegations in Paragraph Six of the complaint.

Wherefore, the respondent, C. E. Niehoff & Co., prays that the complaint against it be dismissed.

C. E. Niehoff & Co.,
By its attorneys,
/s/ James J. Magner,
/s/ Whitney Campbell,
/s/ Charles R. Sprowl.

James J. Magner,
Whitney Campbell,
Charles R. Sprowl,
134 South LaSalle Street,
Chicago 3, Illinois.

54 UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

In the matter of C. E. Niehoff & Co., a corporation.	Docket No. 5768

ORDER ADMITTING IN EVIDENCE RESPONDENT'S EXHIBIT 73 AND REJECTING RESPONDENT'S EXHIBITS 74, 75 and 76.

(Received Jan. 15, 1953.)

At the last hearing in this proceeding, ruling was reserved on the admission in evidence of Exhibits 73-76 tendered by respondent. Briefs have been filed on both sides and carefully considered by the hearing examiner. Similar exhibits in a companion case E. Edelmann & Company, Docket No. 5770, were excluded by the examiner for reasons set out in his memorandum opinion of March 24, 1952. Those reasons still appear valid to the examiner.

Counsel for respondent here, however, urges admission on a different or additional ground—namely, the Federal shop book rule—USCA Title 28, Section 1732, which provides:

(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business", as used in this section, includes business, profession, occupation, and calling of every kind.

55 (b) If any business, institution, member of a profession or calling, or any department or agency of

government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless held in a custodial or fiduciary capacity or unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This subsection shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence.

From an examination of the case law cited and found, the examiner is of the opinion that the statute as recently amended does not go so far as to command the admission of such evidence as is tendered here. These surveys are compiled by the respective trade association's skilled employees from questionnaires mailed to and answered by such members of the association who care to do so. This task is and has been regularly performed by such employees under a duty to their employer to do so accurately. But the basic data—the information on the questionnaires is not a "product of routine procedure, whose accuracy is substantially guaranteed by the fact that the record (the filled in questionnaires) is an automatic reflection of observations" (Interpolation supplied), *N.Y. Life Ins. Co.* v. *Taylor*, 147 F. 2d, 297; nor did the "habit and system of making such a record (filling in the questionnaires) with regularity (once a year) call for accuracy through the interest and purpose of the entrant"; nor is the filling in of these questionnaires so regular a course of business transactions that "an error or mis-statement is almost certain to be detected and the result disputed by those

dealing with the entrant" (Interpolations supplied), 5 Wigmore 3rd Ed. Sec. 1522. Here the questionnaires were filled out only once a year—not a regular nor routine task by the automotive jobber and the compiler of the survey had no way to detect errors or question statements beyond checking computations. The answering of such questionnaires could not be correctly called routine or regular, or automatic. Furthermore, although these questionnaires were mailed to the entire membership, answering them was entirely voluntary and only a small percentage of the membership chose to do so. (125-175 out of 1,100 or 1,200 in 1951, Tr. 1571.)

Lastly, and of perhaps more importance, the entrant, the automotive jobber, was under no duty to the association and there was no risk of censure from a superior for inaccuracies, as in the case of a bookkeeper. "(the statute) was not intended to permit the receipt in evidence of entries based on voluntary hearsay statements made by third parties not engaged in the business or under any duty in relation thereto", *Johnson* v. *Lutz*, 170 N.E. 517.

Respondent's counsel urges that exclusionary rules applicable to criminal and civil jury cases should not and do not govern admissibility of evidence in administrative proceedings. Although this is the general statement, nevertheless the Administrative Procedure Act commands that each party shall have the right "to conduct such cross-examination as may be required for a full and true disclosure of the facts." Such cross-examination is impossible here for the reasons set out by the examiner in his opinion of March 24, 1952, in Docket No. 5770. Without such cross-examination the examiner, who must initially find the facts, would be unable, not merely to determine what weight to give these surveys, but to determine what to do with them at all and whether to give them any weight at all. Without such cross-examination, they do not constitute the "reliable, probative and substantial evidence" required by the Administrative Procedure Act. Accordingly,

It Is Ordered that respondent's Exhibit 73 be admitted merely to show what the questionnaire was, and that respondent's Exhibits 74, 75 and 76 be rejected.

/s/ Frank Hier.
Hearing Examiner.

January 14, 1953.

Room 802-A, New Postoffice Building,
Chicago, Illinois,
Wednesday, September 13, 1950.

Met, pursuant to notice, at 10:00 o'clock a.m.

Before: Abner E. Lipscomb, Trial Examiner.

Appearances:

Eldon P. Schrup and James E. Corkey, Counsel supporting the Complaint.

Whitney Campbell, Attorney for the Respondent (134 South LaSalle Street, Chicago, Illinois).

* * * * *

Direct Examination.

By Mr. Corkey:

Q. Will you give your full name to the reporter, Mr. Niehoff?

A. Conrad E. Niehoff.

Q. And your home address?

A. 5510 Sheridan Road.

Q. And your business adress?

A. 4925 West Lawrence Avenue, Chicago, Illinois.

Q. Are you the president of the respondent in this proceeding?

A. I am, yes, sir.

Q. For how long have you been connected with this company, Mr. Niehoff?

A. For its entire life, about 28 years.

Q. That is since about 1923?

A. That is right, sir.

Q. And have you always had the position as president?

A. Yes, sir.

Q. Mr. Niehoff, as specification 1 of this subpoena asks for the original and two copies of all price lists of C. E. Niehoff & Co. issued or effective during the calendar years 1947, 1948, and 1949. Do you have those available?

A. Yes, sir.

Mr. Corkey: May we take a short recess, Your Honor?

Trial Examiner Lipscomb: Very well.

(A short recess was taken.)

Trial Examiner Lipscomb: The hearing will be in order.

Mr. Corkey: I am going to ask the reporter if he will mark these for identification, being all the documents which Mr. Niehoff has tendered in response to the demand in specification 1 of the subpoena.

Trial Examiner Lipscomb: Let the instruments be marked in order.

(The papers referred were marked Commission's Exhibits 1, 2, 3, 4, 5, 6-A through D, 7-A through C, 8-A through D, 9-A through C, 10-A through D, 11-A through D, 12-A through B, 13-A through D, 14-A through C, and 15-A through C, for identification.)

By Mr. Corkey:

Q. Mr. Niehoff, I show you these documents which have been marked Commission's Exhibits 1 through 5 for identification, and ask you whether or not these are all of the catalogs of C. E. Niehoff & Co. issued on or effective during the calendar years 1947, '48 and '49?

A. I believe they are, sir.

Q. Isn't it true, Mr. Niehoff, that Catalog No. 16 was also effective during this period but is not now available?

A. Yes, Catalog No. 16, hydraulic brake parts, is not available.

Q. No copies existed in your files?

A. That is right.

Q. Mr. Niehoff, these catalogs divide the lines of the Niehoff Company into two general parts, do they not?

A. Yes, they do, although the catalog also represents our equipment line.

Q. Mr. Niehoff, is the equipment line in the catalog numbered Commission's Exhibit 1 for identification?

A. Yes, it is in here.

Q. In other words, Mr. Niehoff, Commission's Exhibit 1 for identification includes the ignition line and the equipment line?

A. That is correct.

Q. Commission's Exhibit No. 2 for identification, Mr. Niehoff, is what type of catalog?

A. Supplementary catalog for Ford parts only.

Q. Does that mean Ford ignition parts?

A. Ignition and testing equipment also.

Q. And Commision's Exhibit 3 for identification, Mr. Niehoff, is again an ignition catalog and equipment catalog?

A. Yes, it is.

Q. If I understand you correctly, Mr. Niehoff, Commission's Exhibits 1 and 2 for identification superseded Commission's Exhibit 3 for identification.

A. Yes, it did.

Q. Can you tell us approximately the dates during which Commission's Exhibit 3 for identification represented the Niehoff catalog with respect to ignition parts and equipment?

A. Yes, it was published in 1947 and '48 principally, though I think our catalog succeeding this was issued in the latter part of 1948. This primarily covers 1947.

Q. Then Commission's Exhibit 1 for identification was issued some time late in 1948?

A. I believe it was 1948.

Q. I show you now those documents which have been identified as Commission's Exhibits 4 and 5 for identification, and ask you to tell us what those catalogs are.

A. This is a hydraulic parts catalog, and was issued, I believe, in 1948.

Q. You are making reference to the document marked Commission's Exhibit 4 for identification. And can you tell us when this document marked Commission's Exhibit No. 5 for identification was the effective catalog of the Niehoff Company?

A. It was prior to the issuance of Catalog 16, which I think dates back quite a bit. I wouldn't be able to tell you as to the date of publication, but it might go back prior to 1945.

Q. It was the effective catalog during 1947 and part of '48; is that right?

A. You are asking me a question I wouldn't be able to answer specifically, because after No. 15, No. 16 catalog followed, and I imagine the No. 16 catalog was issued some time in '47. It may have been very late in the year.

Q. That is the catalog that is not now available?

A. That is right, sir.

Q. And it dealt with hydraulic brake parts?

A. Yes, sir, hydraulic parts.

Q. In many respects, I assume, Catalog 16 is similar to Catalog No. 17?

A. They are almost identical, except for changes in the specifications, and maybe the addition of a few items.

Mr. Corkey: May we go off the record just a moment?

Trial Examiner Lipscomb: Off the record.

(Discussion off the record.)

Trial Examiner Lipscomb: On the record.

By Mr. Corkey:

Q. Mr. Niehoff, making reference again to this document which has been marked Commission's Exhibit 4 for identification, will you tell us when that was published?

A. I would like to have the sales manager verify this. This was published in May of this year, I believe, the No. 17 catalog on hydraulic parts.

Mr. Geyer: Yes, we sent the first copies out June 1 to the trade.

By Mr. Corkey:

Q. This catalog, Mr. Niehoff, superseded the Catalog No. 16, which you did not have available?

9 A. That is right. It also seems to me there should be some catalog around, but I don't know where we could find it.

Q. Mr. Niehoff, I show you these documents which have been marked as Commission's Exhibits 6 through 15 series, and ask if you can tell us what these documents are.

A. These are price schedules, and they are classified as list, dealer, wholesale confidential, and jobber.

Q. You took these price lists from your files of the Niehoff Company?

A. Yes, we did.

Q. As the effective price lists issued by Niehoff during the years 1947, '48 and '49?

A. That is correct, sir.

Mr. Corkey: If your Honor please, if there are no objections we will offer in evidence these catalogs and price lists.

Mr. Campbell: No objection.

Trial Examiner Lipscomb: They will be received in evidence and marked as Commission's Exhibits 1 through 15. Commission's Exhibits 6 through 15 are series exhibits.

10 (The papers referred to, heretofore marked for identification Commission's Exhibits 1, 2, 3, 4, 5, 6-A through D, 7-A through C, 8-A through D, 9-A through C, 10-A through D, 11-A through D, 12-A through B, 13-A through D, 14-A through C and 15-A through C, were received in evidence.)

Mr. Corkey: Mr. Niehoff, I now ask you for the original and true copies of all contract forms used by C. E. Niehoff & Company in connection with the sale of goods during the calendar years '47, '48, and '49, being demanded in specification 2 of the subpoena.

The Witness: Right here, sir.

Mr. Corkey: Off the record.

Trial Examiner Lipscomb: Off the record.

(Discussion off the record.)

Trial Examiner Lipscomb: On the record.

Mr. Corkey: If your Honor please, I will ask the reporter to mark these documents which have been tendered in response to specification 2 of the subpoena.

Trial Examiner Lipscomb: Let the instruments be marked for identification.

(The papers referred to were marked Commission's Exhibits 16 through 21 for identification.)

By Mr. Corkey:

Q. Mr. Niehoff, I show you this document which has been marked Commission's Exhibit 16 for identification, and ask you whether or not that is a Niehoff jobber agreement used during the calendar year 1949?

A. Yes, it is, sir.

Q. Mr. Niehoff, in the lower left hand corner of this exhibit under the word "jobber" there is a darker area, which I presume means that this was blanked out.

A. It does, yes.

Q. That had the name of a jobber with whom Niehoff had the particular agreement?

A. I believe so, yes.

Q. And the darker area, Mr. Niehoff, starting at the third line of print, also represents an area where the particular jobber's name had appeared?

A. Yes, sir.

Q. Mr. Niehoff, I also show you Commission's Exhibits 17 and 18 for identification, and ask you whether or not those represent Niehoff jobber agreements effective during the years 1947 and 1948?

A. Yes, sir, they do.

Q. And again the darker areas on those exhibits are meant to conceal the names of the particular jobbers with whom these agreements had been entered into?

Mr. Campbell: I object.

Mr. Corkey: I am sorry.

12 Mr. Campbell: Your Honor, we didn't have available just the ordinary forms for some of these prior years, and we were asked to bring in our typical contracts and for that purpose the names of the particular jobbers were blanked out.

Mr. Corkey: All right.

By Mr. Corkey:

Q. Mr. Niehoff, having reference now to the Commission's Exhibit 18 for identification, there is a paragraph about two-thirds of the way down the page which appears to have been "X'd" out by a typewriter. Can you explain that?

A. Yes, that paragraph was eliminated from all contracts issued in those years.

Q. You mean from all contracts issued in the year 1947?

A. Yes, sir, '47.

Q. So that every jobber's agreement of that year carried that same "X'ing" out?

A. Yes, sir.

Q. Mr. Niehoff, I show you Commission's Exhibits 19, 20 and 21 for identification, and ask you whether or not these are the form contracts used with the Niehoff wholesale distributors during the years 1947, '48 and '49?

A. Yes, they are.

Q. Mr. Niehoff, on the document marked Commission's Exhibit 21 for identification what would have been the eighth paragraph has apparently been "X'd" out by a typewriter. Is that true of all of the form contracts

13 of the year 1947 identical with this Commission's Exhibit 21 for identification?

A. Yes, sir.

Q. Mr. Niehoff, the darkened areas on Commission's Exhibits 19 through 21 for identification, where the name of the jobber might normally appear, was intended simply to provide the Commission with a typical contract, without revealing the names of the specific jobbers; is that right?

A. That is correct.

Mr. Corkey: If there are no objections, Your Honor, we would like to offer these in evidence.

Mr. Campbell: No objection.

Trial Examiner Lipscomb: They will be received in

evidence and marked as Commission's Exhibits 16 through 21.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 16 through 21, were received in evidence.)

By Mr. Corkey:

Q. Mr. Niehoff, specification 3 of the subpoena calls for records and documents hereinafter specified relating to, summarizing, or evidencing applicable prices and other terms accorded in sales transactions involving the several members of the group buying organization known as Cotton States, Inc., and said corporation, during the following designated periods of time: first, from January 1, 1947, through and including December 31, 1949, the original and true copies of all contracts, franchises, and agreements—

Mr. Campbell: May I interrupt? Do you want that one now?

Mr. Corkey: I thought I would get the whole subpoena in the record, and then you might tender all documents. Also, the original and true copies of all correspondence. Secondly, it calls for the monthly billing period terminating in November, 1948, and for the monthly billing period terminating in November, 1949, true copies of all statements submitted by C. E. Niehoff & Co., and true copies of all invoices pertaining to the statements submitted.

There is one question with reference to specification 2 of the subpoena. These documents which have been marked Commission's Exhibits 16 through 21 are the only documents which you have returned in response to specification 2 of the subpoena. Is that correct?

Mr. Campbell: That is correct, six typical contracts, two for each year.

Mr. Corkey: If Your Honor please, I think we might have a recess for half an hour while we go over these documents that have been brought here in reference to specification 3.

Trial Examiner Lipscomb: Off the record.

(Discussion off the record.)

Trial Examiner Lipscomb: The hearing will now be adjourned, to reconvene in this room at 2 o'clock.

(Whereupon, at 11:10 o'clock a.m., a recess was taken until 2:00 p.m., this day.)

16 Afternoon Session.

2:00 p.m.

Trial Examiner Lipscomb: The hearing will be in order.

Mr. Schrup: I would like to clear up one point that we discussed previously with regard to paragraph 4 of the complaint. It is my understanding with counsel for the respondent that there is no denial that the products that were sold at different prices by the respondent to competing purchasers for resale are products of like grade and quality.

Mr. Campbell: I think there may be some language in that statement that I wouldn't agree with, Your Honor, but the products that are sold by the Niehoff Company are all of like grade and quality.

Trial Examiner Lipscomb: Very well, proceed.

Mr. Campbell: While we are clearing up one or two matters, Your Honor, I would like to say that we were not able to find a copy of Catalog 16. I think that point appears on the record this morning. Apparently all copies of that catalog have been sent out of the office to customers. However, it may be possible by some further search to get one back from a customer, if it is of any significance or of any importance. We will be glad to endeavor to do that. Of course, you do have a price list for the catalog.

Mr. Corkey: I would like to see the record, but it
17 is my understanding that Mr. Niehoff explained the apparent omission to my satisfaction. He said, if I recall, that Catalog No. 17 was in most respects identical with Catalog No. 16, except that certain parts probably had been added to No. 17 as new cars had come on the market, and that if anything the catalog was probably a better description of the products they sold than No. 16 would have been.

Mr. Campbell: That is correct. We just want to know whether you would like to have us make a more intensive search in other quarters for a copy of 16. If so, we would be glad to do it.

Mr. Corkey: We have come across another question, though, with reference to the invoices that have been submitted in accordance with the subpoena. We would like to know, if Mr. Niehoff is in a position to state the answer, or whoever is responding to the subpoena, if

these are the only invoices that remain in the files of Niehoff & Co. Are there any other invoices?

Mr. Campbell: For the covered period?

Mr. Corkey: For the period covered.

Mr. Niehoff: To my knowledge they are all the invoices that cover that period.

Mr. Corkey: These appear to be shipping invoices.

Mr. Niehoff: They are billing invoices, and the only records that we would have, I believe. Would you have any other records, Mr. Geyer?

Mr. Corkey: If Your Honor please, I will ask the reporter to mark the materials returned in response to specification 3, with the exception of that part which is called for by subparagraph 2 of specification 3 dealing with the invoices and statements, which we won't mark at this time.

Trial Examiner Lipscomb: They will be marked for identification.

Mr. Campbell: Did I get that statement correctly, Mr. Corkey, that you are proposing to mark for identification materials produced here in response to specification 3 sub 1-A and B?

Mr. Corkey: That is right.

(The papers referred to were marked Commission's Exhibits 22 through 87 for identification.)

Mr. Corkey: Now, in compliance with specification 3 of the subpoena, part I, the documents are identified as Commission's Exhibit 22 through and including Commission's Exhibit 87 have been marked for identification, and we will not offer those in evidence at this time.

Mr. Campbell: I wonder if you would mind segregating the three contracts and identify them by their exhibit numbers, the rest being all correspondence.

Mr. Corkey: In compliance with 1-A of specification 3, the documents marked as Commission's Exhibits 22, 23 and 24 for identification, have been received. In compliance with 1-B of specification 3, the documents tendered include Commission's Exhibits 25 through 87 for identification.

21 CONRAD E. NIEHOFF resumed the stand and testified further as follows:

Direct Examination (continued) by Mr. Corkey.

Q. Mr. Niehoff, your company's principal office and place of business is located at 4925 Lawrence Avenue, is it not?

A. Correct.

Q. And all of your manufacturing facilities are located there?

A. Yes, sir.

Q. Do you own and operate warehouses, Mr. Niehoff?

A. We do not own any warehouses.

Q. Do you rent warehouse space at points throughout the country?

A. We have warehouse setups that are operated by 22 the representative in that territory.

Q. Are those representatives generally engaged in the business of reselling automotive products and supplies?

A. Yes, they are, sir.

Q. You pay them a fixed rental for warehousing your materials, do you?

A. No, we have paid them a sales commission and a warehouse commission.

Q. You pay both a sales commission and a warehouse commission?

A. Yes.

Q. On goods that they warehouse for you?

A. That is right.

Q. When those goods are shipped to these warehouses are the people operating the warehouse billed for those goods?

A. In some instances, yes, and in some instances, no.

Q. The goods shipped to the warehouses that are not billed are shipped to approximately how many different warehouses throughout the country?

A. One is correct, I believe.

Q. Can you tell us the location?

A. Yes. I don't know just how I can clarify this without confusing it, but in a given area, let's say like Boston, we have a sales representative who has a stock of mer-

chandise which he uses to service our accounts in
23 the territory, and in that instance he purchases all the materials, warehouses them, and resells them to such jobbers as he may acquire in the territory. He also represents us and sells directly in behalf of the factory to the accounts that he wishes to serve out of the plant rather than out of the warehouse.

Q. You mean that on receipt of orders he transmits those orders to your plant here in Chicago for servicing from that plant?

A. Yes, that is true.

Q. He also carries a stock of goods and supplies the trade from that stock of goods that he carries?

A. Yes, particularly acting as a service to the smaller accounts who prefer to buy from the warehouse rather than from the plant.

Q. On those goods he is billed for the goods that he is holding by Niehoff?

A. That is right, they become his property.

Q. After they are shipped from the Niehoff plant to him?

A. Right.

Q. Now, you mentioned an account that received goods from Niehoff and did not pay for those goods until a sale had been consummated with a customer?

A. Yes, we have a warehouse arrangement on the Pacific coast where we warehouse the stock, and the sale is made out of the stock and the billing is done out of Chicago.

24 Q. Is that a unique arrangement for Niehoff, or does Niehoff have more than one such account?

A. No, that was established on the Pacific coast, and the setup in the east is a litle different.

Q. Can you tell us the name of the warehouse and its location on the west coast?

A. Yes, it is Paul G. Niehoff & Company.

Q. Is that a separate corporation?

A. Yes, it is a separate corporation.

Q. Is that a relative of yours?

A. It is my brother, yes.

Q. And what city is that located in?

A. Los Angeles.

Q. The billing for sales made from this Los Angeles location is carried on by Niehoff in Chicago; is that correct?

A. That is correct, yes. Not all of the sales are handled in that manner, however. As explained in the previous comment, where the local account prefers to buy out of the stock of the warehouse, that billing is done by the Paul G. Niehoff Company.

Q. Directly?

A. Directly, yes.

Q. Where the account prefers to buy from Chicago the billing is by Chicago?

A. That is right.

25 Q. Does the Paul G. Niehoff Company engage in the resale of any products other than Niehoff products?

A. Yes, it represents other concerns in the automotive field.

Q. Are they what you would call manufacturers' representatives?

A. Probably you would.

Q. Would you call them jobbers of automotive parts?

A. They are not jobbers. At least not from my point of view, because they don't job.

Mr. Schrup: More like a broker?

The Witness: Well, a sales representative who operates their own warehouse, travels their own salesmen.

By Mr. Corkey:

Q. Other warehouses, however, that you deal with are that you have included in that description, first purchase the goods from Niehoff before further sale is consummated?

A. Yes. In the case of our Boston warehouse that is true, and it is also true as far as New York is concerned.

Q. Who is the warehouse representative in Boston?

A. They term themselves the House of Peasley.

Q. And who is the so-called warehouse account in New York?

A. Bigelow and Company.

Q. Bigelow & Company is an ordinary automotive parts jobber, is it not?

A. No, not to my way of thinking. He travels his 26 own men, sells to jobbers, and acts as a representative in the territory.

Q. He does not job automotive parts?

A. Not to my knowledge.

Q. Mr. Niehoff, how would you classify the accounts of the Niehoff Company?

A. You mean the trade accounts or the wholesale accounts?

Q. All of your accounts.

A. Well; the price sheets are plainly marked as to the classification of accounts. There is the dealer, the confidential wholesale account, and there is the jobber, sometimes termed distributor. And then we have the distributor, or warehouse distributor, that generally operates branches and covers an extensive territory.

Q. Then all customers of Nichoff fall into one of those four categories?

A. Yes, unless they are manufacturing accounts.

Q. So then actually you have five categories of customers; is that correct?

A. I believe that covers it fully.

Q. Now, how many of these dealers does Nichoff sell to?

A. We don't sell to dealers, except through jobbers.

Q. How many wholesale people?

A. Confidential accounts, they are sold through jobbers or distributors.

Q. But not directly by Nichoff?

A. No.

Q. How many jobber accounts does Nichoff sell to?

A. As of now, say, 1949?

Q. As of 1949. It doesn't have to be a definite figure.

A. Well, to that point, do you mean jobbers and distributors, or the total number of accounts that we sell?

Q. I think just the jobbers now.

A. The great majority of them, I would say, somewhere in the neighborhood of 500 to 700 accounts.

Q. And approximately how many warehouses distributor accounts?

A. Approximately 75 to 100, I would say.

Q. And about how many of them are in the manufacturers' category?

A. There would be relatively few, because in that category I don't think we do more than two per cent of our volume of business, maybe 3 per cent. They are special accounts, such as in the aviation field, that might buy certain items, special contacts, or special parts.

Q. Can you estimate the number of those companies?

A. I would say not more than 15 or 20 at the outside; because that does not come under my supervision. And

we have a lot of small specialty accounts that might want something special made for them.

Q. Do you know the names of those accounts offhand?

A. I wouldn't know any of those accounts offhand.

28 Q. You don't know the names of any of them?

A. I am trying to think. But I don't believe I could say specifically.

Q. Mr. Niehoff, is it proper to classify the Niehoff lines as ignition parts and hydraulic brake parts, and equipment?

A. Yes.

Q. I have named three categories, ignition parts, hydraulic brake parts, and equipment.

A. That is about the full extent.

Q. Is that the way your company usually thinks of it?

A. Yes, sir, that is about the classification.

Q. Do you have a classification that would be more acceptable to you?

A. No, we have a small department of rebuilt units, but it still covers ignition parts.

Q. You consider that as a separate activity?

A. No, it is a part of the ignition activity.

Q. I just wanted to get your method of breaking these things down, rather than my own. Do you consider that rebuilt business separate from your ignition parts, as you would consider your hydraulic brake parts?

A. From the customers' point of view there is actually no difference, but when you departmentalize it to manufacturers there is.

Q. Then how do you think of your lines as being broken down?

29 A. Ignition is our principal line, equipment, and hydraulic brake parts. And if you want to classify rebuilts you can add that, to it. It is a very, very small part of the business.

Q. And rebuilts apply, do they not, to the ignition equipment?

A. As classified to the jobbers, yes.

Q. I am sorry, I don't think you heard me. Rebuilts apply to ignition equipment and not to the other two fields?

A. That is right, not to hydraulic parts or to equipment.

Q. Now, can you estimate for us, Mr. Niehoff, approximately the percentage of your total volume of sales dur-

ing, we will say, the year 1949, that would be applicable to the ignition parts?

A. Yes, the volume would run about 85 to 90 per cent of the whole.

Q. And how about the equipment line, Mr. Niehoff?

A. I would say from 3 to 6 per cent.

Q. And how about the hydraulic brake parts?

A. That would run 5 to 6 per cent. I'm not sure how those figures add up.

Q. How about the rebuilts, have you included the rebuilts in that?

A. They are generally classified in the ignition picture.

Q. Well, you are short just about four per cent. I suppose the four per cent would be adding a little bit more on equipment and hydraulic brake parts? I think that is sufficient for our purposes.

A. I might say some of it is manufactured merchandise.

Q. Oh, you have not included the manufactured merchandise in these estimates?

A. Well, I would think that would probably run from one to one and a half per cent, or maybe two per cent. It varies a great deal according to the year in which you might be concerned. We at one time had, and still have, some magneto parts. It is virtually a dead line with us, because it was principally used for sports.

Q. About how much of your total volume during '49 would that cover?

A. I would say less than one per cent.

Q. Mr. Niehoff, I am going to show you again this catalog which is marked Commission's Exhibit 1 for identification. That deals with the Niehoff ignition line, does it not?

A. Yes, it does, sir.

Q. Mr. Niehoff, in that catalog you have listed the ignition and equipment lines carried by Niehoff?

A. That is right.

Q. It provides a rather complete description of all ignition and equipment items manufactured by Niehoff?

A. It does, yes.

Q. It would vary from any other catalog, Mr. Niehoff, only in that, with relation to the ignition and equipment items, it would carry the latest items in the Niehoff line, that is, the new cars that have recently come out on the market?

A. New specifications, and probably some new items. Otherwise, it would be complete.

Q. You were unable to supply us with the catalog which immediately preceded that one, and which had been effective during part of the time in which we are interested?

A. No, in the ignition line we did supply the catalog.

Q. I am sorry.

A. It is in the hydraulic brake line.

Q. Then Catalog No. 25 preceded Catalog No. 27 in the ignition line?

A. That is right.

Q. Then this catalog No. 2, which is marked Commission's Exhibit No. 2, what reference does that have to the Niehoff lines?

A. This covers the parts for the Ford, Lincoln and Mercury cars, generally classified as Ford items. Most of these items are also represented in the catalog prior to this, which was catalog No. 25.

Q. Do the same items that appear in Commission's Exhibit 2 and Catalog No. 2 also appear in Catalog No. 27?

A. Yes, virtually all. There have been some eliminations and some additions.

Q. Would there be any standard by which to de-
32 scribe the elimination or the additions?

A. I don't know just how you want me to answer this. When we compile a catalog we go through the process of eliminating the items on which the sales may be negligible over a period of a given time. And we add new items in connection with the specifications on new cars that have a potential sales possibility.

Q. What is the purpose of the special catalog covering the Ford items and the items of universal application?

A. Those are some accounts, such as classified generally as official distributors of Delco-Remy and Auto-Lite products, official service stations that do not accept Niehoff merchandise but will accept sales of Ford parts.

Q. Commission's Exhibit 4, Mr. Niehoff, deals, does it not, with your hydraulic brake parts line?

A. Yes.

Q. And that is your current catalog on hydraulic brake parts?

A. Yes, it is.

Q. And it describes all the various items that make up your hydraulic brake line?

A. Yes.

Q. That is superseding Catalog No. 16, which you were unable to produce; is that right?

A. That is right.

Q. Most of the items, however, that would be in-
33 cluded in No. 16 are also included in No. 17, are they not?

A. Yes, sir. This is more complete. There may have been some slow moving items eliminated, but primarily it is bringing the specifications up to date including the new items.

Q. And No. 16 supersedes that catalog known as Commission's Exhibit 5, does it not?

A. This No. 15, yes.

Q. Mr. Niehoff, does your company contact the trade through salesmen?

A. Yes, sir, it does.

Q. And does it use manufacturing representatives?

A. Yes, it does in the case of the Pacific coast area, and the eastern coast area that has been described in these warehouse setups that we have in that area.

Q. Then the manufacturing representatives that you are talking of are in every case the warehouse setups that you previously described?

A. They are in our instance, yes.

Q. If I understand correctly, that included three accounts, one on the west coast, one in Boston, and one in New York?

A. That is correct.

Q. Does the company maintain certain house accounts that are not contacted by salesmen or by your manufacturing representatives?

A. I would say no to that question. There might
34 at some time in the past years be an exception to that rule.

Q. Did the practice of maintaining house accounts prevail at any time during the years '47, '48 and '49?

A. I don't think so.

Q. Who would be able to answer that definitely?

A. Well, I don't know. Mr. Geyer can give you his opinion about it. I would say no, to be very specific.

Mr. Geyer: We have no house accounts.

The Witnes: I would like to ask a question off the record.

Trial Examiner Lipscomb: You may ask the question if you wish on the record.

The Witness: Well, I don't know exactly what you mean by "house account," because we really don't deal in such accounts. It might be a question of salesmen calling upon them, or sales manager calling upon them, or myself calling upon them.

By Mr. Corkey:

Q. Mr. Niehoff, do you pay salesmen on the basis of salary and commission?

A. Generally, yes. We pay some salesmen salary and no commission, depending upon the area and the conditions under which they work. But that is generally with a new man starting in.

Q. Does Niehoff have any private brand accounts?

A. No, sir.

35 Q. Mr. Niehoff, when you sell to the Bigelow Company in New York are you selling with each shipment to that company?

A. I don't quite understand the question. We bill each invoice to the customer.

Q. I will rephrase the question. Are all the goods of Niehoff carried by the Bigelow Company in New York owned by Bigelow or by Niehoff?

A. By Bigelow.

Q. Does Bigelow Company have a special contract with Niehoff?

A. Actually they have no contract.

Q. They are not considered, Mr. Niehoff, as one of the wholesale distributors or one of the warehouse distributors?

A. They are functioning, you might say, as a warehouse on Niehoff merchandise to a given area.

Q. Never mind that. Just answer that question. All the goods that Bigelow carries are owned by Bigelow?

A. Correct.

Q. What are the terms of sale of Bigelow?

A. You mean cash terms of sale? Two per cent end of the month proximo.

Q. And how are the items of the Niehoff line priced to Bigelow?

A. They are priced giving consideration to the fact that they are actually selling the merchandise.

Mr. Corkey: I'm sorry, Your Honor, I don't think 36 that is responsive. I don't want the considerations of pricing. I want to know the basis of pricing.

Trial Examiner Lipscomb: Do you understand the question, sir?

The Witness: I believe I do, sir. You mean at what discounts they are buying?

Mr. Corkey: I will withdraw the question.

By Mr. Corkey:

Q. Are the Niehoff items priced to Bigelow based on any of the current price lists of the Niehoff Company?

A. Yes, they are, sir.

Q. Does the Bigelow price represent a discount off of those price lists?

A. Yes, they do, sir.

Q. With reference to which of your price lists can you best explain the Bigelow price?

A. The jobber price, or distributor, whichever you classify it.

Q. Making reference, then, to Commission's Exhibit 6-A, can you tell us the terms with respect to price at which the Bigelow Company would buy from Niehoff the items listed in Commission's Exhibit 6-A?

A. In a general way, I can.

Q. Would you, then, tell us in a general way?

A. The discounts range from 10 per cent off to, I
37 believe, as high as 20 per cent. But I am not 100 per cent positive on that.

Q. That is enough. Are there any further discounts that would apply to this price of 10 to 20 per cent off the prices listed in Exhibit 6-A?

A. I don't follow your question.

Q. If I understood you, the Bigelow price would be 10 to 20 per cent lower than the price listed on Commission's Exhibit 6-A for identification, for identical items?

A. Yes, that is right.

Q. Now, there would also be a two per cent discount, probably for cash payment?

A. I believe so.

Q. Would there be any other discounts or allowances or rebates which might affect the net price paid by Bigelow on items listed on Commission's Exhibit 6-A?

A. None that I know of, no, sir.

Q. Now, Mr. Niehoff, does the same situation prevail with respect to your account in Boston?

A. The operation in Boston is slightly different.

Q. To what extent would the situation differ from the operation in New York?

A. Insofar as they sell out of the factory to accounts as factory representatives, and they also have a warehouse from which they service the smaller accounts.

38 Q. The activities which you have described as a warehouse activity are similar to those performed by the Bigelow Company, are they not?

A. Yes, similar but not exactly the same.

Q. To what extent do their activities differ from the Bigelow activities with regard to this characterization as warehouse?

A. To the extent that they represent and sell Niehoff parts for shipment from the factory.

Q. I appreciate that, but I am now confining myself to the remainder of their operations other than as your large representatives.

A. Well, we had no warehouse operation in '47, '48 or '49, until the very latter part of last year. I think I am correct on that statement.

Q. That is, until the last part of 1949 you had no warehouse?

A. Yes.

Q. Then all the material that was sent to this Boston address was still owned by Niehoff?

A. There was none sent to the Boston warehouse to my recollection, except that which was sent to the customers direct.

Q. Then this Boston representative contacted your customers during the years '47, '48 and '49?

A. Right.

Q. And in response to the orders that he received Niehoff shipped to your customers?

39 A. Yes, that is right.

Q. The operations, then, in Boston underwent a change in the latter part of 1949?

A. Yes, sir.

Q. It was at that time that this Boston account made arrangements to have a stock of Niehoff parts located in Boston; is that right?

A. Correct, sir.

Q. Are the parts located and held in Boston owned by Niehoff?

A. No.

Q. They are owned by the Boston account?

A. That is correct.

Q. At the time they are shipped to this Boston account title passes to the Boston company?

A. Correct.

Q. At the same time this Boston account does still obtain orders for Niehoff products in and around the Boston area which are serviced from Niehoff's Chicago address?

A. That is correct.

Q. And those accounts are billed from Chicago?

A. That is correct.

Q. Now, the Boston arrangement is similar to the one you have on the west coast with Paul G. Niehoff Company, is it not?

A. Yes, in respect to their forming what you might term a dual setup of both warehouse and selling direct to the customer.

Q. What particulars would be different, Mr. Niehoff?

A. Well, the warehouse docket that we carry on the Pacific coast belongs to the company and when it is sold it is billed to the customer or to the Paul G. Niehoff company.

Q. Then the arrangement with the Paul G. Niehoff Company provides him with a stock of goods which is owned and controlled by the Niehoff Company; is that right?

A. Yes, it is owned by us.

Q. The Paul G. Niehoff Company in turn sells that to accounts on the west coast; is that correct?

A. Yes, sir.

Q. Some of the sales made by the Paul G. Niehoff Company are filled from your Chicago office rather than from the stocks held by the Paul G. Niehoff Company on the coast; is that right?

A. That is right, yes, sir. They have salesmen throughout the territory.

Q. Do you know how many salesmen the Paul G. Niehoff Company has?

A. I would say three to five men generally.

Q. What states do those salesmen operate in, Mr. Niehoff?

A. California, Oregon, Washington, Idaho, Arizona, and part of New Mexico, and Utah.

Q. Mr. Niehoff, on your Boston account what is the basis currently of the prices charged by Niehoff, with

reference to the prices which appear in Commission's Exhibit 6-A?

41 A. They also vary from 10 to 20 per cent.

Q. Do you mean they vary to the extent that they are 10 or 20 per cent below the prices that appear on Commission's Exhibit 6-A?

A. That is right. They get a commission on the merchandise that they sell direct to the accounts. They get a commission plus a warehousing cost on those items which are relatively minor and sell out of the warehouse. I think our warehouse sales do not average $200 a month there.

Q. What is the warehouse commission?

A. Generally 10 per cent, although we have items that are less than that. There may be some instances where they vary slightly from that.

* * * * * *

The Witness: I would like to explain—

Mr. Corkey: Just a minute. There is no question pending.

Mr. Campbell: He just wants to correct something.

Mr. Corkey: He is volunteering some information.

Trial Examiner Lipscomb: Go ahead, Mr. Niehoff.

42 The Witness: I just wanted to say that the arrangement with the Peasley warehouse, I believe, was in the latter part of '48 instead of '49.

By Mr. Corkey:

Q. Mr. Niehoff, having reference now to Commission's Exhibit 6 series, and in particular having reference to Commission's Exhibit 6-D, that is a price list of the Niehoff Company, is it not?

A. That is the list price schedule.

Q. And Niehoff distributes price lists like 6-D to its several customers and purchasers?

A. Yes.

Q. Niehoff does not charge its customers and purchasers based on the prices listed in Commission's Exhibit 6-D, does it?

A. No, it does not. That is merely a suggested price list.

Q. A suggested resale price to the consumer?

A. That is right.

Q. Now, the price list which is 6-C, and is entitled

"Dealer prices," is also distributed by Niehoff to its several customers and purchasers, is it not?

A. Yes, sir.

Q. That again is a suggested resale price list, is it not?

A. Yes, to the dealer.

Q. And Niehoff does not charge any of its cus-
43 tomers or purchasers the prices shown on this Commission's Exhibit 6-C, does it?

A. No, it does not.

Q. Mr. Niehoff, is there a mathematical formula which represents the difference between the prices listed on Commission's Exhibit 6-D and those listed on Commission's Exhibit 6-C?

A. I would say actually no, if I understand your question right. There are discounts sometimes figured off of list, generally ranging from 33⅓ to 40 per cent off.

Q. You mean between the dealer price and the list price as shown on Commission's Exhibit C?

A. Yes.

Q. What is the percentage range that you gave, Mr. Niehoff?

A. 33⅓ up to 40 per cent. It may be even 45 in some instances.

Q. But there is no precise formula governing each and every one of the prices on these two lists?

A. No, there isn't.

Q. Mr. Niehoff, Commission's Exhibit 6-B gives a list price and a W.C. class price. What do the letters "W.C." mean?

A. They mean "wholesale confidential". We used to call them service station prices.

Q. And what customers and purchasers are priced on the basis of this wholesale confidential price?

A. That price is slightly better than the dealer
44 price, and is generally quoted to car dealers and to truck concerns, and to individual service stations who stock the merchandise and do a servicing business of various makes of cars.

Q. Does the Niehoff Company sell any of these people directly on the basis of this price list?

A. I don't believe we do.

Q. But you do not know?

A. I would say that we do not, to put it more directly.

Q. Mr. Niehoff, Commission's Exhibit 6-A shows a

jobber price. Is this the price that is charged as the base price to your several customers and purchasers?

A. Yes, sir.

Q. Can the prices on Commission's Exhibit 6-A be expressed as a mathematical percentage of the prices listed on Commission's Exhibit 6-D?

A. Well, they vary to a considerable extent.

Q. Can you give us a range in which that variation might exist?

A. I would say between 50 and 60 per cent from list schedule.

Q. The jobber price, then, on 6-A is 50 to 60 per cent lower than the price set up in the price sheeet known as 6-D?

A. That is right. I would say that on some items it may even be a longer discount than that.

Q. But there is no one percentage off?

A. Not one percentage. It is a number of percentages.

45 Q. Mr. Niehoff, your company in selling its products uses two types of contracts, do they not?

A. Yes, sir.

Q. A so-called jobber contract?

A. Jobber contract, yes, sir.

Q. And what is the other one?

A. The other one is the distributor's contract, or the distributor's remit.

Q. Is the first one the jobber contract?

A. Yes, sir. I might clarify that, that sometimes the jobber and distributor are called one and the same thing. For a period of time they were classified as jobbers, and then they were classified as distributors, so that it might be a little confusing.

Q. Purchasers of Niehoff that are sold direct are classified either as jobbers or distributors?

A. Warehouse distributors.

Q. And that includes three people?

A. No, the warehouse distributors do not include three people.

Q. I am sorry. Then would you give us a classification of the direct customers of Niehoff?

A. We have a jobber, we have a distributor, and we have what we call a warehouse distributor. And we have

our own branch house accounts that function as branch
46 warehouses for our merchandise.

Q. And then you also have this classification known as manufacturers?

A. Well, we actually have no such classification, because we have very few such accounts.

Q. They represent a different category of accounts?

A. That is right.

Q. Now, your jobber accounts purchase—with reference now to the prices which are shown here—on the basis of the prices on Commission's Exhibit 6-A?

A. The jobber accounts generally speaking purchase from this price sheet, or purchase according to these prices, and our jobber's contract applies to it.

Q. To this price sheet?

A. That is right.

Q. Now, what is — what did you mean when you said "generally speaking"? Are there some exceptions?

A. No, generally covers that category.

Q. Now, the customers which you classify as distributors also purchase, do they not, on the basis of the prices listed in Commission's Exhibit 6-A?

A. I don't know whether I follow you on that, Mr. Corkey. All discounts are —

Q. I am not talking about discounts, Mr. Niehoff. I am asking you if the basis of pricing to the accounts
47 which you term distributor accounts, if that basis of pricing is on the prices listed in Commission's Exhibit 6-A?

A. Yes, very definitely the same price schedule.

Q. Now, Mr. Niehoff, the same with reference to the accounts which you denominate wholesale distributor accounts?

A. They use the same base price schedule.

Q. They use the same base price, which base price is Commission's Exhibit 6-A?

A. Correct.

Q. I mean, that is typical of the base price for a particular period?

A. Yes, sir.

Q. Now, you named another category, Mr. Niehoff, the branch house?

A. Well, you asked about the classification of accounts, and I said we have jobbers, we have distributors, and we have what we term the distributor's warehouse remit.

Q. You have accounts, Mr. Niehoff, which you classify as jobbers, as distributors, as warehouse distributors: is that correct?

A. That is correct, yes sir.

Q. And then you have a fourth classification. What is that known as?

A. No, we have no fourth classification, as you considered it, unless you consider the manufacturers as a classification.

48 Mr. Corkey: Do you understand that, counsel?

Mr. Campbell: I think I can clarify it. If I am correct, Mr. Niehoff, a warehouse distributor and a branch house is the same in your classification.

The Witness: That is right, both the same.

Mr. Campbell: In other words, these branch house arrangements in New York, Boston and Los Angeles —

The Witness: Oh, no.

Mr. Campbell: Then I am wrong about that.

Mr. Corkey: Maybe I can clear it up with another question.

By Mr. Corkey:

Q. What is this branch house category that you referred to, Mr. Niehoff.

A. I probably made a mistake by saying "branch house," because it is the distributor's warehouse agreement that gives the larger accounts that classification, so to speak.

* * * * *

Q. Mr. Niehoff, we have the category of jobber, the category of distributor, and am I correct that the dis-

49 tributor category is broken into two parts?

A. Yes.

Q. And can you tell us what those two parts are?

A. Well, part one is when the distributor gets a discount of 10 per cent off, which is not in the contract. Part two is when they receive this contract, which gives them a discount based upon their volume of sales.

Q. And then as I understand it, Mr. Niehoff, the difference in the two categories of your distributor accounts is based on discounts off the prices set forth on the price sheets equivalent to Commission's Exhibit 6-A?

A. That is right, sir.

Q. Otherwise, there is no different system of pricing for those accounts?

A. None whatsoever.

Q. The base price for your jobber accounts and for all of your distributor accounts—are those price lists similar to Commission's Exhibit 6-A?

A. Right.

Q. Mr. Niehoff, you made reference to a category of customers in which you used the descriptive term "branch house." Can you explain that category of customer?

A. That category of customer is the same as our distributor wholesale agreement.

Q. That classification of customer will include
50 those people who are priced, as all of your distributor customers are priced, with the exception of discounts on volume, but nevertheless based on the price list equivalent to Commission's Exhibit 6-A; is that correct?

A. I believe that is correct, yes, sir.

Q. Mr. Niehoff, you are the brother of Paul G. Niehoff?

A. I am, yes, sir.

Q. And he operates on the west coast?

A. That is right.

Q. Do you or does C. E. Niehoff & Co. own stock in the west coast corporation?

A. We do not, neither myself nor the corporation.

Q. It is operated entirely independent of the C. E. Niehoff Company?

A. Entirely independent, yes, sir.

Q. Does the west coast company own any stock of the C. E. Niehoff Company?

A. It does not.

51 (Witness excused.)

FRED H. GEYER was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Corkey.

Q. Mr. Geyer, will you give your full name to the reporter?

A. Fred H. Geyer.

Q. And your home address?

A. 4165 West Berteau Avenue.

Q. And you are employed by the C. E. Niehoff Company?

A. Yes, sir.

Q. How long have you been so employed?

A. Since 1933.

Q. What is your position now with the C. E. Niehoff Company?

A. Sales manager.

Q. How long have you been the sales manager?

A. Since 1945.

Q. What position did you hold immediately prior to that?

A. Salesman.

Q. And had you held that position since 1933?

A. Yes, sir.

52 Q. What are your duties as sales manager?

A. To route the salesmen and keep them posted on prospects that we have, to go out in the territory and work with them occasionally, whenever it is possible for me, and to keep them fully informed on any new items that may come up at all times.

Q. Do you also take part in establishing sales policy?

A. Yes, sir.

Q. Are you a director of the company, Mr. Geyer?

A. No, sir.

Q. An officer?

A. Vice president.

Q. How long have you been an officer, Mr. Geyer?

A. Since March 4, 1949.

Q. How would you classify the various accounts, customers and purchasers of the Niehoff Company?

A. As jobbers, distributors, and our distributor warehouse accounts.

Q. Any further classification?

A. No, sir.

Q. How about the manufacturing classification?

A. Well, first of all, I have nothing to do with the manufacturers. I just handle the jobbing end of the business for the company, and so I have no contact with that type of account at all.

Q. Can you name some of the people in that category?

53 A. In what category?

Q. Of manufacturers.

A. No, I don't contact them. I don't have anything to do with them. I just handle the jobbing end.

Q. What is your position in the company?

A. Sales manager.

Q. And vice president in charge of sales?

A. Yes, sir.

Q. How many accounts would you classify as jobbers?

A. As regular jobbers, or our total number of accounts?

Q. What are your total number of accounts?

A. I would judge somewhere around—I am not positive of this—probably 850.

Q. And how many of those are in the category of jobbers?

A. As jobbers, I would say probably at the present time 100 or so.

Q. And how many distributors?

A. Well, I am just going to guess. Probably somewhere around 600.

Q. And how many in the category as distributor warehouse accounts?

A. Oh, I would say somewhere between 75 and possibly 100.

Q. How do you classify this account known as the Bigelow account in New York?

A. That is considered a warehouse. And there again I do not have control over their salesmen. I just take care of our own salesmen, and they in turn have their own sales force.

Q. Do you have control over the sales force of your distributors?

A. No, sir.

Q. Am I to understand that the account known as the Bigelow account is no concern of yours as an officer of the Niehoff Company?

A. Would you say that again, please?

Q. Do you mean that the account known as the Bigelow account is no concern of yours as an officer of the Niehoff Company?

A. Oh, surely it is a concern of mine. All the companies are, because they distribute our merchandise. What I said was that they had their own salesmen and we do not dictate what those salesmen are to do, who they are to contact, and so forth.

Q. Do you dictate what the salesmen of your distributors do, who they are to contact, and what they are to do?

A. No, sir.

Q. Then the Bigelow account and the Boston account and the west coast account do not fall into any of the three categories you have mentioned as knowing something about, that is the jobbers, the distributors, and the distributor warehouse accounts?

A. They do not know anything about that, did you say? Yes, they do.

55 Q. I am sorry—

Mr. Campbell: I don't believe the question is understood.

Mr. Schrup: I don't think so.

By Mr. Corkey:

Q. The account in New York known as the Bigelow account, the Boston account, and the west coast account, that is, the Niehoff account, do not fall into the category as jobber accounts, distributor accounts, or distributor warehouse accounts?

A. They do not.

Q. Do they come under your jurisdiction as the sales manager of the company?

A. Only in issuing any new items or in sending them catalogs and giving them information on current items. Or if we should put on a sales program for any service stock or anything like that, they are given the same information as our regular salesmen working out of Chicago.

Q. But they do not come under your jurisdiction as vice president in charge of sales?

A. Right.

Q. They are in the category known a manufacturers?

A. Manufacturers' agents, you might say, or manufacturers' distributors.

Q. They are not under your jurisdiction?

A. That is right.

56 Q. Do you know whose jurisdiction these manufacturing accounts would be under?

A. Under Mr. Bigelow, and Mr. Peasley, and Mr. Paul G. Niehoff.

Q. I am sorry. I have changed back now to that category of accounts which Mr. Niehoff terms manufacturers.

A. Oh, manufacturers.

Q. Yes, and I thought possibly with your close connection with the company and its sales you might know who in the organization knows anything about those accounts.

A. Well, to my knowledge those accounts are handled by our engineering department, because in most cases it is a specialty item that is made up for this manufacturer, and the prices and quotations are made through that department, with the consent of Mr. Niehoff.

Q. But the head engineer is primarily responsible for selling those accounts?

A. I wouldn't say he is primarily responsible for selling them, because in most cases, I believe, the quotations come in through the mail; or possibly somebody might have come in and contacted us, and the engineering department then handled it.

Q. But the contact is not made through your office?

A. No, sir.

Q. It is made in the first instance with the chief engineer?

A. Right.

57 Q. What other part of the sales of the Niehoff organization does the chef engineer supervise?

A. Not any that I know of, except that we work together on new items and talk matters over.

Q. What is the name of the chief engineer.

A. E. R. Grant.

Q. Does he supervise a force of people who contact the several manufacturers who might be interested in ignition parts or hydraulic brake parts or equipment that Niehoff manufactures?

A. No, sir.

Q. How do you establish contact with such accounts?

A. I am sure I couldn't tell you. I tried to tell you that some of those contacts were made through the mail. How the companies decide on wanting to buy that from us, or how it comes about, I don't know, outside of probably they have seen Niehoff products all over the country that jobbers have sold.

Q. Does the Niehoff & Co. sell to any of the chain stores and mail order houses?

A. No, sir.

Q. Customers which come under your supervision, or rather under your cognizance, are sold from a base price similar to those prices listed on Commission's Exhibit 6-A: is that right?

A. Yes, sir.

Q. That is the jobber price sheet?

A. Right.

58 Q. As distinguished from the wholesale confidential price sheet, the dealer prices, and the list prices?

A. Right.

Q. Does that same arrangement apply, Mr. Geyer, with reference to hydraulic brake parts?

A. Yes, sir.

Q. And equipment parts?

A. With one exception. On equipment the list price is eliminated and the dealer's price is the so-called list price to dealers, because it is only sold to the garage man or the dealer.

Q. So that in the case of equipment items there are only three price lists instead of four; is that correct?

A. There are only two, the wholesale and dealer's price, and the yellow and green are both the same.

Q. So that only two are for the equipment items?

A. Right.

Q. In all other cases there are four?

A. Right.

Q. And all of those cases in which you have cognizance of the customers and purchasers of Niehoff, the base price is set forth as the jobber price is that correct?

A. Yes, sir. That is, you are talking now as of this date, because as we said a moment ago—

Q. The terminology has changed in 1950?

59 A. That is right, but as far as the price it is no different.

Q. But during the period 1947, '48 and '49, the jobber price on all items, whether hydraulic brake part items, ignition items, or equipment items, was always based from the jobber price list?

A. Yes, sir.

Q. Which was the pink price list also in every case, was it not?

A. Yes, sir.

Q. All other price lists sent out to customers in the category over which you had supervision, which you have described as jobbers, distributors, and distributor warehouse accounts, were suggested resale price sheets?

A. Yes, sir.

Q. Now, will you explain the change in terminology which has taken place in 1950 with respect to these various price sheets?

A. You mean using the word "distributor" now and formerly the word "jobber"?

Q. Yes, if you will explain to us how the terminology has changed in this year 1950.

A. As far as the prices are concerned there is no difference whatsoever. The change came about due to the association we belong to wanting the manufacturers to try and use the same terminology and the same colors for the sheets. I think for quite a long time many manufac-
60 turers used the word "distributor" while we still used "jobber". So a year ago, or whenever it was, late last year I believe, or early this year, we changed the wording to "distributor".

Q. "Distributor" instead of "jobber"?

A. Right. That was more as a point to make it simpler for the jobber, who is supplied with many cost sheets from manufacturers on the basis of distributing. That is about it.

Q. And then I assume, making reference now to Commission's Exhibit 6 series, that the pink sheet which is Commission's Exhibit 6-A, is now known as a distributor price?

A. At the prices shown on that sheet, yes.

Q. And the green price sheet, which is Commission's Exhibit 6-B is now known as the wholesale confidential price?

A. That is right.

Q. Have there been any changes in the yellow sheet known as Commission's Exhibit 6-C?

A. No, sir.

Q. It happened, then, merely in the case of the jobber, that his designation was changed to conform to that generally prevailing in the trade, being distributor?

A. That is right.

Q. Mr. Geyer, what was the name of the association that inaugurated or initiated this change in the terminology?

A. The NSPA.

Q. The National Standard Parts Association?

61 A. Yes, and that also was approved by the NEWA, which is the jobbers' association.

Q. That is manufacturers' equipment, isn't it?

A. No, the wholesalers' association. They also have an association, and in both cases they suggested not only the wording but also the colors of the sheets.

Q. Mr. Geyer, what is the current policy of the Niehoff

Company with respect to freight charges to its various customers?

A. Three dollars a hundredweight.

Q. A freight allowance of three dollars?

A. Yes, sir, 100 pounds or over.

Q. And on shipments of less than 100 pounds?

A. The customer pays the transportation.

Q. Can you explain to us the mechanics with reference to freight payments, the buying mechanics?

A. Well, that is something that is handled by our credit department. You are referring to how we handle the freight transactions, is that it?

Q. Yes, sir.

A. I believe that we pay the transportation, and then bill it back to the jobber on his invoice. I think that is the way we are doing it at the present time.

Q. That is not a matter that comes under your supervision?

A. Right.

62 Q. For how long has there been an allowance of $3 a hundredweight, Mr. Geyer?

A. I believe that was placed on our price sheet—I am not quite sure about that—a year ago. It may be that on this sheet that you have—

Q. You may make reference to any of these, if it will help you.

A. This is August 1, 1949, and it was $2 a hundred. And I may be wrong about this, but I think that last fall it was changed to $3 a hundred. But I am quite positive that it has been on there all this year.

Q. Now, those customers and purchasers which come under your supervision are limited, I think you said, to the jobbers, the distributors, and the distributor warehouse accounts?

A. Right.

Q. Are each and every one of the customers in those three classifications accorded the same terms with respect to freight payments?

A. Yes, sir.

Q. Each and every customer?

A. Yes, sir.

Q. Mr. Geyer, has that been true during the years 1947, '48 and '49?

A. Not at $3 a hundred, but at $2 a hundred, which was on the price sheet at that time.

63 Q. Every customer was accorded the same treatment, the same identical terms with respect to freight payments?

A. Yes, sir.

Q. Mr. Geyer, what has been the policy with respect to obsolescence—again making reference solely to those customers and purchasers which came under your cognizance?

A. All accounts who handled our line complete—and when I say "complete" I mean the ignition line—when we get out a new catalog, if we took out any parts in that catalog which we thought were slow moving parts, the jobber was permitted to return those to us transportation prepaid, at 10 per cent handling charge.

Q. Did you send out a bulletin to the trade or make it generally known that these parts could be returned?

A. Yes, sir.

Q. Now, you made reference to the ignition line. Did a different policy prevail with respect to the equipment line or to the hydraulic brake parts line?

A. No, the policy wasn't any different, except that up until this year we have had very few parts that had become obsolete, and that is why I referred to the ignition line, because we have handled it over a period of many years on that same basis.

Q. You mean on the brake parts line and the equipment line obsolescence has never been a factor?

A. That is right. In fact, equipment was not sub-
64 ject to return. That was placed on our price sheet.

Q. Mr. Geyer, you have estimated that there are approximately 75 to 100 distributor warehouse accounts?

A. That is right. That is purely a guess.

Q. Those distributor warehouse accounts carry the complete Niehoff line?

A. Yes, sir. Excuse me. They may not have the hydraulic line. When I say "complete" I mean the complete ignition line.

Q. They carry the complete ignition line?

A. Right.

Q. Not all of those accounts, however, handle the hyraulic brake parts or the equipment line?

A. Not all of them.

Q. Does the Niehoff Company have a contract requiring exclusive distribution from those companies?

A. No, sir.

Q. Do those accounts generally hold a contract with the Niehoff Company?

A. Yes, sir.

Q. A written contract?

A. A contract like you have there.

Q. It would be similar to this contract?

A. Yes, sir.

Trial Examiner Lipscomb: Off the record.

65 (Discussion off the record.)

Trial Examiner Lipscomb: On the record.

By Mr. Corkey:

Q. These accounts, Mr. Geyer, which you have denominated as Warehouse distributor accounts hold contracts similar to that identified as Commission's Exhibit 19, do they not?

A. Yes, sir.

Q. At the present time?

A. Yes, sir.

Q. Now, Mr. Geyer, the accounts which you have denominated as distributor accounts also have entered into written contracts with the Niehoff Company?

A. I didn't get the first part of your question.

Q. The accounts which you earlier described as the distributor accounts also have written contracts with the Niehoff Company?

A. Yes, we have what we call a distributor's agreement.

Q. Is that agreement in all respects identical with the agreement—

A. No, this is the warehouse agreement. The other one is just our distributor's agreement.

Mr. Corkey: The witness in his last answer was making reference to Commission's Exhibit 19.

By Mr. Corkey:

Q. Mr. Geyer, the other class of customers to which
66 you referred as under your cognizance was denominated by you as jobbers?

A. Yes, sir.

Q. I assume that you have written contracts with those customers?

A. Yes, sir.

Q. I ask you to look at Commission's Exhibit 16 and tell us whether or not that is a typical contract which would be entered into by Niehoff with one of those customers.

A. Yes.

Q. Mr. Geyer, I show you these three documents which have been marked Commission's Exhibits 19, 20 and 21. They have been introduced in the record as typical form contracts covering three periods of time, 1947, 1948, and 1949. Is any one of those typical of the contracts that you enter into with your distributor accounts?

A. Yes, this one here. This is the contract which we use at the present time. You are referring to warehouse distributors, aren't you?

Q. Mr. Geyer, you classified the accounts, if I remember, as jobbers, distributors, and distributor warehouse accounts?

A. Yes, sir, that is correct.

Q. If I recall the record, you said that Commission's Exhibit 19 was the type of contract entered into with distributor warehouse accounts?

67 A. Right.

Q. You later said that Commission's Exhibit 19 was not the type of contract entered into with your distributor accounts?

A. You showed me a jobber's agreement, and I said, "That is the agreement we were using with our jobbers."

* * * * * *

Q. Mr. Geyer, you said that this was not the distributor agreement?

A. This was our warehouse distributor or jobber agreement, and the other agreement, which is our jobber agreement is the agreement which used to be called the distributor account agreement.

Mr. Corkey: I am sorry. I am trying to use your terminology, not my own. Let's try again.

The Witness: Pardon me one moment. You showed me a jobber's agreement—

Mr. Corkey: Off the record.

Trial Examiner Lipscomb: No, this is on the record.

Mr. Corkey: All right, Mr. Geyer, we will start again.

68 By Mr. Corkey:

Q. You have classified the customers as jobbers, distributors, and distributor warehouse accounts?

A. Right.

Q. You said that Commission's Exhibit 19 was typical of the contracts with your distributor warehouse accounts?

A. Right.

Q. You later said that Commission's Exhibit 19 was not typical of the contracts with your distributor accounts?

A. That is right.

Q. I asked you then if your jobber accounts' agreements, Commission's Exhibits 16, 17 and 18, covering that three-year period of '47, '48 and '49, were typical of the contracts with your jobbers.

A. These are with the jobbers, and the accounts that you call distributors.

Q. With the accounts that you call distributors.

A. That we call or signify as distributors.

Q. Commission's Exhibits 16, 17 and 18, then, Mr. Geyer, are the contracts that Niehoff & Company has entered into during the years 1947, '48 and '49 with the accounts which you have denominated as distributors?

A. Correct.

Q. Those accounts which you have said number approximately 600; is that correct?

69 A. That is correct, except that the amount may be off. I don't definitely know.

Q. You estimated that amount?

A. That is right.

Q. During the years 1947, 1948 and 1949, the total number of accounts that entered into contracts similar to Commission's Exhibits 19, 20 and 21, you estimated at between 75 and 100, I believe?

A. That is right.

Q. And you call those accounts distributor warehouse accounts, do you not?

A. Correct.

Q. Mr. Geyer, in your original classification of the Niehoff accounts you distinguished between jobbers and distributors, and you estimated—and these are just estimates—100 jobbers and 600 distributors. What is the basis of that classification?

A. The jobber classification is a classification of the accounts with Niehoff & Company who have not signed on one of the agreements and who in most cases do less than $1200 worth of business.

Q. And did I understand you to say that you had or had not had them sign an agreement?

A. Will you say that again, please?

Q. Did you say that they had or had not signed

70 one of these agreements?

A. They do not have a signed agreement.

Q. Then the 100 accounts that you put in the jobber category have not during the years '47, '48 and '49, signed agreements similar to Commission's Exhibits 16, 17 and 18; is that correct?

A. When I was talking about the exhibits I was not talking about '47 and '48 and '49. I was talking about this year. How many of those accounts we did not have sign in those other years, I haven't any idea.

Q. What was the basis of your classifying the accounts as jobbers and distributors?

A. You mean when we sold the accounts, when we took them on?

Q. Mr. Geyer, you made the classification as jobbers, distributors, and distributor warehouse accounts. What was the basis of the distinction between the jobbers and the distributors?

A. On his volume and whether he took on our line complete. When I say "complete", again, I mean our ignition line.

Q. Are we to assume that the accounts that took on your complete ignition line and did a sufficient amount of volume merited the title of distributor as opposed to those accounts which did not give you sufficient volume and did not take on your complete line, who warranted only the title of jobber?

A. All accounts or any account who did not have
71 our complete line or take on our complete line, and who we in our opinion didn't feel that they were going to do a volume of $1200 or better, those accounts were sold on a jobber basis.

Q. What was the difference in the basis of sales to jobbers and distributors?

A. You mean in the percentage of cost, or the percentage of volume?

Q. I mean any way at all. You said they were sold on the basis of jobbers. What did you mean by that?

A. I meant they were sold at the price sheet which we had printed as a jobber's price sheet.

Q. How were the distributors sold?

A. The distributors were sold on the agreement or the contract which we called our jobber's agreement, and on that agreement the schedule is made up according to $1200, 5 per cent, and so on.

Q. Am I to understand that those customers which you classified here for us this afternoon as jobbers were the customers which were not to receive volume rebate?

A. No. I should say in a lot of cases after a customer took on our line and his volume got up to a certain amount, our salesmen were instructed then to sign him on our jobber's agreement, so that he could enjoy on his volume the increased rebate as shown on the agreement.

Q. But when you classified these accounts for us
72 you classified as a distributor anyone who signed the jobber agreement; is that right?

A. That is right.

Q. And you classified as a jobber a customer or purchaser who had not signed the jobber agreement?

A. Right.

Q. And whose anticipated volume would not amount to $1200 a year; is that right?

A. That is right. We of course had no idea when we took on a new account whether or not he was going to reach the $1200, or what his volume was going to be, so that is why we just sold him on the regular jobber's price.

Q. He would have some past performance, wouldn't he?

A. That is true, but we also know it is true that maybe a jobber might have sold $2,000 worth the year before, and this year less than $1,000 worth.

Q. Am I right in saying that the test, or one of the tests for qualification as a member of the category you denominate as distributors is the fact that the customer or purchaser took on the complete Niehoff ignition line?

A. Your question is that we figured that a jobber should take on our complete line to be considered a distributor?

Q. Yes.

A. That is correct. And also that in our opinion he was a jobber who was doing in our estimation a volume
73 greater than $1200 or $1500 a year.

Q. So that the qualifications to rise from a jobber category to the distributor category were volume and complete coverage on the Niehoff ignition line?

A. I would say yes.

Q. The accounts which you have called distributor warehouse accounts are located, are they not, at various points throughout the country?

A. Yes, sir.

Q. Are they confined to the larger cities generally speaking?

A. Not necessarily.

Q. What are the qualifications entitling a customer or purchaser to be classified as a distributor warehouse account?

A. To handle our line complete, again, and his volume must exceed $6,000.

Q. When you talk about handling the complete line you are making reference to the fact that the company does not actively and aggressively resell the ignition parts of a competitor?

A. No, sir. He may have another line in some cases such as the National.

Q. If he carries the National line, is there any point of his duplicating with Niehoff equipment?

A. Yes. First of all, on our program we have a service stock setup which is sold by the jobber, which carries all three of the national lines, and when the jobber sells the service stocks it is necessary for him to have our line complete so he can take care of the fill-in that has to be sold to the account who has purchased the service stock.

Q. You feel that to qualify as a distributor or warehouse account it is necessary for the account to carry the complete Niehoff line?

A. The complete Niehoff ignition line.

Q. Complete Niehoff ignition line, yes. But that the fact that that account also carries the national equipment does not disqualify the account as a potential distributor or warehouse account?

A. Correct.

(Whereupon, at 5:20 p. m., September 13, 1950, the hearing in the above entitled matter was adjourned until December 14, 1950.)

76 Room 802-A New Post Office Building
433 West Van Buren Street
Chicago, Illinois

Tuesday, January 30, 1951

Met pursuant to notice, at 10:00 a. m.

Before: Frank Hier, Trial Examiner.

Appearances:

Eldon P. Schrup and Frank Mayer, counsel supporting the complaint.

Whitney Campbell, Attorney for the respondent, 134 South La Salle Street, Chicago, Illinois.

77 Proceedings.

Trial Examiner Hier: Docket 5768, C. E. Niehoff & Company, the second hearing in this case.

Before we go ahead with the hearing this morning there is a procedural matter which I have to get cleared up, and that is this: On January 23, 1951, the Commission, by order, substituted me for Trial Examiner Lipscomb. Now, the Administrative Procedure Act provides, in Section 5(c) that the same officer who presides at the reception of evidence shall make the decision on the part of the Commission except where such officer becomes unavailable to the agency. Examiner Lipscomb is not unavailable to the agency.

Mr. Campbell: I didn't understand that statement, sir.

Trial Examiner Hier: I said Examiner Lipscomb is not unavailable to the agency, and as I construe that section of the Act, both parties in proceedings of this kind have the right to have the man who makes the decision, at least the official decision, be the same man who saw or heard the witnesses.

Now, in this case we have had two witnesses, 75 pages of testimony and 21 exhibits. The right which is guaranteed by that section, of course, may be waived by you gentlemen, and unless it is, I will strike all this testi-
78 mony and these exhibits and we will start over. What do you gentlemen want to do about it?

Mr. Mayer: We have no objections.

Trial Examiner Hier: And you?

Mr. Campbell: I have no objection, Your Honor. I would just like to ask whether Your Honor will be sitting in this case from now on?

Trial Examiner Hier: I have got the case from here on out, Barring physical accident, I will finish.

Now, there is one other slight matter here. There are 21 exhibits in evidence. At the last hearing, on page 20, we marked Exhibits 22 through 87 for identification. These numbers have been assigned to definite documents and I want to know from counsel supporting the complaint if he is going to offer all of those documents in evidence.

Mr. Mayer: No, Your Honor, we are not going to offer all those documents.

Trial Examiner Hier: All right, then, the record may show this: That the marking of Commission's Exhibits for identification Nos. 32 through 87, inclusive, which appears on page 20, is stricken. Those numbers are vacated and any exhibits which counsel in support of the complaint chooses to have identified and offered will be assigned numbers following after No. 21.

Mr. Schrup: Well, I think there is one matter 79 that we might clarify before we go further.

Trial Examiner Hier: All right.

Mr. Schrup: At the time of the last hearing there was some question about the response to the subpoena duces tecum and the respondent bringing in the material in somewhat different form. There was one item that was not available that has since been found nad we have available now, in response to the subpoena,—Catalog No. 16, and the statements and invoices to Cotton States, Incorporated, during the month of November, 1948 and during the month of November, 1949. Those items were produced at the last hearing but apparently were not in the form desired by the attorneys for the Commission, so they have been produced here in a different form, which we believe does meet with that request.

Trial Examiner Hier: All right. The record may show that you have them and have tendered them to counsel.

Mr. Mayer: Shall we call Mr. Niehoff to the stand, please?

Trial Examiner Hier: Let the record show that Mr. C. E. Niehoff resumes the stand, having been previously sworn.

C. E. NIEHOFF resumed the stand and testified further as follows:

Direct Examination by Mr. Mayer.

Mr. Mayer: Your Honor, I would like to have this document marked for identification, which is a catalog in response to subpoena issued to C. E. Niehoff & Company.

Trial Examiner Hier: That is Catalog No. 16. Will you mark that Exhibit No. 22 for identification?

(The document referred to was marked Commission's Exhibit No. 22 for identification.)

By Mr. Mayer:

Q. Mr. Niehoff, I show you Commission's Exhibit No. 22 for identification and ask you to describe that document to us?

A. The Hydraulic Brake Parts Catalog of C. E. Niehoff & Company contains illustrations and the general descriptive matter of all hydraulic parts of our line.

Q. And what is the number on that catalog, Mr. Niehoff?

A. No. 16.

Q. Did this catalog supersede Catalog 15?

A. It followed No. 15, if that is what you mean.

Q. In order of time?

A. That is right.

Q. About what date was the date on which Catalog 16 was published?

A. 1947.

Mr. Mayer: I offer Commission's Exhibit marked for identification No. 22.

Mr. Campbell: No objection.

Trial Examiner Hier: It may be received.

(The document referred to, heretofore marked for identification, COMMISSION'S EXHIBIT NO. 22, was received in evidence.)

By Mr. Mayer:

Q. Mr. Niehoff, would you describe for us the classification of customers of C. E. Niehoff & Company?

A. Customers that we sell? Is that what you want?

Q. Yes, sir.

A. Well, we have a class of customers called jobbers

to which we issue our jobbers price sheet. Those are our primary customers.

Q. And that is normally the pink price list, is that correct, Mr. Niehoff?

A. That is correct, yes.

82 Q. Mr. Niehoff, do all the jobber customers of C. E. Niehoff & Company purchase according to signed agreements?

A. No, they do not necessarily do so.

Q. Do some of the jobber accounts of C. E. Niehoff & Company purchase according to the terms of signed agreements?

A. Yes, they do.

Q. Mr. Niehoff, what is the difference, or what is the basis for the determination as to which jobber operates without a contract and the jobber who purchases under a signed agreement?

A. Generally the basis is the volume of business that they do.

Q. And what is that volume, sir?

A. Under our jobbers agreement it was $1200 minimum and up to about $3600. The sliding scale treatment. 83 is based on their volume of purchases per annum.

Q. Was this in the form of an annual volume discount?

A. Yes, it was.

Q. Was the jobber who purchased over $1200 per year, but who had not signed the jobber's agreement, entitled to any annual volume discount?

A. I don't know whether I can answer that. If he had a contract, he was entitled to it.

Q. Then the jobber who had no contract was not entitled to an annual volume discount, regardless of the size of his annual purchases?

A. Well, the question as to whether he handles our line complete was always a factor in the determination as to whether we would submit a contract to him. If he was just buying one or two items or the minimum number of items in the line, it wasn't always necessary that he was qualified for a contract.

Q. When you speak of line, Mr. Niehoff, which line are you referring to?

A. Well, I am referring to either part of the ignition line or part of any other line that he does not buy com-

pletely. If he were to buy the ignition line complete, he would qualify.

Q. Was that an essential qualification to becoming classified as a jobber with an agreement, let us say?

84 A. Well, I don't know whether I can answer that question.

Q. Well, were all the jobbers, Mr. Niehoff, who entered into agreements with C. E. Niehoff & Company handling the complete Niehoff line?

A. I don't get your question.

Mr. Mayer: Read the question.

(The reporter read the last question.)

The Witness: I assume so, yes.

By Mr. Mayer:

Q. Do you have personal knowledge, Mr. Niehoff, as to whether they were or were not?

A. Well, I can't make an offhand statement because there may be exceptions to that rule.

Q. Do you know of any instance in which a jobber without an agreement purchased more than $1200 worth of Niehoff products in one calendar year?

A. Do I know of such jobbers?

Q. Yes.

A. Well, offhandedly, I can't give you any specific instances of it.

Q. I would not need specific cases, Mr. Niehoff, but did that ever happen?

A. There might have been such a case, yes.

Q. Mr. Niehoff, what further classification beyond the jobber classification did C. E. Niehoff & Company

85 have with its customers?

A. We had a distributors contract also, which applied to a volume in excess of $6,000 per annum.

Q. Does the company have a classification as distributor who does not sign an agreement with C. E. Niehoff & Company?

A. Yes.

Q. And what were the terms of sale accorded that type of customer?

A. It was the customer whose volume generally ran in excess of $3600 or less than $6,000. They were classified as distributors without having specific contracts.

Q. And were they given any discount off the regular jobber price?

A. Yes, they were.

Q. What was that discount, sir?

A. The discount was generally 10%.

Q. Now, sir, could you tell us the precise difference between a jobber who operated within a signed agreement with C. E. Niehoff & Company and a distributor who operated without any contract with C. E. Niehoff & Company?

A. Well, I don't know what you are asking there, because I don't know what information you want.

Q. Well, Mr. Niehoff, you have told us that you have a classification of accounts known as jobbers and that these accounts are given terms of sale according to a written contract with C. E. Niehoff & Company. You have also told us that you have distributor accounts who do not operate under any written contract with C. E. Niehoff & Company, and I am asking you now what is the difference between these jobbers and distributors?

86

A. The difference is in their volume of business which I tried to describe when I stated that they are under a classification where they would do a volume of business in excess of $3600.

Q. Mr. Niehoff, when a jobber operating under a written contract with C. E. Niehoff & Company, when his purchases went over the amount of $3600, was he automatically classified as a distributor?

A. He was classified as a distributor, I don't know whether you would say automatically. Obviously he would be, if his volume would be consistent we would classify him as a distributor to simplify the operation and give him the advantage of the discount from invoice.

Q. Now, when the distributor operating without a signed agreement well below $3600 in annual purchases, was he reclassified, then, into the jobber with agreement classification?

A. Well, I would say generally, yes. It may not be true in every instance but that was our general procedure.

Q. Would you notify a distributor whose volume of business had fallen below $3600 annually that he had been dropped in classification to the jobber agreement classified type of customer?

87

A. Well, generally that was taken up through our salesmen in the territory.

Q. How long, Mr. Niehoff, would it be necessary for a distributor to be below the $3600 annual yearly purchase

amount before you would notify him that he was no longer entitled to a distributor's discount?

A. Why, generally we would check it annually.

Trial Examiner Hier: The question is, how long, though, before he was notified?

Mr. Mayer: How many years, how many months, would it be necessary?

The Witness: I wouldn't be able to tell you that.

By Mr. Mayer:

Q. Who would, Mr. Niehoff?

A. Well, I don't know, because it is a matter of, maybe one customer was on the books for a period of time that may be several months or longer.

Q. Did you have any fixed policy with regard to this matter, or—

A. Yes, we had the policy of reclassifying these accounts at the beginning of each year to determine their status based upon their previous years of business.

88 Q. Well, then, did you, at the first of every year, notify a distributor who had fallen below the $3600 worth of annual purchases that he was no longer entitled to the distributors' discount?

A. I think we did, yes.

Q. Mr. Niehoff, was there any further classification of customers within the distributor classification?

A. None other than the distributors' agreement which applied to accounts whose business was somewhat in excess of $6,000 per annum.

Q. May we call those accounts distributor with agreement accounts?

A. I think that is correct.

Q. Now, Mr. Niehoff, would you tell us the difference between a distributor without an agreement and a distributor with an agreement?

A. The difference is generally in his volume of business.

Q. Was there a definite amount set to determine when a distributor could qualify for a distributor with agreement classification?

A. Well, as I stated before, we would review these accounts at the end of each year and if they had qualified in their volume, we would then submit a distributors' agreement to them.

Q. What was the volume requirement?

89 A. $6,000 or more per annum.

Q. Before a distributor would be submitted a distributors' agreement?

A. Yes, sir. I might add that there might have been exceptions to that case.

Q. Mr. Niehoff, what would the exceptions be based upon?

A. Well, upon competitive conditions such as we found when we might have taken out a new account in the territory. The salesman usually classified the account according to his best judgment and according to the information given by the account itself as to their volume of business in our line.

Q. Mr. Niehoff, do your salesmen classify these accounts or do you classify these accounts?

A. Frequently the salesman makes a recommendation to us because he is on the ground and knows the situation better than we do in the office.

Q. I still repeat the question, Mr. Niehoff. Do you actually make the classification or does the salesman make the classification?

A. We accept the recommendations of the salesmen where we feel that it is consistent with the reports as to the volume of business that the account does.

Trial Examiner Hier: Do you mean by that that the salesman recommends and you decide?

The Witness: Yes, I think that is the correct an

90 swer, Your Honor.

By Mr. Mayer:

Q. The exceptions, then, are made at the home office in determining the classification of the customer, rather than in the field by the salesmen themselves?

A. Well, I don't know about any exceptions being made.

Q. Mr. Niehoff, did you consider the volume of business which you have stated was a requirement to be classified as a distributor with an agreement as an essential factor in that determination?

A. Yes, we did.

Q. Do you, or did you in 1949, classify any accounts as distributors with agreements who did not reach the minimum total annual sales which you had prescribed?

A. I don't seem to understand that question.

Trial Examiner Hier: He means by that, have you put anybody in the $6,000 and above class who didn't reach that total in 1949?

The Witness: Well, we have no basis of assuring ourselves that an account will do the volume of business in a subsequent year, even though they had a contract.

Trial Examiner Hier: Well, he wants to know, though, if in 1949 you had any account and allowed them the corresponding discount in the $6,000 and above bracket, who actually didn't buy that much? Now, the answer is
91 either yes, no, or I don't know.

The Witness: I wouldn't be surprised if we did have some that didn't buy that much.

Trial Examiner Hier: All right.

By Mr. Mayer:

Q. Would this account that did not reach this particular volume in 1949 uniformly have been one who did reach the requirement in 1948?

A. I wouldn't know.

Q. Didn't you reclassify your customers as of the first of every year, based upon their total annual volume purchases?

A. We classified the customers at the beginning of 1949 and on the assumption that they would do a volume of business in excess of the contract requirements, yes.

Q. I am not sure we have this straight yet, Mr. Niehoff, but was there any account which did not reach the volume of $6,000 in 1948 classified as a distributor with an agreement in 1949 and also in that year did not purchase $6,000 annually from C. E. Niehoff & Company?

A. I wouldn't be able to say unless I saw the records.

Q. Mr. Niehoff, what were the terms of sale accorded a distributor who signed an agreement with C. E. Niehoff & Company?

A. The terms are specified right on the agreement that has been submitted to you.

92 Q. That was 10% off the face of the invoice plus the annual volume discount to which he would be entitled?

A. Well, the discount was 10% off of the base price or the printed price.

Q. And in addition to that, what did he receive?

A. He would receive an additional discount based upon his volume of business, which is also indicated in the contracts that are in your hands.

Q. Was that retroactive, Mr. Niehoff?

A. Yes, it was retroactive for the earned period of the year.

Q. Mr. Niehoff, in the course of one year's purchases from C. E. Niehoff & Company, upon the indication that a purchaser in the classification of jobber, if his purchases already totaled over $1200, let us say, midway during the year, would he automatically receive, or would he receive any discount off the jobber price list for the remainder of his purchases?

A. No, I don't believe so.

Q. It is quite possible, then, is it not, for, say, during the calendar year of 1949, for a jobber purchasing more than $1200 during that year receiving no discount, and a jobber with an agreement purchasing over $1200 but less than the straight jobber, upon which he would receive a discount?

A. Well, if he was under contract he would receive
93 the discount.

Trial Examiner Hier: We will take a short recess.

(A short recess was taken.)

Trial Examiner Hier: Proceed.

By Mr. Mayer:

Q. Mr. Niehoff, in the year 1949 did you have the Cotton States account?

A. Yes, sir, we did.

Q. What other group buying account did you have in 1949?

A. None other.

Q. Did you sell to any other group accounts prior to 1949?

A. Here at one time I think we did sell an account on the Pacific Coast. That might have been 1946 or 1947. I am not certain about it. They dropped us because competition came in and took the account away from us.

Q. Did you sell Cotton States account in 1950, Mr. Niehoff?

A. Yes, we did.

Mr. Mayer: Mr. Examiner, I would like to have marked for identification these documents which are agreements between Cotton States and—

Trial Examiner Hier: What are the dates?

Mr. Mayer; 1947, 1948 and 1949.

Trial Examiner Hier: All right. You may mark as Commission's Exhibit No. 23 for identification contract between the respondent and Cotton States dated April
94 10, 1947; as Commission's Exhibit No. 24 for identification, contract between the respondent and Cotton States, Inc., dated February 22, 1948; and as Commission's Exhibit No. 25 for identification, contract between the same parties the same month and day of the year 1949.

(The papers referred to were marked Commission's Exhibits 23, 24 and 25, for identification.)

By Mr. Mayer:

Q. Mr. Niehoff, I now hand you the document marked Commission's Exhibit No. 23 for identification, and I ask you to explain what that document is, sir?

A. That is our distributor's agreement with Cotton States, Inc., Greenwood, Mississippi.

Q. What are the effective dates of that agreement?

A. The year from the date of January 2, 1947 to December 31, 1947.

Q. All right, sir. Would you explain the typewritten figures typed in under the printed figures in the middle of the document?

A. That is a discount of 8% allowed on the volume if the volume was in excess of $18,000 of this Company, with the exceptions as stated below, of course, which were not subject to the discounts.

Mr. Mayer: I offer in evidence Commission's Exhibit for identification No. 23.

95 Mr. Campbell: No objection.

Trial Examiner Hier: It may be received.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT NO. 23, was received in evidence.)

By Mr. Mayer:

Q. I show you Commission's Exhibit for identification No. 24, sir, and ask you to describe that document for us?

A. This is a distributor's agreement with Cotton States, Incorporated, of Greenwood, Mississippi, effective for the year of January 2, 1948 to December 31, 1948.

Q. Mr. Niehoff, I now show you Commission's Exhibit

for identification No. 25 and ask you to describe that document for us, sir?

A. This is a distributor's agreement with Cotton States, Incorporated, of Greenwood, Mississippi, effective from January 3 to the end of the year of 1949.

Mr. Mayer: I offer in evidence Commission's Exhibit No. 24 for identification and Commission's Exhibit No. 25 for identification.

Trial Examiner Hier: Any objection?

Mr. Campbell: No objection.

Trial Examiner Hier: They may be received. The record may show these last three exhibits are photostatic copies of the respondent supporting the claim.

96 (The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 24 and 25, were received in evidence.)

By Mr. Mayer:

Q. Mr. Niehoff, were any sales made by the C. E. Niehoff Company to Cotton States, Inc., of Greenwood, Mississippi, during the year 1947 according to the terms of Exhibit No. 23?

A. Were any sales made? The answer would be yes.

Q. Mr. Niehoff, regarding the typewritten figures which are typed in under the printed figures in the center of the agreement, I ask if those figures were found in all Niehoff warehouse distributors' agreements for the year 1947?

A. I don't believe they were, because most of the accounts did not reach that volume.

Q. Mr. Niehoff, could you tell us one other account which operated under an agreement which had them?

A. I couldn't offhandedly, no.

Q. Mr. Niehoff, could you tell us if any sales were made according to the terms of Exhibit 24 during the year 1948?

A. Yes, sales were made according to this agreement.

Q. Mr. Niehoff, is this the typical Niehoff warehouse distributor's agreement offered to all distributors who signed agreements with C. E. Niehoff & Company?

A. Yes, sir.

97 Q. Could you tell us if any sales were made during the calendar year 1949 according to the terms of the agreement known as Commission's Exhibit No. 25, sir?

A. Yes, sir, sales were made to Cotton States from this agreement for the year 1949.

Q. And is this the typical Niehoff warehouse distributors agreement offered to all Niehoff distributors who signed agreements?

A. Yes, sir.

Mr. Mayer: Mr. Examiner, I would like to have marked for identification these documents which have been submitted in response to the subpoena addressed to C. E. Niehoff & Company, which purport to be one month's transaction between Cotton States, Inc. and C. E. Niehoff & Company.

Trial Examiner Hier: A half inch of paper apiece. The Examiner directs that the invoices for the month of November, I take it to be, 1949, of respondent to Cotton States, Inc., be clamped together as one exhibit, and that the entire group be marked Commission's Exhibit No. 26 for identification.

Mr. Mayer: Did you include the statement as well as the invoices?

Trial Examiner Hier: Yes, all stapled together.

(The papers referred to were marked Commission's Exhibit No. 26, for identification.)

98 Mr. Mayer: Mr. Examiner, I want to talk about individual pages in there.

Trial Examiner Hier: It appears from Commission's Exhibit No. 26, which consists of credit memoranda and invoices, that each individual invoice has a separate invoice number, and each credit memoranda has a separate memorandum number. They can be referred to individually by these numbers.

By Mr. Mayer:

Q. Mr. Niehoff, I show you a statement which is part of Commission's Exhibit No. 26 for identification, dated November 30, 1949, from C. E. Niehoff & Company, to Cotton States, Incorporated, of Greenwood, Mississippi, and ask you to describe what that statement tells us?

A. That statement to Cotton States shows the shipments made during the month of November, 1949.

Q. And what is the total amount in the balance column?

A. The total is $5,498.42.

Q. Thank you, sir. Now, referring, Mr. Niehoff, to another portion of Commission's Exhibit for identification

No. 26, I show you what appears to be an invoice from C. E. Niehoff to Cotton States, Incorporated, of Greenwood, Mississippi, showing that the order was shipped to Milton Supply Company of Meridian, Mississippi. This is numbered 14820—B.O. and your invoice number is described as 7194. Would you tell us—the center of the document—what the letters FF-170 mean, sir?

A. That is a part number. Ignition part number.

Q. Now the letters AL-158?

A. That is also a part number.

Q. And the 10% figure opposite the amount $11.42?

A. That is the distributor's discount of 10%.

Q. And the 7% figure which is opposite the figure $7.01, sir?

A. That is the discount on the distributor's agreement as allowed to Cotton States.

Q. So that is a typical transaction between C. E. Niehoff & Company and a member of Cotton States, Incorporated, sir?

A. Yes, it was.

Q. Did every member of Cotton States purchasing from your company deduct the 10% discount and the 7% annual volume discount from the face of the invoice?

A. I believe so, though it generally might have been shown on the statement at the end of each month. They had the 7% in addition to the regular 10%, the exception being, of course, the net items on which there would be no additional discount under the distributor's agreement.

Q. Mr. Niehoff, I show you another part of Commission's Exhibit No. 26 for identification, which is an invoice from C. E. Niehoff & Company to Cotton States, of Greenwood, Mississippi, showing that the purchase was shipped to Nealey's Gulf Service Station of Gilbertown, Alabama, bearing the number 16838 and your invoice number of 7271. I ask you, sir, to describe the figures and their meaning, in the middle of the document?

A. The item is one SS-6. That is a stock of merchandise shipped to the customer's dealer, namely, as specified on the invoice, and instance shipment was made directly to the customer on behalf of the Cotton States, Incorporated.

Q. All right, sir. Would you continue to describe the figures?

A. Well, the discount of 10% was allowed to the distributor, to Cotton States, yes, plus the freight allowance.

Q. What was the freight allowance?

A. At that time it was $2.00 per hundred pounds, as specified on the invoice.

Q. All right, sir. I note that this invoice does not carry the 7% annual volume discount. Could you tell us why not, sir?

A. It is a net item and it is not subject to the 7%.

Trial Examiner Hier: Mr. Niehoff, does your company have any transactions, financial or otherwise, with the individual members of Cotton States, other than shipment of merchandise to them?

The Witness: I don't know just what you mean.

101 Trial Examiner Hier: What I mean is this: I will go into detail, then. Did you receive any orders from individual members of Cotton States, or did the orders come from Cotton States?

The Witness: So far as my knowledge is concerned, my recollection, the Cotton States sends the orders and we process the orders and send the invoices to Cotton States at Greenwood. Shipments, however, were directed to the individual.

Trial Examiner Hier: Member?

The Witness: Member of the group.

Trial Examiner Hier: From whom would you receive payment?

The Witness: From Cotton States, I think. That is generally accepted.

By Mr. Mayer:

Q. I would like to ask one further question along the Examiner's line of questioning. Was the order sent in from the headquarters of Cotton States or was the order sent in from the individual member on a Cotton States order blank?

A. Well, you are asking me a question that I don't know whether I would be correct. It is my impression they came from Cotton States at Greenwood, but I might be mistaken.

Q. Who would know that? Would Mr. Geyer be able to answer that?

102 A. Maybe he would. I assume it might have been even both practices were followed. I wouldn't know, specifically.

Mr. Geyer: The jobbers send the orders to us on Cotton States on individual jobs—

The Witness: They do?

Mr. Geyer: Yes, sir.

Trial Examiner Hier: The statement is that the individual jobbers send the orders to the respondent on Cotton States order blanks in the majority of instances.

By Mr. Mayer:

Q. I show you another part of Commission's Exhibit for identification No. 26, which purports to be a credit memorandum issued by the C. E. Niehoff & Company to Cotton States Incorporated, No. 1353, and dated November 15, 1949. Could you describe that to us?

A. Well, this is for some returned merchandise consisting of various parts under the different code numbers specified here. It may have been obsolete merchandise or defective, I wouldn't know which, and for which a credit allowance was made. It is a regular procedure.

Q. The normal procedure between Niehoff & Company and Cotton States, however, was not to issue a credit memorandum covering the regular discounts and the annual volume discounts? They were taken right off the face of the invoices themselves?

103 A. In the case of Cotton States?

Q. Yes.

A. That is right.

Mr. Mayer: Mr. Examiner, I now offer Commission's Exhibit No. 26 for identification into evidence as showing a typical month's transaction between C. E. Niehoff & Company and Cotton States.

Trial Examiner Hier: Any objection, Mr. Campbell?

Mr. Campbell: No objection.

Trial Examiner Hier: It may be received.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBIT NO. 26, were received in evidence.)

Trial Examiner Hier: Before you get onto something else, I would like to ask the witness this question. Incidentally, Mr. Campbell, if you have any objection to any question I put to a witness at any time, don't hesitate to make it. I note, Mr. Niehoff, Commission's Exhibit No. 23, which is your 1947 contract, has this extra 8% discount allowance for the volume of $18,000 or over, whereas the contracts for the succeeding two years did not have that. Was there some reason why it was included in the one and not the other two?

The Witness: Well, as I recall it now, the reason that there have been some changes made in the terms of
104 the subsequent contracts was that we might change discounts or prices at any time and that usually those changes on this kind of contract are made in the subsequent year and I assume that $18,000 allowance was made, or the 8% allowance was made to meet competitive conditions. That is the way I would describe it.

Trial Examiner Hier: Did you allow it in 1948 and 1949?

The Witness: No, we did not. Our allowance is strictly in accordance with the terms of the contracts.

By Mr. Mayer:

Q. Do you recall specifically any particular order blank which was from Cotton States, Incorporated itself, rather than from one of the members?

A. You mean orders coming in from Cotton States?

Q. Yes.

A. Well, I assume that we did receive orders from Cotton States direct, yes.

Trial Examiner Hier: The question was, though, do you recall specifically any instance?

The Witness: Well, I don't know that I can recall it specifically, no. I don't believe I could do that.

By Mr. Mayer:

Q. All right, thank you. Do you recall any specific instance of shipping any merchandise direct to Cotton
105 States, Inc. at Greenwood, Mississippi?

A. Well, I don't believe I do.

Q. Mr. Niehoff, under the terms of the warehouse distributors agreement existing between Cotton States and C. E. Niehoff & Company, what were the terms of sale offered the individual members of Cotton States?

A. The same terms that would apply under our distributors agreement.

Q. Mr. Niehoff, I think earlier you stated that there was a certain requirement, minimum requirement, for a distributor to come up to before he could be classified in the manner as a distributor with an agreement?

A. Yes. May I explain that this way, that I believe the customer might have a distributor's agreement and not reach the necessary volume and therefore he would not be entitled to the discount and of course we have no assur-

ance as to the volume of business that they might do in any subsequent year.

Q. Likewise it was possible for a distributor without an agreement to exceed the minimum requirement and not participate in the annual volume discount, wasn't it?

A. It may have happened, yes, but what we usually did was to classify, reclassify the account so as to give an agreement in the subsequent year.

Q. Do you classify each individual member of Cotton States as a warehouse distributor or a distributor with an agreement?

106 A. We have had only the distributors agreement in effect that we have with Cotton States, Incorporated.

Q. But you offer the same terms to each and every member of the Cotton States group, do you not, sir?

A. Yes, and to any other jobber that would qualify under the contract.

Trial Examiner Hier: Wait a minute, I am getting confused. On these Cotton States purchases they get this volume discount, it runs up to $12,000, is that right, taken on the face of the invoice. Do I understand from the last question and answer that they offer the same terms that they do to any other jobber—that any individual member of Cotton States gets the discount in addition to that jobber's contract?

Mr. Mayer: No, that is not —

Trial Examiner Hier: Well, I wish you would clear that up because I don't get it.

Mr. Mayer: Do you want to strike the last question and answer?

Trial Examiner Hier: No, leave that stand. I just don't understand that question and answer. Apparently you and the witness do, so clear it up between you.

By Mr. Mayer:

Q. Mr. Niehoff, each and every member of Cotton States was receiving the terms of sale afforded a dis-
107 tributor with an agreement with C. E. Niehoff & Company, were they not?

A. To Cotton States, Inc.?

Q. By virtue of their membership in Cotton States?

A. Right.

Q. To your knowledge, would any individual member during any calendar year meet the minimum requirement

of total annual volume sales to be classified as a distributor with an agreement?

A. Yes, sir, I believe the majority would.

Trial Examiner Hier: Now, that raises an interesting question in my mind. Do you keep a record in your company of the amount of sales by your company that went to each individual member of Cotton States?

The Witness: Yes, I believe we have a record which would designate as to how much each of the individual concerns purchased.

By Mr. Mayer:

Q. Mr. Niehoff, would each and every individual member purchasing during any one calendar year, though, have qualified for the maximum annual volume discount?

A. Some would and some I don't believe did.

Q. In other words, from your last answer, each and every member of the Cotton States group purchased in sufficient quantities in the calendar year 1949 to be classified as a distributor with an agreement and at least 108 qualify for the annual volume discount?

A. Well, I believe they did. I am not 100% certain because I haven't the figures here at this moment, but there may have been an exception to that rule.

Q. Would Mr. Geyer be able to answer that for us precisely?

A. I don't know whether he would or not.

Trial Examiner Hier: Mark that question in your notes.

By Mr. Mayer:

Q. Mr. Niehoff, the effect, then, of the warehouse distributors agreement between Cotton States and C. E. Niehoff & Company was to allow each and every member of the Cotton States buying group to benefit according to the discount offered a distributor with an agreement, and also to receive the maximum annual volume discount?

Mr. Campbell: Your Honor, I object to the question. I think it is argumentative.

Mr. Schrup: I think he already answered. He answered yes.

Trial Examiner Hier: Sustained. I think it is argumentative.

By Mr. Mayer:

Q. Mr. Niehoff, during 1949 was there any minimum

requirement of purchases by each member of Cotton States group before they participated in the agreement or in
109 the benefits of the agreement signed between C. E. Niehoff & Company and Cotton States, Incorporated?

A. Well, in most instances their purchases would be sufficient in the first month of the year to qualify them for the maximum discount, or within the course of the first two months, because of the volume of business that was done with Cotton States.

Q. That is basing, however, each individual member's participation upon the total amount of purchases by the group?

A. Yes. We only sold the Cotton States. We had our agreement with Cotton States.

Mr. Mayer: Your Honor, I would now like to have marked for identification a series of documents returned under the subpoena addressed to C. E. Niehoff which represents correspondence between the Cotton States group and C. E. Niehoff & Company.

Trial Examiner Hier: All right. Miss Reporter, you may let the record show there have been marked for identification the following, all of them photostats: Commission's Exhibit No. 27, a letter, Cotton States to respondent, dated November 9, 1946; 28, letter from the respondent to Cotton States dated November 27, 1946; 29, photostat, jobber prices of the respondent dated January 10, 1947; 30, the second sheet of the same document; 31, letter,
Cotton States to respondent, December 2, 1946; 32,
110 letter, Cotton States to respondent, July 7, 1947; 33, letter from respondent to Cotton States, July 18, 1947; 34-A, B and C, a letter from respondent to Cotton States, July 25, 1947; 35, a letter, Cotton States to respondent, July 28, 1947; 36, letter from respondent to Cotton States dated August 1, 1947; 37, a letter from respondent to Cotton States dated August 1, 1947; 38-A and B, a letter from respondent to Cotton States dated August 5, 1947; 39, letter from Cotton States to respondent dated February 24, 1948; and as 40, a letter from respondent to Cotton States dated March 1, 1948.

(The papers referred to were marked Commission's Exhibits Nos. 27, 28, 29, 30, 31, 32, 33, 34-A, -B and -C, 35, 36, 37, 38-A and -B, 39 and 40, for identification.)

111 *Direct Examination by Mr. Mayer (continued).*

Q. Mr. Niehoff, I show you the document marked Commission's Exhibit for identification No. 27, and ask you to describe that for us, sir?

A. This is a letter addressed to C. E. Niehoff & Company from Cotton States, Inc. of Greenwood, dated November 9, 1946.

Q. Can you identify the handwriting on that document, Mr. Niehoff?

A. I don't know the handwriting on the document.

Q. Could you tell us if it was put on there at the Niehoff offices?

A. I should judge it was, from the remarks that are on here, but I don't know who made the comment.

Q. I show you the document marked Commission's Exhibit for identification No. 28 and ask you to please describe that, sir?

A. This is a letter to Cotton States dated Novem-
112 ber 27, 1946 from our Sales Department, written by H. L. Kirchschlager.

Q. Was that in connection with the previous letter which was marked Commision's Exhibit for identification No. 27?

A. I judge it is, yes.

Q. And what is the general content of those two letters?

A. They refer to a statement of October 28, 1946 that apparently was submitted to them by our company to Cotton States.

Q. And with particular reference to what items, Mr. Niehoff?

A. Well, I don't know what items were covered because it refers to a discount, to the net items which apparently were shown on the contract with reference to such items as cutouts, regulators and brake parts which were not subject to the regular discount.

Q. At this time?

A. At that time yes.

Q. Mr. Niehoff, I now show you Commission's Exhibits for identification Nos. 29 and 30, and ask you to please describe those for us, sir?

A. Jobber prices, January 10, 1947, as issued by C. E. Niehoff & Company to our jobbing trade in general, and

also this is marked, the heading, Cotton States, Incorporated, of Greenwood, Mississippi, and this gives the classification of the items that are subject to the sales allowance of 8% under our contract and it designates those 113 items that of course are not subject to discount.

Q. Does this, the 8% figure on the price list, does that refer to the annual volume discount?

A. Yes, that is the volume discount allowance in excess of the minimum which I think was $18,000 at that time.

Q. Mr. Niehoff, was any other warehouse distributor at this period allowed a deduction of 8% for an annual volume discount?

A. Why, I believe yes, if they received more than $18,000 worth of business they would be allowed such discount.

Q. Was that discount provided for in the warehouse distributors agreements?

A. I am under the impression it was, yes.

Mr. Mayer: May I offer in evidence Commission's Exhibits for identification Nos. 27, 28, 29 and 30?

Trial Examiner Hier: Any objection?

Mr. Campbell: No objection.

Trial Examiner Hier: They may be received in evidence—27 to 30.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 27, 28, 29 and 30, were received in evidence.)

Trial Examiner Hier: Off the record.

(Discussion off the record.)

114 Trial Examiner Hier: On the record.

Mr. Mayer: Your Honor, I offer in evidence Commission's Exhibits for identification Nos. 31, 32 and 33, which documents were submitted by C. E. Niehoff & Company under subpoena.

Trail Examiner Hier: Any objection, Mr. Campbell?

Mr. Campbell: No objection. They have been described for the record, have they not?

Trial Examiner Hier: That is right. They are received in evidence, then.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS NOS. 31, 32 and 33, were received in evidence.)

By Mr. Mayer:

Q. I show you now the document marked for identifi-

cation as Commission's Exhibit for identification No. 34-A, B and C, which is a three-page letter from yourself to Mr. Louis Post dated July 25, 1947, and call particular attention to paragraph two on the second page of the letter. I will ask you to read that, please, sir?

A. (Reading.) We have actually extended you a better discount than is generally extended due to the fact that your volume has been very substantial, and which is greatly appreciated on our part, and that this arrangement of an allowance of 8% had been established prior with you.

Well, I believe that the inference of this letter is
115 that they are getting the volume, maximum volume allowances under, as set forth in this contract or agreement, and that is what I had in mind when I stated that paragraph.

Q. What would you have in mind, Mr. Niehoff, by better discount than is generally offered?

A. Well, by virtue of their volume, they were getting generally a better discount, only based upon volume.

Q. In other words, it wasn't a better discount than is generally offered to a buyer of the same volume?

A. Right.

Mr. Mayer: I offer Commission's Exhibit for identification No. 34-A, B and C.

Trial Examiner Hier: Any objection?

Mr. Campbell: No objection.

Trial Examiner Hier: Received in evidence.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS NOS. 34-A, 34-B and 34-C, were received in evidence.)

Mr. Mayer: I offer in evidence Commission's Exhibits for identification Nos. 35, 36 and 37, which is correspondence between C. E. Niehoff & Company and Cotton States.

Trial Examiner Hier: Any objection to this, Mr. Campbell?

Mr. Campbell: No objection.

116 Trial Examiner Hier: Received in evidence, then.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS NOS. 35, 36 and 37, were received in evidence.)

By Mr. Mayer:

Q. Mr. Niehoff, I show you the document marked Commission's Exhibit for identification No. 38-A and B, which is a two-page letter from yourself to Mr. Louis Post of

Cotton States, dated August 5, 1948, and ask you to read the first paragraph on page 2 of that letter, please sir?

A. (Reading.) We are also planning in the near future, to have some missionary help available to you that will, I am sure, be beneficial to your organization as well as to other members with whom we are working at the present time. It is for this reason that it may be opportune to include the sale of hydraulic brake parts in your activity.

Q. All right, sir. Did the normal Niehoff warehouse distributors contract provide for missionary work?

A. Our contract does not make any reference, I don't believe, to any missionary work. We necessarily have a representative in the territory who tries to assist all accounts and when they have prospects they try to assist them in selling such accounts, usually with the assistance of their own men.

Q. Was this missionary work available to all of 117 your other customers at that time?

A. Yes, it was.

Q. There was no distinction made regarding the volume of purchases of the customer?

A. No.

Mr. Mayer: I offer Commission's Exhibit 38-A and B in evidence.

Trial Examiner Hier: Any objection, Mr. Campbell?

Mr. Campbell: No objection.

Trial Examiner Hier: It may be received, then.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS NOS. 38-A and 38-B, were received in evidence.)

By Mr. Mayer:

Q. Mr. Niehoff, I show you the document marked Commission's Exhibit for identification No. 39, which is a letter from Mr. Louis Post, President of Cotton States; to C. E. Niehoff & Company, and I ask, sir, that you read the entire letter to us?

A. This is a letter dated February 24, 1948 to C. E. Niehoff & Company, and reads: Gentlemen, Referring to your letter February 14th in which you advise that the maximum freight allowances on shipments into our territory is $2.00 per CWT. We have had no notice of any change on the freight allowance and since we have been

getting full freight allowed would appreciate your
118 advising why the change was made and when it was effective.

Q. Would you tell us, Mr. Niehoff, if during 1947 Cotton States were being sold on the basis of full freight allowed?

A. Well, actually, I assume from this that they were, but I am not certain that it is true, see.

Q. This is Mr. Post's statement in the letter to you, that they had been receiving full freight allowed.

A. Post might have been lying, too.

Q. Did your price list during 1947 allow full freight to any customers, Mr. Niehoff?

A. I haven't the price list here so I wouldn't know what reference they made to the question.

Q. Mr. Niehoff, I believe Commission's Exhibit 12-A is the jobber price list for January 10, 1947. Could you tell us if that price list provides for any freight allowances?

A. It is shipments f.o.b. Chicago or warehouse.

Trial Examiner Hier: What about the distributors price list? Does that allow freight?

Mr. Mayer: They all buy off the pink jobber price list. I offer Commission's Exhibits for identification Nos. 39 and 40, No. 40 being the answer from C. E. Niehoff & Company to Mr. Post of Cotton States regarding the freight allowance.

Trial Examiner Hier: Well, any objection, Mr.
119 Campbell?

Mr. Campbell: No objection.

Trial Examiner Hier: They may be received in evidence, then.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS NOS. 39 and 40, were received in evidence.)

By Mr. Mayer:

Q. Do you have any accounts which are not classified as jobber or distributor accounts?

A. Yes, we have.

Q. What accounts are those, sir?

A. Well, we have—at one time we had what we term magneto accounts, or magneto parts accounts, the line has been virtually discontinued, and this was a category outside of the regular jobbing classification of accounts. We

also have accounts that we classify as manufacturers, who require special items for special manufacture under their own requirements. I believe that quite fully covers it. We have another group of accounts that developed during the war as rebuilt accounts that we sold to rebuild units due to the fact that shortage of materials required the rebuilding of old units, and while they generally fell in the category of our jobbing accounts, they would also be in that group of special accounts that would not normally qualify as a jobber on our complete line.

120 Q. Mr. Niehoff, do you have accounts which you would term branch warehouse accounts?

A. Branch warehouse accounts? No.

Q. How would you classify, Mr. Niehoff, your account with the House of Peaslee, of Boston, Massachusetts?

A. Well, Mr. Peaslee, or his organization, is a factory representative for the C. E. Niehoff Company.

Q. Does the House of Peaslee purchase any of C. E. Niehoff & Company's products for resale?

A. Mr. Peaslee represents the C. E. Niehoff Company in a selling capacity and in more recent years has also carried a local warehouse stock for emergency service to his customers.

Q. What are the terms of the agreement with the House of Peaslee and C. E. Niehoff Company?

A. You mean discounts, et cetera?

Q. Yes.

A. Well, they vary on different items. I think the information was given to your representative, Mr. Steele, when he examined the records, and he has that in his hands.

Q. I would like to have your statement concerning it, Mr. Niehoff, at the present time.

A. I would only be able to give them to you from memory but I couldn't tell you as to the kind they were
121 because there were various ranges on various products.

Q. There was no uniform discount, then, granted the House of Peaslee on all shipments from C. E. Niehoff & Company?

A. Well, actually there was a uniformity, yes, I believe so.

Q. And what did that uniformity consist of?

A. You mean insofar as his purchases are concerned?

I think they were running from 10 or 15% off to 22%. In that range.

Q. Was there any particular reason for this range of discounts, Mr. Niehoff?

A. Well, it was commensurate with the services that he rendered to his trade in the territory.

Q. What service did Mr. Peaslee render for the C. E. Niehoff Company?

A. Mr. Peaslee traveled men in the territory and sold to the jobbing trade in the area and also had the warehouse operation not only for Niehoff lines but for other lines that he carries to service these local accounts.

Q. Did the House of Peaslee act as a jobber for any of the Niehoff lines?

A. No, they did not.

Q. What is the territory covered by Peaslee?

A. It is generally known as the New England States.

Q. Was it necessary, Mr. Niehoff, for the various accounts in the New England States area to order through the House of Peaslee in order for them to be accorded 122 a discount on that purchase?

A. I would say that the bulk of the business was direct with the factory and Mr. Peaslee was compensated on a commission basis for that. His warehouse sales, I might add, were very nominal.

Mr. Mayer: Mr. Examiner, I would like to have these documents marked for identification as exhibits submitted by C. E. Niehoff & Company, through subpoena, to a representative of the Federal Trade Commission. These have all been submitted by the Company too.

Trial Examiner Hier: There has been marked as Commission's Exhibits 41-A through L, monthly statement and accompanying papers between respondent and House of Peaslee, and as Commission's Exhibit 42-A through G the same sort of documents covering the month of December, 1949.

(The papers referred to were marked Commission's Exhibits 41-A through L, and 42-A through G, for identification.)

By Mr. Mayer:

Q. Mr. Niehoff, I show you the document which has been marked Commission's Exhibit for identification No. 41-A and I would ask, sir, to have you describe that document for us?

A. That is the April 30 commission statement to the House of Peaslee. That figure represents the sales 123 in the territory he covers.

Q. All right, sir. Was this the only type of settlement which was made with the House of Peaslee monthly?

A. Yes, I believe it was the only type; if they were not warehouse sales, that would be separate, I believe, from the commission.

Q. This would be a typical monthly statement from Niehoff & Company to the House of Peaslee?

A. It would be a typical monthly commission statement, yes.

Q. What would be the difference, sir, if there had been some warehouse sales? Would it appear on the same statement?

A. I don't know. I couldn't tell you that. I am not familiar with the statements.

Q. Who would know?

A. Well, I think your auditor would know, because he went over those records.

Q. Is there anyone in the Niehoff Company who would know?

A. I suppose our bookkeeper would know. The credit manager, too.

Q. Would your salesmanager know?

A. You ask him. I can't ask the question for you.

Mr. Geyer: No, I wouldn't, Mr. Mayer.

Mr. Mayer: I offer into evidence, Mr. Examiner the documents marked Commission's Exhibits for identification 41-A through L.

124 Mr. Campbell: I have no objection, Your Honor. As I said, that is relying on information from counsel that these are photostats of documents given to Mr. Steele by the Niehoff Company.

Trial Examiner Hier: Well, if comparison shows otherwise, they can be withdrawn. They may be received in evidence, 41-A through L.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 41-A through 41-L, were received in evidence.)

Trial Examiner Hier: What about 42-A through G? That is the same situation.

Mr. Mayer: Yes, sir. 42-A through G is the same settlement for the month of December, 1949, for the transac-

tions of the House of Peaslee with C. E. Niehoff & Company.

Trial Examiner Hier: You are in the same position as with 41-A through L?

Mr. Campbell: That is right, sir.

Trial Examiner Hier: All right, they may be admitted in evidence.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 42-A through 42-G, were received in evidence.)

By Mr. Mayer:

125 Q. Mr. Niehoff, with reference to these two settlements represented by Commission's Exhibit 41-A and Commission's 42-A, could you tell us the discount provided for on both of those settlements?

A. Yes. The commission rate is 10%.

Q. Did the 10% commission paid to the House of Peaslee apply to all sales other than as well as out of the Peaslee warehouse?

A. Yes it did at that time. I might add that it is on the net amount of the sales he turned in.

Q. Do you carry the account of L. C. Biglow nad Company of New York City, New York?

A. L. C. Biglow Company is acting as a sales representative in a warehouse for us in the New York metropolitan area.

Q. Does Biglow Company fill orders out of its own warehouse?

A. In their arrangements they do, yes.

Q. Do they also forward orders to be filled out of the Niehoff plant in Chicago?

A. That would be the case—let's put it another way. As a general rule, no, but there are exceptions where that has been done, yes.

Q. What would the reasons be, Mr. Niehoff, for making such exceptions?

126 A. Well, let me explain that Biglow Company has its representatives calling upon the jobbing trade and they solicit the business and fill the orders from the warehouse. They also carry their own accounts. They are familiar with the area and the accounts, due to their long standing in the community, and so primarily their services are directed to the customer through their warehouse.

Q. Does C. E. Niehoff send any salesmen into the New York metropolitan area?

A. Well, yes, I have been in the territory and talked to Biglow, if that is the question. Mr. Geyer has talked to the men at sales meetings to give them information, technically and otherwise, and it has been true, too, that on a few occasions over a period of years that we have had salesmen try to acquaint their men with the line, yes.

Q. Do any of your salesmen solicit accounts in the New York City area?

A. Only when they have asked them to do so in connection with their own activities.

Q. Mr. Niehoff, could you tell us the commission that L. C. Biglow & Company receives on the sales of the various Niehoff products?

A. L. C. Biglow Company receives a commission allowance for sales and warehouse which varies in accordance with the figure that was given to Mr. Steele, your auditor, and they range I think from 15 to 22%. That is, by
127 that, I mean there are some items on which I think there is a discount of 15%, and on others there is a greater discount.

Trial Examiner Hier: Who is the owner of this stock of yours in the Biglow warehouse?

The Witness: L. C. Biglow Company is the owner of the stock.

Trial Examiner Hier: They get this commission you are speaking of when they purchase from you to stock up?

The Witness: The arrangement is such that they carry their own stock, do their own billing out of their own warehouse.

Trial Examiner Hier: Well, I say the commission that you are talking about here is applied to these purchases from you in order to stock their warehouse?

The Witness: Right. They are made an allowance for that service which may be termed a discount or commission, I don't know which you would classify it, but it is compensation for the service that they render to us.

By Mr. Mayer:

Q. This discount or commission is taken off the face of every invoice, isn't that so?

A. Right. To simplify the procedure and make it a little easier to do business on that basis.

Q. Do you know if Biglow received any discount on the net items purchased from C. E. Niehoff & Company?

128 A. Yes. They get a discount on the net items for the reason they have to do the selling and warehousing service.

Q. Are they the only customer of C. E. Niehoff & Company which receives a discount on net items?

A. No. I think that the same would be true of the House of Peaslee and also on our Pacific Coast arrangement.

Q. I think the settlements on the House of Peaslee showed a straight 10% on items which were not warehoused by Peaslee, isn't that so?

A. That was a 10% commission on direct factory sales.

Q. In other words, then, the sales out of the warehouse had different discounts on them, depending on the type of sale that it was?

A. I wonder whether we are getting confused here. The warehouse arrangement was slightly different, let me put it that way, for the reason that there is an additional warehouse allowance made on the merchandise purchased and sold by the House of Peaslee, and the same is true in the case of Biglow.

Q. Now, in the metropolitan area, Mr. Niehoff, do you have customers which you would classify as distributors with an agreement, or just straight distributors within that area?

A. Well, the classification of the accounts is left entirely to L. C. Biglow & Company who cover that territory.

Q. Does C. E. Niehoff & Company approve the classification made by Biglow Company?

129 A. Well, yes and no, because they select their jobbers that they wish to sell to our qualified jobbers and the only question that we might raise is as to whether the account is really doing a wholesale or jobbing business in this line.

Q. Was the discount that Biglow & Company received in addition to the regular discount which was granted to the distributor who held an agreement with C. E. Niehoff & Company?

A. No, the discount granted Biglow was from the jobbers' sheet, not in addition.

Q. If in the resale of these goods Biglow sold to an account nominated as a distributor account with an agreement, did that account receive the normal distributor agreement discount?

A. I am not familiar as to what Mr. Biglow did in that respect.

Mr. Mayer: I would like to have marked for identification two shipping orders of C. E. Niehoff & Company.

Trial Examiner Hier: All right, 43-A and B is the shipping order, C. E. Niehoff & Company to Biglow dated April 8, 1949; 44-A and B is the same thing dated October 20, 1949.

(The papers referred to were marked Commission's Exhibits 43-A and 43-B, and 44-A and 44-B, for identification.)

By Mr. Mayer:

Q. Mr. Niehoff, I show you the documents which have been marked Commission's Exhibit for identification 43-A and 43-B and ask you to tell me what Document No. 43-A represents?

A. It represents an invoice to L. C. Biglow Company of New York. It specifically, however shows that this shipment was in general exception to the rule and was made direct to one of their customers in New York State.

Q. What, precisely, is this document? The invoice?

A. It is the invoice, yes, to Biglow Company.

Q. And what is the handwriting right above the name of the person to whom this shipment is to be made?

A. I suppose it says "Spec." which probably means special, because we don't usually make direct shipments to customers for Biglow Company.

Q. Could you tell me what the figures in the total columns here read and mean? The handwritten figures?

A. Yes. That is the discount given to Biglow Company on this invoice here on the items in question.

Q. What is the amount of the discount?

A. It says, less 22%.

Q. Would that discount apply, whether the order was made direct from the South Bay Auto Part or not?

A. This would be the discount that would be made
131 to Biglow Company. We don't discount—we don't sell to South Bay Auto Parts Company.

Q. Does the order come direct from South Bay Auto Part?

A. No, this came through Biglow.

Mr. Mayer: I offer in evidence Commission's Exhibit for identification No. 43-A and 43-B, and 44-A and 44-B.

Trial Examiner Hier: Any objection?

Mr. Campbell: No objection.

Trial Examiner Hier: It may be received.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 43-A and 43-B, and 44-A and 44-B, were received in evidence.)

By Mr. Mayer:

Q. Mr. Niehoff, who would classify the account of Paul G. Niehoff, of Los Angeles, California, with the C. E. Niehoff Company?

A. Paul G. Niehoff & Company is a factory representative and also acts as warehouse in servicing accounts on the Pacific Coast. He travels men over the entire Pacific Coast area, calling on jobbers.

Q. Does the Paul G. Niehoff Company of Los Angeles sell to the same jobber accounts that the C. E. Niehoff Company of Chicago does?

A. Well, the Paul G. Niehoff and its representa-
132 tives call upon the jobbing trade, and we also ship direct from the factory as well as service them out of the warehouse.

Q. The same jobber account, then, might well purchase from the Paul G. Niehoff Company warehouse stock on one occasion, and direct from the C. E. Niehoff Company in Chicago on another occasion?

A. It is their privilege to do so, but generally it is only on a local basis. By that I mean primarily in the area in which their warehouse is located in the State of California.

Q. Who is the owner of the stock, in the stock of automotive parts?

A. C. E. Niehoff & Company is the owner of the stock in this instance.

Q. In the Paul G. Niehoff Company warehouse?

A. That is right.

Q. Is there any sales transaction between C. E. Niehoff of Chicago and Paul G. Niehoff of Los Angeles before any over-the-counter sales are made to the local jobbers?

A. Well, these are not over-the-counter sales. They are—well, they may be pick-up sales, truly, but such small quantities are handled and billed by Paul G. Niehoff Company and we in turn bill to Paul G. Niehoff Company for that merchandise that is handled out of the warehouse.

Q. The billing, then, for the merchandise is made
133 from C. E. Niehoff to Paul G. Niehoff after the sale has been made from Paul G. Niehoff to the jobber?

A. Yes.

Q. Do you have—that is, the C. E. Niehoff Company of Chicago, have regular jobber and jobber with agreement accounts in that area?

A. Yes, we have some jobbing in that area where the factory services the account direct.

Q. Do you also have distributor and distributor agreement accounts in that area?

A. Yes, we do.

Q. Is there any standard by which the account knows whether to order direct from C. E. Niehoff Company in Chicago or from Paul G. Niehoff Company of Los Angeles?

A. Why, I don't know that there is any standard. It is a privilege that they have as a matter of choice.

Trial Examiner Hier: Do you have salesmen on the Pacific Coast?

The Witness: Paul G. Niehoff.

Trial Examiner Hier: No, I mean you, your company?

The Witness: No, we do not.

By Mr. Mayer:

Q. You do not travel any salesmen in that area?

A. No.

Q. Does the Paul G. Niehoff Company of Los An-
134 geles receive any discount on shipments that are made directly from the Chicago plant to the local customer?

A. That is right. They do.

Q. Could you tell us what those discounts amount to?

A. Well, I can't, offhandedly, no, but I think you have the figures in your hands. They were given to your auditor.

Q. At least discounts are given on sales which would go normally to a jobber account or jobber agreement account?

A. I think they are generally 10%, if my memory serves me correct.

Q. Are these discounts paid to Paul G. Niehoff Company in addition to the discounts which are granted the particular customer?

A. They are commission to Paul G. Niehoff Company and they are a commission allowance made on the net sales to the customer.

Q. So on a quantity sale, Mr. Niehoff, by a distributor in the Los Angeles area which is ordered direct from the Chicago plant, is there any commission paid to the Paul G. Niehoff Company on that sale?

A. Yes, there would be.

Q. And that is in addition to the commission which is received by the purchaser by reason of his being a distributor account?

A. That is right. That is a compensation for his 135 services in the territory.

Q. Does this apply to net items as well as other specific items?

A. Yes. The discount rate may be different. I am not certain about that.

Q. On shipments out of the Los Angeles warehouse, was there a warehousing commission paid to Paul G. Niehoff & Company?

A. Yes, sir.

Q. And also a sales commission?

A. Well, yes.

Q. And was this paid, sir, in addition to the normal discount which would be granted a distributor or distributor with an agreement?

A. Well, his commissions or discount and allowance, whichever you term it, are made from the base jobbers price and is really not an addition, that is, so far as cost of merchandise is concerned that he redistributes.

Q. Mr. Niehoff, who owns the merchandise which is sold out of the Los Angeles warehouse to a particular jobber who wants to buy from that warehouse?

A. Well, originally we own it but it is transferred or billed to Paul G. Niehoff Company if he services and carries the account.

Q. Is it billed to Paul G. Niehoff Company before 136 the sale to the jobber or after the sale to the jobber?

A. It might be either way.

Q. Then the distributor who purchases from the warehouse is granted his commission by virtue of the fact he is a distributor, and the Paul G. Niehoff Company of Los Angeles receives its discount or commission in addition to that already taken off the list for the distributor?

A. For services rendered, either sales or warehousing services.

Mr. Mayer: I have two sets of documents here—

Trial Examiner Hier: Let the record show there has been marked for identification as Commission's Exhibit Nos. 45-A through J, assorted papers indicating the monthly business done between C. E. Niehoff Company of Chicago and Paul G. Niehoff Company of Los Angeles

for the month of April, and as Commission's Exhibit 46-A through O the same batch of documents for the month of October, 1949.

(The papers referred to were marked Commission's Exhibit Nos. 45-A through 45-J, and 46-A through 46-O, for identification.)

Mr. Mayer: Can we have a recess for two or three minutes, Your Honor?

Trial Examiner Hier: Yes.

(A short recess was taken.)

Trial Examiner Hier: On the record. Proceed.

137 By Mr. Mayer:

Q. Mr. Niehoff, I show you Commission's Exhibit for identification No. 45-A, and ask you, sir, to tell us what all the figures on the statement mean?

A. Well, I am just looking at it, I am trying to figure it out myself. This is a commission statement of Paul G. Niehoff Company of Los Angeles for sales in his territory—in other words, shipments made directly to accounts in the Pacific Coast area through our company on which Mr. Paul G. Niehoff, operating as Paul G. Niehoff Company is compensated in the form of a commission.

Q. Would you tell us what this line, Pacific Coast Accounts No. 3, means?

A. Well, it means the accounts that he sold and shipped to during the month of April on the Pacific Coast, or the Pacific Coast area that he covers.

Q. Would that be the shipments out of the Chicago plant direct to the customer located in that area?

A. Yes, I believe so.

Q. How about the line which reads, warehousing accounts #4?

A. I believe that is merchandise shipped out of the warehouse and billed to these accounts out of the Chicago office.

Q. Now the next line, which reads, P. G. Niehoff #4. What would that cover?

A. Well, it is my assumption that that would in-
138 dicate the—I am not at all certain about that—it is my assumption that it would be those accounts that he shipped and billed out of the warehouse stock and was billed to Paul G. Niehoff. That is my assumption. I am not exact on that.

Q. These were sales which were shipped out of the P.

G. Niehoff warehouse and billed by the Chicago plant to P. G. Niehoff?

A. That is my assumption, yes. This seems to be a summary of a commission statement made up of these other statements here.

Q. Have you ever seen one of these before, Mr. Niehoff?

A. Well, I assume I have seen these statements before. I just looked at one a little while ago, but I don't handle the detail of it either, so I am not just conversant as to how they are handled.

Q. Now, Commission's Exhibit for identification No. 45-C. Would you tell us the meaning of the various figures in the columns under 12%, 10%, 6% and so forth?

A. Well, this shows the invoice with the different part numbers and the different discounts that would apply, or commissions due on the items in question.

Q. Depending upon what those items were, and what the agreed upon discount was concerning the sale of those items?

A. I believe that is correct.

Q. Mr. Niehoff, I show you Commission's Exhibit 139 for identification No. 45-E and ask you what the words SJ Regular mean in the first part of the body of the document?

A. Well, I can't tell you that. I know J stands for jobber. Why the S is on there, I don't know how the office classifies them. I assume it is to qualify them for the change of commissions that have been set up for Paul G. Niehoff on the Pacific Coast.

Q. Would that be a different type of account than that indicated in the next to last account by J Regular?

A. Well, J Regular, that means, it is my assumption, the regular line. Here it says J Cabinets, which means the cabinets have a different rate or are net, as the case may be in this instance, but they are still all receiving the J prices, the jobbers prices.

Q. From the regular jobber price list?

A. Yes.

Q. Mr. Niehoff, I was trying to contrast the first item entered, which is the SJ Regular and shows Warehousing commission of 10% and straight commission of 10%, and J Regular, warehousing 10% and straight commission 12%.

A. Well, that is the rate that would apply on the J

account, see. In other words, they receive 10 and 12 on this J account covering certain classes of merchandise.

Q. They received 20 on this SJ account?

A. SJ, yes, because there might be some items on 140 which there is only a 10% allowance for warehouse commission.

Q. Mr. Niehoff, on Commission's Exhibit for identification No. 45-F, would you tell us what that document is?

A. This is an invoice to Henderson Brothers of Sacramento, California.

Q. Can you tell from that invoice whether the shipment was made from Chicago or Los Angeles?

A. Why, I assume it was made from Chicago.

Q. Now, would you tell us what the handwritten initials BH and the line over PGN mean?

A. Well, PGN naturally stands for Paul G. Niehoff, and BH, I would say, in the old days we classified them as branch house, because Henderson Brothers have a number of branches. I think that is the way it was classified.

Mr. Mayer: I offer in evidence Commission's Exhibit for identification Nos. 45-A through J.

Trial Examiner Hier: Any objection?

Mr. Campbell: No objection, Your Honor.

Trial Examiner Hier: It may be received.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS NOS. 45-A through 45-J, were received in evidence.)

By Mr. Mayer:

Q. Mr. Niehoff, I show you Commission's Exhibit for identification No. 46-A and ask you if that is a typical 141 monthly summary from C. E. Niehoff & Company to Paul G. Niehoff of Los Angeles?

A. Yes, it is.

Q. Pointing out in particular Commission's Exhibit for identification No. 46-E, sir, would you explain the hand-written figures appearing in the last three columns, right below the figures 929.05?

A. Yes, this is an invoice to Henderson Brothers, Sacramento, California, of October 18, 1949, and this gives you the description of the items and the price and the discounts, which is the distributors discount of 10%, and here is a trade allowance, Pacific Coast area, of $2.55, which I think explains these figures.

Q. Is that freight allowance allowed on the shipment from Chicago?

A. Yes.

Q. Was it customary in 1949 to offer freight allowances for shipments to the West Coast area?

A. Yes, I think the established rate was $2.55 at that time.

Q. Did that apply to shipments for Paul G. Niehoff Company as an individual, as well as to your other accounts as distributors and jobbers?

A. No, because when we ship our own merchandise to the warehouse we have to pay the freight on it.

142 Q. Paul G. Niehoff, then, did not own the goods in his own warehouse until he actually sold them to some account?

A. That is right. There may be exceptions to that rule, however.

Mr. Mayer: I offer in evidence Commission's Exhibits for identification 46-A through 46-O.

Mr. Campbell: No objection, Your Honor.

Trial Examiner Hier: They may be received.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBITS 46-A through 46-O, were received in evidence.)

By Mr. Mayer:

Q. Mr. Niehoff, is there any protection given the Paul G. Niehoff Company on purchases made from customers in the California area?

A. Purchases made by customers in California? What kind of protection do you mean?

Q. For example, if a customer ordered direct, without any salesman solicitation—for example merely seeing the Niehoff catalog and ordered direct from the Chicago plant and in return received shipments direct from the Chicago plant, would Mr. Paul G. Niehoff, or Paul G. Niehoff Company, receive any commission or discount on that order?

A. Well, in the first place, if we had any inquiry from anybody in the territory, it would be referred back

143 to the Pacific Coast office, asking them to contact the account. We usually don't get orders from customers unless they have decided to take on the line and that process requires assistance through the salesmen, and as a matter of time, naturally, such account has to be qualified creditwise and qualified also as a jobber, and I don't

know of any instances where we would just get orders from a customer sent in to us, but I might add this, too—that whenever there are any sales in the territory, regardless, commissions are paid to salesmen in the territory, yes.

Q. Mr. Niehoff, do you keep monthly summaries of purchases by individual members of the Cotton States group?

A. Yes, I think we have that.

Q. Would you have yearly summaries, as well as monthly summaries available for purchases by the individual members of the group?

A. I think Mr. Steele has gotten that information from us.

Q. If Mr. Steele does not have that information, would you furnish that to us upon request?

A. I will gladly furnish it to you, yes.

Mr. Mayer: Thank you, sir. That is all we have now, Mr. Examiner.

Trial Examiner Hier: Just a moment. Do you want to cross-examine?

Mr. Campbell: I would rather not cross-examine at
144 this time and put everything that we have in by way of clarification or otherwise, when the respondents end their case.

Trial Examiner Hier: All right. The witness is excused then. Thank you, sir.

(Witness excused.)

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record. Let the record show that Fred H. Geyer, having been previously sworn, resumes the stand for further direct examination.

FRED H. GEYER resumed the stand and testified further as follows:

Direct Examination.

Mr. Mayer: Miss Reporter, will you read the question we reserved in the record previously for Mr. Geyer?

(The reporter read the question as follows:

"Question: Would each and every member's purchases during any one calendar year, though, have qualified for the maximum annual volume discount?")

The Witness: As far as I can remember. I think there is only one member who—you are talking about 1949?

Trial Examiner Hier: Yes.

The Witness: Who did not qualify to the extent of $6,000 which the agreement calls for. That is the 145 question?

By Mr. Mayer:

Q. Yes, sir. Do you recall, Mr. Geyer, how many members qualified for more than the minimum, minimum annual—

A. I think all of them did except this one.

Q. Do you know how many would have qualified for the maximum annual volume rebate?

A. That I don't know. That I couldn't tell you.

Mr. Mayer: That is all I have for Mr. Geyer.

Trial Examiner Hier: Direct examination completed. I understand counsel for respondent does not care to cross-examine at this time but wants to put all his testimony in when counsel supporting the complaint have finished.

(Witness excused.)

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record. This being all the testimony of counsel supporting the complaint at this time and place, adjournment is taken by agreement between counsel, to reconvene at 10:00 A.M. on March 2, 1951, in Room 332 Federal Trade Commission Building, Washington, D. C.

(Whereupon, at 3:50 P.M. January 30, 1951, the hearing in the above-entitled matter was adjourned.)

146 Room 532, Federal Trade Commission Bldg., Pennsylvania Avenue and Sixth Street, NW., Washington, D. C.,
March 2, 1951.

Met, pursuant to notice, at 10:00 a.m.

Before: Frank Hier, Trial Examiner.

Appearances:

Eldon P. Schrup, Frank Mayer, and James E. Corkey, Counsel supporting the complaint.

Whitney Campbell, Counsel for Respondent, C. E. Niehoff & Co., 134 South LaSalle Street, Chicago, Illinois.

147 Proceedings.

Trial Examiner Hier: All right, gentlemen.

Mr. Reporter, there has been marked by the Examiner as Commission's Exhibits for identification, the following documents:

Commission's Exhibit No. 47-A through E is an individual comparison of net proceeds from sales to customers located in specified markets — 1949.

(The papers referred to were marked Commission's Exhibit 47-A through 47-E, respectively, for identification.)

Trial Examiner Hier: As Commission's Exhibit No. 48 for identification, a summary of sales to members of Cotton States, Inc. — 1949.

(The paper referred to was marked Commission's Exhibit 48, for identification.)

Trial Examiner Hier: From here on I have these invoices. Exhibit 49-A and B, an invoice to the Motor Supply Company of Dallas, Texas, 1-11-49.

(The papers referred to were marked Commission's Exhibit 49-A and 49-B, respectively, for identification.)

Trial Examiner Hier: As Commission's Exhibit No. 50, invoice to John M. Walton, Inc., New Orleans, Louisiana, 1-14-49.

148 (The paper referred to was marked Commission's Exhibit 50, for identification.)

Trial Examiner Hier: As Commission's Exhibit 51, invoice to Alabama City Auto Parts, Gadsden, Alabama, 2-24-49.

(The paper referred to was marked Commission's Exhibit 51, for identification.)

Trial Examiner Hier: As Commission's Exhibit 52-A and 52-B, invoice Ellis Auto Parts, Jacksonville, Florida, 4-4-49.

(The papers referred to were marked Commission's Exhibit 52-A and 52-B, respectively, for identification.)

Trial Examiner Hier: As Commission's Exhibit 53-A and 53-B, invoice to Wilson Auto Parts and Equipment, Inc., Jacksonville, Florida, 7-7-49.

(The papers referred to were marked Commission's Exhibit 53-A and 53-B, respectively, for identification.)

Trial Examiner Hier: As Commission's Exhibit 54, invoice to Auto Electric Service Company, Montgomery, Alabama, 8-1-49.

(The paper referred to was marked Commission's Exhibit 54, for identification.)

Trial Examiner Hier: As Commission's Exhibit 55, invoice to Fort Smith Automotive Supply, Fort Smith, Arkansas, 8-2-49.

(The paper referred to was marked Commission's Exhibit 55, for identification.)

149 Trial Examiner Hier: As Commission's Exhibit 56-A and 56-B, invoice to Fort Smith Automotive Supply, Fort Smith, Arkansas, 9-7-49.

(The papers referred to were marked Commission's Exhibits 56-A and 56-B, respectively, for identification.)

Trial Examiner Hier: As Commission's Exhibit 57, and invoice to United Service of Shreveport, Shreveport, Louisiana, 10-21-49.

(The paper referred to was marked Commission's Exhibit 57, for identification.)

Trial Examiner Hier: As Commission's Exhibit 58, an invoice to Williams Auto Supply, Fort Smith, Arkansas, 10-24-49.

(The paper referred to was marked Commission's Exhibit 58, for identification.)

Trial Examiner Hier: As Commission's Exhibit 59, an invoice to J. B. Cook Auto Machine Company, Nashville, Tennessee, 10-11-49.

(The paper referred to was marked Commission's Exhibit 59, for identification.)

Trial Examiner Hier: As Commission's Exhibit 60, an invoice to F. & H. Parts Company, Duncan, Oklahoma, dateless.

(The paper referred to was marked Commission's Exhibit 60, for identification.)

150 Trial Examiner Hier: Commission's Exhibit 61 for identification is an invoice to Motor Supply Company, Decatur, Alabama, 10-25-49.

(The paper referred to was marked Commission's Exhibit 61, for identification.)

Trial Examiner Hier: There has been marked as Commission's Exhibit 62 for identification an invoice to Haskins Supply Co., Inc., Enid, Oklahoma, 10-18-49.

(The paper referred to was marked Commission's Exhibit 62, for identification.)

Trial Examiner Hier: Commission's Exhibit for identification 63-A, B and C, is an invoice to Higginbotham-Pearlstone Hardware Company, Dallas, Texas, 10-27-49.

(The papers referred to were marked Commission's Exhibit 63-A, 63-B and 63-C, respectively, for identification.)

Trial Examiner Hier: And as Commission's Exhibit 64-A, B, and C, an invoice to McClellan Motor Supply, Enid, Oklahoma, 11-1-49.

(The papers referred to were marked Commission's Exhibit 64-A, 64-B and 64-C, respectively, for identification.)

Trial Examiner Hier: Next, as Commission's Exhibit 65-A and B, and invoice to Central Auto Parts, Inc., Shreveport, Louisiana, 10-28-49.

151 (The papers referred to were marked Commission's Exhibit 65-A and 65-B, respectively, for identification.)

Trial Examiner Hier: As Commission's Exhibit 66, an invoice to United Service, Alexandria, Louisiana, 10-24-49.

(The paper referred to was marked Commission's Exhibit 66, for identification.)

Trial Examiner Hier: As Commission's Exhibit 67-A, B, C, and D, an invoice to Stratton-Warren Sales Company, Memphis, Tennessee, 11-2-49.

(The papers referred to were marked Commission's Exhibit 67-A, 67-B, 67-C and 67-D, respectively, for identification.)

Trial Examiner Hier: Commission's Exhibit 68-A and B, an invoice to F. & H. Parts Company, Duncan, Oklahoma, 11-4-49.

(The papers referred to were marked Commission's Exhibit 68-A and 68-B, respectively, for identification.)

Trial Examiner Hier: As Commission's Exhibit 69-A and B, an invoice to Cole Brothers, Nashville, Tennessee.

(The papers referred to were marked Commission's Exhibit 69-A and 69-B, respectively, for identification.)

Trial Examiner Hier: As Commission's Exhibit 70, and invoice to Monger Auto Supply, Ponca City, Oklahoma.

(The paper referred to was marked Commission's Exhibit 70, for identification.)

152 Trial Examiner Hier: Next, Commission's Exhibit 71, which is an invoice to N. & L. Auto Parts Company, Jacksonville, Florida, 11-3-49.

(The paper referred to was marked Commission's Exhibit 71, for identification.)

Trial Examiner Hier: An invoice to United Service, Alexandria, Louisiana, 11-7-49, a Commission's Exhibit 72.

(The paper referred to was marked Commission's Exhibit 72, for identification.)

Trial Examiner Hier: Commission's Exhibit 73-A and B, is an invoice to Motor Supply Company, Chattanooga, Tennessee, 11-7-49.

(The papers referred to were marked Commission's Exhibit 73-A and 73-B, respectively, for identification.)

Trial Examiner Hier: Commission's Exhibit 74-A and B, an invoice to Haynes Auto Supply Company, Tulsa, Oklahoma, 11-8-49.

(The papers referred to were marked Commission's Exhibit 74-A and 74-B, respectively, for identification.)

Trial Examiner Hier: Commission's Exhibit 75 is an invoice to Farr Auto Supply, Alexandria, Louisiana, 11-23-49.

(The paper referred to was marked Commission's Exhibit 75, for identification.)

Trial Examiner Hier: As Commission's Exhibit 153 76-A and B, an invoice to C. & J. Auto Parts Company, Gadsden, Alabama, 11-9-49.

(The papers referred to were marked Commission's Exhibit 76-A and 76-B, respectively, for identification.)

Trial Examiner Hier: Commission's Exhibit 77, an invoice to Willo Battery and Parts Company, Jacksonville, Florida, 11-8-49.

(The paper referred to was marked Commission's Exhibit 77, for identification.)

Trial Examiner Hier: Commission's Exhibit 78 is

an invoice to Chelsea Auto Parts Company, Memphis, Tennessee, 11-9-49.

(The paper referred to was marked Commission's Exhibit 78, for identification.)

Trial Examiner Hier: As Commission's Exhibit 79-A and B, an invoice to the Harrison Motor Supply Company, Montgomery, Alabama, 11-10-49.

(The papers referred to were marked Commission's Exhibits 79-A and 79-B, respectively, for identification.)

Trial Examiner Hier: As Commission's Exhibit 80, an invoice to Union Auto Electric Service, Memphis, Tennessee, 11-10-49.

(The paper referred to was marked Commission's Exhibit 80, for identification.)

Trial Examiner Hier: As Commission's Exhibit 154 81, an invoice to United Parts Company, Tulsa, Oklahoma, 11-11-49.

(The paper referred to was marked Commission's Exhibit 81, for identification.)

Trial Examiner Hier: As Commission's Exhibit 82, an invoice to Alf Bowers, Augusta, Georgia, 11-11-49.

(The paper referred to was marked Commission's Exhibit 82, for identification.)

Trial Examiner Hier: As Commission's Exhibit 83-A and B, and invoice to Carter Auto Supply, Dallas, Texas, 11-16-49.

(The papers referred to were marked Commission's Exhibit 83-A and 83-B, respectively, for identification.)

Trial Examiner Hier: As Commission's Exhibit 84 an invoice to Baird Bearings and Parts Company, Birmingham, Alabama, 11-16-49.

(The paper referred to was marked Commission's Exhibit 84, for identification.)

Trial Examiner Hier: As Commission's Exhibit 85-A and B an invoice to A-G Motor Supply Company, Oklahoma City, Oklahoma, 11-16-49.

(The papers referred to were marked Commission's Exhibit 85-A and 85-B, respectively, for identification.)

Trial Examiner Hier: As Commission's Exhibit 86-A and B, and invoice to Lancaster Battery and Electric Company, Chattanooga, Tennessee, 11-17-49.

155 (The papers referred to were marked Commission's Exhibit 86-A and 86-B, respectively, for identification.)

Trial Examiner Hier: As Commission's Exhibit 87,

an invoice to Automotive Wholesalers, New Orleans, Lousiana, 11-18-49.

(The paper referred to was marked Commission's Exhibit 87, for identification.)

Trial Examiner Hier: As Commission's Exhibit 88, an invoice to Auto Electric Company, Ponca City, Oklahoma, 12-1-49.

(The paper referred to was marked Commission's Exhibit 88, for identification.)

Trial Examiner Hier: As Commission's Exhibit 89, an invoice to Auto Parts Warehouse Company, Chattanooga, Tennessee, 11-25-49.

(The paper referred to was marked Commission's Exhibit 89, for identification.)

Trial Examiner Hier: As Commission's Exhibit 90, for identification, copy of an invoice to Bearings, Parts and Supply Company, Augusta, Georgia, 12-1-49.

(The paper referred to was marked Commission's Exhibit 90, for identification.)

Trial Examiner Hier: And as Commission's Exhibit 91-A and B, an invoice to Wholesale Parts Company, Dallas, Texas, 12-19-49.

156 (The papers referred to were marked Commission's Exhibit 91-A and 91-B, respectively, for identification.)

Trial Examiner Hier: The record may also show that those documents which have been marked as Commission's Exhibits 49-A through 91-B are photostats, presumably of the originals and that the date which has been given with the identification in each instance is that appearing under the printed legend "Date shipped", and where the date shipped is blank, the date given under printed legend "Your order date" was dictated.

All right, gentlemen.

Mr. Mayer: I would like to call Mr. Steele to the stand, Mr. Examiner.

Trial Examiner Hier: All right, Mr. Steele.

MELBOURNE C. STEELE was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Mayer.

Q. Would you state your full name, please, sir?
A. Melbourne C. Steele.
Q. Your occupation?
A. Accountant.
Q. By whom are you employed, Mr. Steele?
A. The Federal Trade Commission.
157 Q. For how long have you been employed by the Federal Trade Commission in the capacity of accountant?
A. Since 1929.
Q. Mr. Steele, are any aspects of your work in the nature of supervisory aspects?
A. Yes, sir.
Q. Would you describe what supervisory work you do?
A. Well, on an investigation or other work with different individuals where it entails additional help I set up and study the form of procedure to be followed and take off the work as it is to be done and supervise that work of different employes which are assigned to assist me and then direct the nature and extent of the summaries and preparation of anything taken from the tabulations or other work that we have.
Q. Mr. Steele, how long have you been engaged in the work of visiting respondents' plants and places of business for the purpose of examining documents and records to be used in matters pending before the Federal Trade Commission?
A. Since 1929.
Q. And how long have you been engaged in drawing up the tabulations for use in Federal Trade Commission proceedings?
A. For the same period of time.
Q. Mr. Steele, would you tell us your educational background as an accountant?
A. Two years at the University of Idaho School of
158 Business Administration and am a graduate of the Benjamin Franklin University, Washington, D. C.
Q. Mr. Steele, in this tabulation, or those tabulations,

which have been marked Commission's Exhibit for identification 47-A through E, and Commission's Exhibit for identification 48, are these summaries your own personal work?

A. No, sir. They were prepared by one of the other employes of the Commission under my supervision.

Q. Now, Mr. Steele, I direct your attention to Commission's Exhibit for identification 47-A through E, and ask you to tell us what this document represents?

A. This exhibit represents a comparison of the net proceeds from sales to customers located in specified markets during the year 1949 by the respondent C. E. Niehoff and Company, and these markets are in general throughout the southern area of the United States.

Q. Mr. Steele, what records of the respondent were examined in preparation to drawing up the documents which are known as Commission's Exhibits for identification 47-A through E and Commission's Exhibit for identification 48?

A. Those exhibits are prepared from summaries of sales in different sales territories which the company respondent had in its files, which were furnished to me by Mr. Kirchschlager, the Assistant Treasurer of the respondent, and this material was spot-checked with invoices and
159 credit memorandums for the accuracy of the compilation prepared by the company.

Q. Was Mr. Kirchschlager the employe of C. E. Niehoff and Company with whom you worked in preparing these data?

A. Yes, sir.

Trial Examiner Hier: How do you spell that name?

Mr. Kirchschlager: K-i-r-c-h-s-c-h-l-a-g-e-r.

Trial Examiner Hier: Thank you.

By Mr. Mayer:

Q. Now, Mr. Steele, do these tabulations which are marked Commission's Exhibit 47-A through E, and Commission's Exhibit for identification 48, reflect the facts and figures which were made available to you solely by the respondent?

A. Yes, sir.

Q. Now, directing your attention to Commission's Exhibit for identification 47-A, would you describe for us, Mr. Steele, what is meant by the various columns on this exhibit?

A. Well, column one represents the name and the company's classification, as shown by the summaries furnished

me by the company, of the customer, such as jobber or distributor. J means jobber. JA means jobber with agreement. D means distributor. DA means distributor with agreement. Column two shows the location of the customer.

Q. Mr. Steele, may we return to column one and explain while we are here the meaning of the capital C which
160 appears in parentheses opposite two of the entries on this page?

A. The capital C in parentheses indicates that this account was a member of Cotton States, Inc.

Q. Also the asterisk which appears opposite the item of J. B. Cook located in Little Rock, Arkansas?

A. The asterisk indicates that this account had more than one location and for the purpose of computing the annual volume and rebate the company combined the sales of each location.

Q. Were the shipments in every instance to the same location, Mr. Steele?

A. No, the shipments were to the individual stores of these companies that had more than one store.

Q. Now, would you continue with column two?

A. Well, column two, as I have indicated, represents the location of the account.

Column three represents the total sales during the year 1949 at jobber prices. Now this account has been computed by me, that is, in instances with respect to the D and DA accounts to reflect the actual jobber prices. In other words, the information furnished by the company is of net figures shown in column five, from which we have deducted a ten percent discount allowed distributors. So, in order to get at the actual jobber price for comparison with those who bought at the regular jobber prices, I have added back
161 that ten percent to get the full gross figure.

Column four represents the ten percent distributor discount.

Column five is the net sales as shown by the summary furnished me by the company.

Column six is cash discount offered by the respondent at the rate of two percent per annum to all customers and is computed on the net sales with the exception of the Cotton States accounts on which it is computed after deducting the rebate, since that rebate was remitted monthly.

Q. Mr. Steele, are the figures in column seven the actual figures taken from respondent's records and merely added to make the total by you?

A. No. These figures were shown on the company's summary as such as the amount of rebate sales with the exception of the Cotton States accounts to members of Cotton States, Inc., and they were computed—No, excuse me. Let me go back over that and straighten it out. Rebate sales are figures shown by the company's summary in every case.

Q. All right, sir.

A. Column eight, the rebate was shown by the company's summary in every case except members of Cotton States, Inc. In those cases the amount of rebate was computed by me by applying the percentage which was shown by the summary for each of those members to the
162 amount of the rebate sales as shown by the summary.

Column nine represents the percent of annual volume rebate, which is shown by the summary as being paid by the respondent to each of these accounts.

Column ten represents net proceeds from sales after deducting the distributor's discount of ten percent, the cash discount of two percent and the amount of the annual volume rebate.

Q. Ten indicates, Mr. Steele, the net proceeds received by C. E. Niehoff and Company as a result of their sales to the various customers listed. Is that correct?

A. That is correct.

Q. All right, sir.

A. Column eleven represents the percent of net proceeds shown in column ten to the sales at jobber prices, as shown in column three.

Trial Examiner Hier: We will take a short recess.

(A short recess was taken.)

Trial Examiner Hier: All right. Mr. Steele, to recapitulate, columns one and two were taken from respondent's records. Columns five, seven, eight and nine were taken from summaries of information furnished you by the respondent with the exception that in column eight Cotton States appears and you computed that yourself and all of the remaining columns are computed or derived figures. Is that right?

163 The Witness: To be specific, columns three, four eleven and six were computed by me from information furnished by the company.

Trial Examiner Hier: How about column ten?

The Witness: Yes, column ten.

Trial Examiner Hier: That is a computed figure also?

The Witness: Yes, sir.

Trial Examiner Hier: All right. Go ahead.

By Mr. Mayer:

Q. Mr. Steele, throughout Commission's Exhibit for identification 47-A through E, there are some notations in parentheses, some reading three months, six months and nine months.

Would you explain those to us please?

A. That indicates the company had a contract or sold to that customer only for that period of time. The notation is put on there because no figure of annual volume rebate for part of the time is taken into account. For example, if they only bought through a period of six months the sales were doubled in order to determine whether the customer was entitled to the annual volume rebate.

Q. And the parenthetical expression on Commission's Exhibit for identification 47-A opposite the Fort Smith Automotive Supply, the entry "Sold out", what does that mean, Mr. Steele?

A. It just means he sold out to another account. He 164 would not be entitled to annual volume rebate, but the new account might, if he took over the Niehoff line.

Trial Examiner Hier: For what period of time are these figures applicable? He must have sold out during the year 1949.

The Witness: That is right, the year 1949.

Trial Examiner Hier: How much of the year 1949 is reflected on this exhibit as to Fort Smith Automotive Supply?

The Witness: I don't know.

By Mr. Mayer:

Q. Mr. Steele, the figure opposite Fort Smith Automotive Supply in Fort Smith, Arkansas, the amount of purchases from C. E. Niehoff and Company is the total during the period they were purchased in 1949, whatever that is?

A. Yes, sir.

Q. Column three which is the total sales column, does that include more than one sale?

A. Oh, yes. That includes all the sales during the period of time up to the time that he did sell out.

Q. Now, on Commission Exhibit for identification 47-C the parenthetical expression "out of business". What does that mean, Mr. Steele?

A. That sometime during the year 1949 this customer went out of business for one reason or another. Therefore, he would not be entitled to annual volume rebate at the end of the year.

165 Q. Then, this entry "out of business" Mr. Steele, means that they went completely out of business, or does it merely mean they ceased to handle the Niehoff line?

A. No. That they went completely out of business.

Q. Where did you get that information from, Mr. Steele?

A. From Mr. Kirchschlager.

Q. On Commission Exhibit for identification 47-A the parenthetical expression "sold out" opposite the Fort Smith Automotive Supply Company at Fort Smith, Arkansas, where was that information gathered?

A. That was shown on the summary of sales furnished by the respondent.

Q. All right, Mr. Steele, would you describe for us, paying particular attention to Commission's Exhibit for identification 47-A what the comparison reveals as to the situation regarding purchasers in Fort Smith, Arkansas?

A. Well, the first account listed in Fort Smith was the Fort Smith Automotive Supply Company, which was a jobber with agreement. In other words, he was entitled to annual volume rebate if his sales reached the percentage provided in the agreement.

During the period of time up to the time he sold out, he purchased merchandise to the value of $1,843.00, and he was offered a two percent discount on that purchase in the amount of $36.86 from the net proceeds of $1,806.14, or ninety-eight percent of his total pur-
166 chases.

The second account at Fort Smith was entitled Hanna-Gray, which was also a JA account. His purchases amounted to only $129.00 on which he was offered a two percent cash discount. He was entitled to no annual volume rebate and the net proceeds also amounted to ninety-eight percent of the sales.

The third account was Williams Auto Supply Company, which is a regular distributor account without agreement, entitling them to annual volume rebate. Their purchases amounted to $1,864.44. Deducting the cash discount and the distributor discount of ten percent which he was given off the face of each invoice, the net proceeds

from sales to that account to the respondent represented 88.2 percent.

Q. All right, sir.

Trial Examiner Hier: Mr. Steele, I notice in column five "net sales" there are never any cents in that column. That is the same of the net sales during the year 1949, and it strikes me it is odd there are no cents, merely round figures in dollars.

The Witness: That is taken from the company's summary and they dropped the cents in their own summary.

Trial Examiner Hier: From that figure in column five is built up the figures in columns three and four?

The Witness: With respect to the DA and D accounts only. For the J and JA accounts, it is the same figure.

Trial Examiner Hier: This chart would be to the extent of a few cents then wrong? I won't say wrong, but at any rate, there is an error in columns three and four to the extent the cents were dropped in column five?

The Witness: Yes, column five is rounded out.

Trial Examiner Hier: Well, I think you told me this, but what was the basis of selection here of accounts?

The Witness: These accounts represented three sales districts of the respondent which cover the southern area of the United States.

Trial Examiner Hier: Well, were all accounts selected in a given state?

The Witness: This includes all accounts in these three sales areas which also include the accounts in each city listed here.

Trial Examiner Hier: All right.

By Mr. Mayer:

Q. Now, Mr. Steele, I direct your attention to Commission's Exhibit for identification 47-D, and ask you to point out to us what the comparison reflects as to the situation with reference to customers of G. E. Niehoff and Company in Chattanooga, Tennessee?

A. The first account listed at Chattanooga, Tennessee, is Auto Parts Warehouse Company, which is a J or 168 jobber without an agreement. The sales to that account during the year 1949 amounted to $1,533.00 on which he was offered two percent discount, making net proceeds to the respondent of ninety-eight percent of their sales to that account.

The second account was Lancaster Battery and Electric Company which is a distributor account without an agreement entitling him to the annual volume rebate. However, this account did receive a distributor discount of ten percent of total sales from net sales of $1,220.00, on which he was offered two percent discount, resulting in net proceeds to the respondent of 88.2 percent of the gross sales at jobber prices to that account.

The third account was Motor Supply Company, which was also a jobber without an annual volume sales agreement. His purchases amounted to $627.00, on which he was offered a two percent cash discount, making net proceeds to the respondent of 98 percent of the sales to that account.

Q. All right, sir. Would the comparison disclose then two accounts in Chattanooga, Tennessee, purchased approximately the same amount of gross purchases from the respondent paying different net remittances though on the various purchase prices?

A. Yes, sir.

Mr. Campbell: Your Honor, I object to that question. I think the figures speak for themselves.

169 Trial Examiner Hier: Sustained. That is plain from this chart, if the chart is correct.

By Mr. Mayer:

Q. Mr. Steele, I now direct your attention to Commission's Exhibit for identification 47-D and ask you to tell us what the comparison reflects as to the situation in Dallas, Texas?

A. The first account under Dallas, Texas is the Carter Auto Supply Company, which was classified as a jobber and was given an annual volume sales rebate agreement. The total sales to the account amounted to $2,463.00 on which he was offered a two percent cash discount and on which he earned a seven percent rebate amounting to $172.41, resulting in net proceeds to respondent of 91 percent of the sales at jobber prices to that account.

The second account at Dallas is the Higginbotham-Pearlstone account which was classified as a distributor and was given an agreement entitling him to an annual volume rebate.

This branch of this account at Dallas purchased total sales of $5,277.78, upon which he received a ten percent distributor discount and was offered a two percent cash

discount on the net sales and, to [illegible] other branches, he earned a rebate of five percent, amounting to $227.65. The net process from the sales to this Dallas branch of Higginbotham-Pearlstone netted C. E. Niehoff and
170 Company 83.9 percent of the total sales at jobber prices.

The third account at Dallas shown on the exhibit is Motor Supply Company of Dallas, which is classified as a distributor, but was not given an agreement. Total sales to that account amounted to $550.00 on which he received a ten percent distributor's discount and was offered a two percent cash discount, but received no annual volume rebate and the net proceeds to the respondent from the sales to that account were 88.2 percent.

The fourth account was the Wholesale Parts Company, which was classified as a jobber, but was not given an agreement entitling him to annual volume rebate. Sales to that account amounted to $795.00 on which he was offered two percent cash discount, resulting in net proceeds to the respondent of 98 percent of the total sales to that account.

Trial Examiner Hier: May I ask you if cash discounts are uniformly taken off net sales after deducting whatever discount was applicable to the total?

The Witness: It was applied to net sales in column five, except members of Cotton States, Inc.

Trial Examiner Hier: Was that done by you or the respondent?

The Witness: That was done by me and that is the respondent's policy.

Trial Examiner Hier: The percent found in col-
171 umn nine, what was that figured on?

The Witness: On the rebate sales shown in column seven.

Trial Examiner Hier: Rebate sales are sales after cash discount has been deducted from net sales?

The Witness: No, sir.

Trial Examiner Hier: No?

The Witness: No, sir. Rebate sales represent net sales after eliminating certain items which are not subject to rebate in accordance with respondent's agreement.

Trial Examiner Hier: Is it after cash discount?

The Witness: No, sir.

Trial Examiner Hier: Before cash discount?

The Witness: Yes, sir.

Trial Examiner Hier: All right. Go ahead.

Mr. Mayer: Mr. Examiner, at this time I would like to offer in evidence Commission's Exhibit for identification 47-A, B, C, D, and E.

Trial Examiner Hier: All right. Just a moment. I have another question or two here.

Does your examination of the record of the respondent reveal any pattern of these discounts in column nine? In other words, is it a sliding volume?

The Witness: It is annual volume.

Trial Examiner Hier: Will you look at Commis-
172 sion's Exhibit for identification 47-D for a moment.

Automotive Supply at Amarillo. That is a JA account, agreement or relationship. I see no percentage in column nine at all. Now does that mean Automotive Supply in Amarillo had an agreement with the respondent by which, if he reached a certain bracket he got a stipulated percentage, but that during the year 1949 he didn't even reach the lowest bracket and, therefore, he got nothing. Is that rrect?

The Witness: In this particular case he did reach a bracket which would entitle him to a rebate but he didn't get it.

Trial Examiner Hier: That is the reason I picked that account. It was $2,880.00.

All right, do you have any objection, Mr. Campbell?

Mr. Campbell: I have no objection, your Honor. The only thing we are concerned about—I have no objection to it going into evidence for the purpose of this case, but we don't like to have all this information about our business go into public files.

Is there any way this could be coded in any way or kept confidential for the purposes of this case?

Mr. Schrup: Well, we don't consider the information as being frivolous.

Mr. Campbell: We are still in a competitive market.

Mr. Schrupp: It could be handled in a way that
173 the information would be available to ourselves, that is, the Commission, the Trial Examiner and staff for whatever purpose needed and it forms the basis of findings of fact.

Mr. Campbell: Some of it will, I appreciate that, but this is a complete tabulation of our business.

Mr. Schrup: I presume it is a matter of discretion with the Examiner.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: Back on the record.

I want to ask the respondent if they have checked or spot checked for mathematical errors the data which is in Exhibit 47-A through D?

Mr. Campbell: Not fully, your Honor. Not fully. We have made some check of this. So far as we have been able to check it today we find no errors and we don't expect to.

Trial Examiner Hier: I will admit it in evidence, Commissions' Exhibit 47-A through E, subject to correction. That is, if the respondent finds any errors in this exhibit, they will take them up with the gentlemen supporting the complaint.

Mr. Schrup: That is perfectly satisfactory, your Honor.

Trial Examiner Hier: The record may show that the exhibit is sealed in order to prevent disclosure in the
174 detailed presentation here of the respondent's business in the particular areas. That means, of course, that no one will have access to this exhibit except those directly connected with the case, or except by special permission from the Commission.

All right.

Mr. Campbell: That is entirely satisfactory, your Honor. Thank you.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBIT 47-A through 47-E, were received in evidence.)

Trial Examiner Hier: Go ahead.

By Mr. Mayer:

Q. Mr. Steele, I direct your attention to Commission's Exhibit for identification No. 48, and ask you to describe that document for us, please, sir?

A. This exhibit represents a summary of the sales to members of Cotton States, Inc., during the year 1949 by the respondent C. E. Niehoff and Company.

Q. And what papers and documents of respondent were inspected, Mr. Steele, in order to draw up this summary?

A. The basic data from the summary furnished by the respondent, which is the basis, also the basis for Commission's Exhibit No. 47-A through E, and in addition, checks were made of the invoices, monthly statements and credit memorandums of the respondent with those accounts.
175 Q. Now, Mr. Steele, in explaining this summary, would you take the columns up according to their numbers and explain their meaning for us, please, sir?

A. Column one represents the names of the members of Cotton States, Inc., who purchased from C. E. Niehoff and Company during the year 1949.

Trial Examiner Hier: While you are doing that in connection with each column, will you tell us also whether it is a computed figure or derived figure, or whether it is taken from respondent's records directionally, or information and summaries of accounts not furnished you by them?

The Witness: Column two is location. All names and locations were taken from the summary furnished by the respondent.

Column three is a computation of the total sales at jobber prices made by me based upon column five which is taken from the summary furnished by the respondent.

Column four was also computed by me and represents ten percent of the amounts shown in column three to show the distributor discount which the accounts received and this in line with the policy of the company which deducts the distributor discount from the face of the invoices.

Trial Examiner Hier: Off the record a moment.

(Discussion off the record.)

Trial Examiner Hier: On the record. Go ahead.

176 The Witness: Column five represents the net sales as shown by the summary furnished by the respondent.

Column six is a computation of the two percent cash discount offered by the respondent to all of its accounts.

Column seven is the rebate sales as shown by the summary furnished by the respondent with the exception of the total at the bottom of the sheet which was computed by me.

Column eight is a computation of the annual rebate to each of these accounts based upon the percentage shown in column nine which was shown on the summary furnished by the respondent applying to the rebate sales shown in column seven, which is also shown on the summary furnished by the respondent.

Column ten shows net proceeds to the respondent from the sales to these accounts and was computed by me by deducting from the sales shown in column five cash discount shown in column six and the amount of rebate shown in column eight.

Column eleven represents the percent of net proceeds of total sales. In other words, percent of net proceeds

shown in column ten to total sales shown in column three at jobbers prices and was computed by me or under my direction.

The totals shown at the bottom of the exhibit in all cases were computed by accountants of the Federal Trade Commission.

177 Trial Examiner Hier: What does your note mean?

The Witness: That is to indicate that the cash discount was computed after deducting the rebate shown in column eight from net sales shown in column five.

Trial Examiner Hier: This cash discount is figured differently than in Exhibit 47-A through E?

The Witness: Not for these accounts. These accounts appear on 47-A through E. It is figured the same way, but it is figured different from the other accounts of respondent. The reason for that is that the rebate is deducted on each invoice to members of Cotton States, Inc., whereas, on all other accounts, the rebate is made annually.

Trial Examiner Hier: All right.

Mr. Mayer: Your Honor, I offer in evidence Commission's Exhibit for identification 48.

Mr. Campbell: I have no objection, your Honor. I would like to have the same ruling apply to this exhibit.

Trial Examiner Hier: Do you have any objection to its being applied?

Mr. Schrup: I have no objection.

Trial Examiner Hier: All right, Commission's Exhibit for identification 48 is received in evidence and directed to be sealed.

(The paper referred to, heretofore marked for identification COMMISSION'S EXHIBIT 48, was received in
178 evidence.)

By Mr. Mayer:

Q. Mr. Steele, I now show you Commission's Exhibits for identification 49-A through 91-B, and ask you, sir, if they are all copies of invoices submitted by the respondent to you?

A. Yes, sir; they are.

Q. Mr. Steele, have there been any additions made to those invoices since they have been in your possession?

A. No, sir.

Mr. Mayer: Mr. Examiner, we offer these documents in a group into evidence to reflect the actual sales had in transactions between C. E. Niehoff and Company and sev-

eral of the purchasers which have been listed on Commission's Exhibit 47-A through E, and these do not disclose transactions with each purchaser, but were merely selected at random to give a representative picture of the transactions.

Trial Examiner Hier: Now does the added information contained on those particular invoices which are to customers listed on Exhibit 47-A through E, corroborate or dispute the data on 47-A through E?

Mr. Mayer: It corroborates it.

Trial Examiner Hier: That is in the nature of corroborative evidence only?

Mr. Mayer: Yes, sir.

179 Trial Examiner Hier: Why do we need them, then?

Mr. Mayer: We are attempting to show the mechanical methods of respondent in making sales to these accounts as indicated and we—

Trial Examiner Hier: (Interposing.) Mr. Campbell, is there any dispute on the part of the respondent?

Mr. Campbell: No, your Honor, there is no dispute whatever. I think these exhibits are unnecessary and it is just burdening the record.

Trial Examiner Hier: I don't like to unnecessarily burden the record.

Mr. Campbell: I think Mr. Steele's statements are correct.

Mr. Schrup: May we go off the record?

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: Back on the record.

I will give you gentlemen tendering these documents a chance, through this witness, to explain their necessity in this record. At the moment, from what has been said, both on and off the record, it is merely corroborative of evidence which has not been contested.

If you want to examine the witness further on that point, go ahead.

By Mr. Mayer:

180 Q. Mr. Steele, exactly what do Commission's Exhibits marked for identification 49-A through 91-B disclose to you?

Trial Examiner Hier: That is not disclosed on these charts, Commission's Exhibit 47-A through E?

The Witness: Well, the first thing is that the company's

invoices were in line with their published price lists which are in the record and which I checked each and every invoice with the published price lists.

Now it also, in my mind, explains the company's policy, whether they are allowing a ten percent discount to distributors and, on the other hand, whether they are allowing any discount to jobbers and others who are not entitled, according to the published prices and agreements. In other words, it is both a positive and negative check of the company's established, published policy.

By Mr. Mayer:

Q. Mr. Steele, what do these invoices reveal that Commission's Exhibit 47-A through E, does not reveal?

A. Well, the pricing and prices are in accordance with the company's price list.

Trial Examiner Hier: You have made a check yourself and you say they are?

The Witness: Yes, sir.

Trial Examiner Hier: Well, I don't need any invoices. I can't see any point of these exhibits being in the record, gentlemen, so the record may show Commission's Exhibits 49-A through 91-B which have been marked for identification, are rejected.

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It may be that someone in this case may need them, but at the moment I don't see the relevancy. Go ahead.

Mr. Mayer: Mr. Examiner, I would like to have these documents marked for identification. They are documents submitted by the respondent.

Trial Examiner Hier: All right. The record may show that a two-page document headed "Branch house volume sales allowance, January, 1950" has been marked as Commission's Exhibit for identification 92-A and B.

Mr. Campbell: May I interrupt there?

Trial Examiner Hier: Yes, sir.

Mr. Campbell: I think the title of this may be a little misleading and I would like to suggest to Mr. Mayer that that title should be changed to be consistent with the other terminology used today and should be changed to: "Distributors' agreement volume sales allowance for the year 1949."

Trial Examiner Hier: All right, I will change it. "Distributors' Agreement volume sales allowance."

Mr. Campbell: That is right and you put in the date.

Mr. Mayer: And the date should be for the year 1949.

Trial Examiner Hier: All right, Mr. Reporter, we 182 will go back and do this right.

There has been marked for identification as Commission's Exhibit 92-A and B, a document headed "Distributors' Agreement Volume Sales Allowance for the year 1949, and as Commission's Exhibits 93-A through D, a four page document entitled "Jobber's agreement volume sales allowance for the year 1949."

(The papers referred to were marked Commission's Exhibit 92-A and 92-B, and Commission's Exhibit 93-A, 93-B, 93-C, and 93-D respectively, for identification.)

By Mr. Mayer:

Q. Mr. Steele, I hand you Commission's Exhibit 92-A and B for identification, and ask you if that is the document which was submitted to you by the respondent?

A. Yes, except that the change have been made on the record today on this exhibit.

Q. Mr. Steele, was this document represented to you as a complete summary of the volume sales allowances given to distributors on a nationwide basis, the agreement during 1949?

A. Yes, it included the volume sales allowance given distributors by C. E. Niehoff and Company applicable to the year 1949.

Q. I show you Commission's Exhibit for identification 93-A through D and ask you if that is the document 183 which was submitted to you by the respondent?

A. Yes, with the exception of the works in ink which have been inserted today.

Trial Examiner Hier: Which I put on.

The Witness: Which the Trial Examiner put on, yes.

By Mr. Mayer:

Q. Was this document represented to you, Mr. Steele, as disclosing all the jobbers with agreement who were entitled to volume sales allowance during the year 1949?

A. Yes, sir.

Mr. Mayer: Mr. Examiner, I would like to offer in evidence Commission's Exhibits for identification 92-A and B and 93-A, B, C, and D.

Mr. Campbell: I have no objection to their being admitted in evidence, your Honor, but I would like to request the same rule be applied.

Trial Examiner Hier: Any object to that?

Mr Schrup: That will be understood.

Trial Examiner Hier: All right, Commission's Exhibits for identification 92-A and B, and 93-A through D, are received in the record with the instruction that they be sealed.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBITS 92-A, 92-B, 93-A, 93-B, 93-C and 93-D, were received in evidence.)

184 By Mr. Mayer:

Q. Mr. Steele, are the amounts which appear on Commission's Exhibits 92-A and B and 93-A through D, amounts actually received by the purchaser?

A. Well, as I understand it, they were credited to his account during January, 1950.

Trial Examiner Hier: You understood that from the respondent?

The Witness: Yes, sir.

Mr. Mayer: Well, may I ask counsel to explain, Mr. Examiner, why the change should be made from branch houses to distributors' agreement on the documents which we have in the record as Exhibit 92-A?

Trial Examiner Hier: I thought you agreed on that. That is the reason I made the change.

Mr. Campbell: Well, your Honor, for the purposes of this large chart the accounts have all been classified as J, JA, D and DA. DA represents distributor with agreement. Now there have been changes in the terminology from time to time within the practices of C. E. Niehoff and Company, and it happened that both the words "branch house" and DA are used somewhat interchangeably for the year 1949. When this exhibit was given to Mr. Steele, the words "branch house" were used at the top of it, but it is the same group of customers who are listed on the chart and who are listed as distributors with agree-
185 ment and that is the reason I suggested it.

Mr. Mayer: And these are all the customers, whether classified as branch house or DA. Is that correct?

Mr. Campbell: That is correct.

Trial Examiner Hier: All right.

Mr. Mayer: All right. That is all we have.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record. Mr. Campbell states on behalf of his client that he and the accountant for

the respondent firm have spot-checked Commission's Exhibits 47-A through E, and 48, and they say they found no errors either in computation or method and that he has no reason to believe that anything will show up from a further check which would require asking Mr. Steele more questions on cross examination. He states that he is not prepared at the moment to cross examine Mr. Steele because Mr. Niehoff has been out of the city and because he hasn't found anything to cross examine about yet. He asks the privilege of cross examination which counsel supporting the complaint oppose.

The ruling is this, that unless Mr. Campbell notifies me within two weeks from date hereof that he has cross examination of Mr. Steele and the nature of such cross examination, there will be no cross examination of this
186 witness and he will be regarded as discharged. If I am so notified within two weeks and the nature of the cross examination proposed is within what I deem to be the proper scope and is not a matter which can be worked out with counsel, then Mr. Steele will be recalled here in Washington for such cross examination by Mr. Campbell.

That finishes it up then, gentlemen.

Mr. Campbell: I would like to add one thing, your Honor. I assume there is no two week limitation on mathematical corrections in this chart?

Trial Examiner Hier: No, not on inaccuracies.

Mr. Campbell: And if inaccuracies are discovered those may be corrected at any time.

Trial Examiner Hier: That is right. All right, gentlemen, is there anything further in this matter here?

Mr. Mayer: I think the record might show, because I am not sure it did get on the record that counsel in support of the complaint did make an effort to present Mr. Steele's work to respondent in advance of the hearing and the spot check was made by Mr. Kirchschlager who presented the basic data to Mr. Steele, and he is here today.

Mr. Campbell: Is Mr. Mayer testifying?

Trial Examiner Hier: No, he is just making a statement.

All right, if there is nothing further at this time
187 and place than we will adjourn this proceeding to reconvene at 10:00 a. m., on March 13, 1951 in room 339 Post Office Building, Memphis, Tennessee, and the record will show that there has also been scheduled an additional hearing the following week at 10:00 a. m., March 19, 1951

at room 304, New Orleans Chamber of Commerce Building, 315 Camp Street, New Orleans, Louisiana.

(Whereupon, at 12:00 m., March 2, 1951, the hearing in the above-entitled matter was adjourned to reconvene at 10:00 a. m., March 13, 1951 at Memphis, Tennessee.)

Room 339, United State Post Office Bldg.
Front and Madison Streets,
Memphis, Tennessee.
Tuesday, March 13, 1951

Met, pursuant to notice, at 10:10 a m.

Before: Frank Hier, Trial Examiner.

Appearances:

E. P. Schrub and P. C. Mayer, Attorneys for the Federal Trade Commission.
Charles R. Sprowe, Attorney for the Respondent, C. E. Niehoff & Company.
134 South LaSalle Street,
Chicago, Ill.

189 Mr. Mayer: We will call Mr. Post to the stand.

Trial Examiner Hier: All right, Mr. Post, will you come around, please.

LOUIS POST was thereupon called as a witness for the Commission, and having been first duly sworn, testified as follows:

Direct Examination by Mr. Mayer.

Q. Mr. Post, will you please state your full name?
A. Louis Post.
Q. And your occupation, sir?
A. President of the D. & N. Auto Parts Company.
Q. Are you connected, sir, with the purchasing group known as Cotton States, Inc., of Greenwood, Mississippi?
190 A. As a member, yes, sir.
Q. Are you connected, sir, in any way as an official with the Cotton States, Inc.?
A. No more, no, sir.

Q. And when did you last hold an office with Cotton States, Inc., Mr. Post?

A. September of this past year.

Q. All right, sir, how long have you been an officer of D. & N. Auto Parts Company?

A. About seventeen years.

Q. Mr. Post, how long have you been engaged in the sale of automotive parts?

A. 29 years.

Q. Mr. Post, what type of company is the D. & N. Auto Parts Company?

A. Wholesale automotive parts jobber.

Q. Is it a partnership, sir?

A. No, it is a corporation now. It was originally a partnership.

Q. And when was the company originally formed, sir?

A. When was it originally formed?

Q. Yes, sir.

A. It was formed as an automotive parts company in 1918.

Q. And when was it incorporated, Mr. Post?

A. I would have to consult the records on that, but
191 I think in 1937; I believe now, but I am not sure.

Q. How long have you been connected with the D. & N. Auto Parts Company, sir?

A. Since its starting in business.

Q. Were you engaged in the automotive parts business before the formation of the D. & N. Auto Parts Company?

A. Nothing only in a general line, as a garage operator.

Q. And how long were you a garage operator, sir?

A. Prior to going into the parts, business, you mean?

Q. Yes, sir.

A. I would say approximately 12 years.

Q. Mr. Post, on the original formation of the D. & N. Auto Parts Company, how many stores did the company maintain?

A. Originally?

Q. Yes.

A. One.

Q. And how many stores did it maintain prior to its becoming a member of the Cotton States, Inc.?

A. Three, I think; I am not sure.

Q. Has the officer setup of the D. & N. Auto Parts Company remained the same since its inception?

A. Since its incorporation?

Q. No, sir, before the company incorporated.
A. Since its inception?
Q. Yes, sir.
192 A. No, Mrs. Manscoe, one of the parties, died.
Q. And what is the corporate setup of today, Mr. Post, of the D. & N. Auto Parts Company?
A. With reference to what?
Q. With reference to its stock, the number of stockholders and the officers of the corporation.
A. There are five stockholders.
Q. And how many officers, sir?
A. Five.
Q. Would you give us the names of the officers, please, sir?
A. That is Victor Whitehead, J. E. Carruthers, P. E. Lewis, myself and W. A. Manscoe, Jr. I think that is 7. I will change that. Your question was since its inception, wasn't it?
Q. Yes, sir, right through and on up to date.
A. Yes, sir. You see, we made a change about two years ago, is what I am trying to put there. We originally had five and now we have seven.
Q. Yes, sir.
A. We made them officers of the company and gave my son some stock in the company and made him a director of the company.
Q. All right, sir.
A. That is the status, as I have it.
Q. Now, Mr. Post, over the years since—I believe it was in 1918, the original formation of the D. & N. Auto Parts Company?
A. Yes, sir.
193 Q. Can you even approximate for us the number of lines of manufacturers that you have handled over those years as an auto parts jobber?
A. I would be fearful to tell you, because it would be a wild guess.
Q. Can you tell us if it would probably be over one thousand?
A. I wouldn't think quite that many.
Q. All right, sir, now Mr. Post what was the year in which D. & N. Auto Parts Company joined the buying group known as Cotton States, Inc.?
A. I formed Cotton States, Inc., in the year 1938, if my memory is correct.

Q. How many members did Cotton States, Inc., have at the time of its organization, sir?

A. Seven, if I recall right.

Q. And how many members does it have today, sir?

A. Nine.

Trial Examiner Hier: Ninety?

The Witness: Nine.

Q. (By Mr. Mayer) Mr. Post, prior to the formation of Cotton States, Inc., did the D. & N. Auto Parts Company make any efforts to join any other buying group?

A. Yes, sir.

Q. Mr. Sprowl: I object to that, and move it be stricken. It has no relevancy to this case.

194 Trial Examiner Hier: What is the relevancy of this question?

Mr. Mayer: Your Honor, I am generally developing testimony showing the importance of group association for independent joiners; to show the background as to the necessity of forming this particular group.

Trial Examiner Hier: I will overrule the objection, and you may move to strike it later if it isn't connected up.

Q. (By Mr. Mayer) What group was that, sir?

A. The Mid-South buying group at that time, sir.

Q. Was that the only group connection the D. & N Auto Parts Company attempted to make?

A. Yes, sir.

Q. Now, Mr. Post, in your own words would you tell us why the D. & N. Auto Parts Company thought it was advisable to join Cotton States, Inc.?

Mr. Sprowl: I object to that as calling for a state of mind and conclusion of the witness.

Mr. Mayer: Your Honor, we attempted to qualify Mr. Post as an expert witness. He is the man who formed the Cotton States Inc., group. He, more than any other individual, would know the value of the group to this particular jobber, the D. & N. Auto Parts Company.

Trial Examiner Hier: It seems to me, Mr. Sprowl, that the testimony goes to the question of the effect to competition. I don't know whether that affects it, but I think it is competent.

195 Mr. Sprowl: We are not interested in his personal motives.

Mr. Mayer: That is true.

Trial Examiner Hier: Go ahead and answer the question. The objection is overruled.

A. The only reason why at that particular time we decided to form a group was being refused membership in an active group at that time.

Q. (By Mr. Mayer.) All right, sir.

A. My main reason was this one fact, that we would take on a line that was unknown in our trade area; we would work it up and get acceptance on that line and when we got the line built up then, the larger group decided they would take it on, or the chain would take it on, with the result we had to go on purchasing through the larger jobber for the larger group. During that period there were some invoices came to us, one or two, I think the record will show, which showed an extra discount over what we got for the same piece of material from the same manufacturer. That is the only reason that I formed the group, was to try to maintain something that I had built up; to keep a line and not let it be taken away from us by a larger operating group, or chain.

Trial Examiner Hier: Wait a minute. I don't want to lead the witness, and I say this to counsel for both sides now. If I put a question to the witness that either one of you counsel find objectionable, don't hesitate to object, 196 because I do frequently put in improper questions, but what part is this discount you speak of?

The Witness: Just what do you mean?

Trial Examiner Hier: In your effort to get in the Mid-South, and in your formation of Cotton States, Inc., I want to know how important that was.

The Witness: I didn't deem the monetary end of it important, but I deemed at that particular time, being more or less ignorant of the jobbing business, to maintain something that I had built up, acceptance of a line. That meant more to me than the money end of it. Does that answer your question?

Trial Examiner Hier: Very well.

Q. (By Mr. Mayer.) Mr. Post, I believe you stated that you—a few minutes ago you stated that you were organizer of Cotton States, Inc.?

A. Yes, sir.

Q. Now, sir, I wonder if you would tell us the benefits as you saw them, which you have described, to these other jobbers in asking them to join Cotton States, Inc.?

Mr. Sprowl: Object on the same grounds as stated before.

Trial Examiner Hier: The other objection was over

ruled, but this question is limited to economic or competition benefits.

A. The only reason that we did instruct the members as we did, was with reference to why it would be
197 beneficial for them as independents to come into it as a group was, as I stated before, they themselves had known occasions where they had built up the acceptance of a line in their trading areas, only to have it taken away from them. Does that answer your question?

Q. (By Mr. Mayer.) Mr. Post, was there any economic advantage to be derived from buying as a member of Cotton States, Inc., other than being able to keep a hold on what you had developed in your territory?

A. Yes, very small.

Q. What is that? What would that be, sir?

A. I think our records there will show that over a peri[illegible] of years; possibly seven and one-half percent.

Trial Examiner Hier: 7½% of what?

The Witness: Of the over-all purchases.

Trial Examiner Hier: You mean of your gross business?

The Witness: Of our gross business, yes, sir.

Trial Examiner: I mean, sometimes at a loss? I don't think the record is clear. You, by being a member of the group, realize 7½% advantage over what? And independent, or what you as an independent normally realize in your purchases, is that what you mean?

The Witness: Yes, sir.

Trial Examiner Hier: All right, proceed.

Q. (By Mr. Mayer.) Mr. Post, since the formation of Cotton States, Inc., do you recall ever having missed
198 a cash discount which was offered by a manufacturer?

A. No, sir.

Q. Do you consider the taking advantage of the cash discount an important item to your purchasing group, sir?

A. Yes, sir.

Q. What is the normal cash discount in recent years, limiting it to 1949. What would be the normal cash discount offered?

A. It normally would be 2%, with a differentiation there of some particular line which may carry five percent.

Q. But generally representing two percent?

A. Yes, sir.

Trial Examiner Hier: Is it agreed by all parties that 2% mean 2% ten days?

Mr. Mayer: Yes, sir.

Mr. Sprowl: Yes, sir.

Trial Examiner Hier: All right, then, proceed.

Q. (By Mr. Mayer,) Now, Mr. Post, will you tell us why it was so important to the Cotton States, Inc.; to also take advantage of the cash discount which was offered by the manufacturers?

A. Why it was to stay in business. If there wasn't any cash discount offered, you wouldn't be in business long.

Q. Is that 2% cash discount money which is important to the Cotton States buying group, sir?

199 A. Yes, sir.

Q. If the 2% discount—cash discount is important, is the 7½%—

Mr. Sprowl: I object to the form of the question as argumentative and leading.

Trial Examiner Hier: Sustained.

Q. (By Mr. Mayer,) Mr. Post, speaking now more of your experience as a jobber, what type of competition do you meet in the trade area that the D. & N. Auto Parts Company serves?

A. Well, we have Abston, we have the Morris Company, J. B. Cook, NAPA stores at every town at which we have a location, and I think the record shows approximately 130 other jobbers in the State of Mississippi alone operating in our trade area.

Trial Examiner Hier: That is competition you run into on behalf of the D. & N. Auto Parts Company, run into?

The Witness: That is right, we have plenty.

Q. (By Mr. Mayer.) Do you consider, Mr. Post, every jobber in the State of Mississippi in competition with your trading stores of the D. & N. Auto Parts Company?

A. I would say indirectly, yes, because they all have friends and they ship to them. We have jobbers out of state to ship into the State of Mississippi; run right into my home town of Greenwood.

Q. What is the normal buying area, Mr. Post, for one of your store; any one?

200 A. I would say within a radius of probably 22 miles, on an average.

Trial Examiner Hier: You are talking about the D. & N. Auto Parts Company?

The Witness: Yes, sir.

Trial Examiner Hier: All right.

Q. (By Mr. Mayer.) Mr. Post, how many salesmen do you travel as the D. & N. Auto Parts Company?

A. Eight.

Q. Mr. Post, what is the ferritory these salesmen travel in?

A. What area?

Q. Yes.

A. Probably the north half of the State of Mississippi.

Q. Mr. Post, do you meet in your area—I am now speaking of the entire group area—competition from the car dealers?

A. Yes, quite extensively.

Q. Please describe that competition to us, sir?

A. Well, the majority of the larger car dealers in our particular trading area, travel in competition to us with trucks loaded with factory manufactured car parts, and they in many cases, give a discount that we, as jobbers, cannot meet. They also go to the extent of giving gratis one or more steel parts pins; in some cases five, with an independent dealer where they put their Chevrolet parts, or Plymouth parts or Ford parts in there, on the basis that we cannot meet. That is the car manufacturer's 20% discount. Our schedule in many cases won't permit us to sell a car dealer.

Q. Mr. Post, do you find in recent years, your sale to car dealers has noticeably decreased?

A. Yes, sir.

Q. Mr. Post, do you know of your own personal knowledge, sir, that the car dealer actually sells a competitive part at a lesser price than you sell it for, sir?

A. No, sir, I don't.

Q. Mr. Post; does the group and the other outlets meet competition from the Western Auto stores?

A. Can we meet competition?

Q. Do you meet competition.

A. We don't sell any Western Auto articles.

Q. Why not, sir?

A. Because they have private labeled material and we can't meet their price.

Trial Examiner Hier: Just a minute. Are you still referring, in your question, to the D. & N. Auto Parts Company?

Mr. Mayer: No, I am referring to Cotton States, Inc.

Trial Examiner Hier: All right. Proceed.

Q. (By Mr. Mayer.) Mr. Post, you spoke of labels, or

labeled merchandise. Would you describe what you mean by that, sir?

A. Well, to take a piston ring manufacturer, for
202 a jobbing outlet, and he will have the same ring made up with private label for Western Auto, or for a jack or any other part; it is just merely attaching a label to make his identification over the original manufacturer.

Q. Mr. Post, is that the same identical part?

A. To my personal knowledge, in my case, it is.

Q. Do you, in your trade area of Cotton States, Inc., find the competition, Mr. Post, from the Gambel-skogmo outlet?

A. Not so much in our trade area, no, sir.

Q. Mr. Post, could you tell us approximately the total amount of purchases of Cotton States, Inc., in 1949?

A. What the total amount of purchases were?

Q. Yes, sir.

A. $868,000, I think. You said in 1949?

Q. Yes, sir.

A. $868,000.

Q. Now, sir, tell us the amount of volume discount earned on those purchases in 1949?

A. I think it was figured right close to 7¼ percent.

Q. As a straight 7¼% of the total purchases you buy?

A. Yes, on some of the discount, apparently some lines run higher and some less, but I think the accurate gauge will be 7¼%. I believe that is what our audit report showed. The break-down from the auditor.

Q. Now, Mr. Post, speaking in terms of the C. E.
203 Niehoff & Company, would you tell us the manner in which a member of the Cotton States, Inc., places an order with C. E. Niehoff & Company, and the manner in which it is handled and invoiced and rebated for?

A. Yes, the respective purchaser has a purchase order pad or form, and in turn he writes the items manufactured, to ship so much of such items that he requires, and the manufacturer ships direct and gives the Cotton States, Inc., office headquarters a copy of the original and duplicate, and Cotton States, Inc. remits to C. E. Niehoff then, and that is the complete handling of it.

Trial Examiner Hier: Just a moment. You say they get an original and a copy of the invoice?

The Witness: Yes, sir.

Trial Examiner Hier: And you say Cotton States remits?

The Witness: Yes, sir.

Trial Examiner Hier: And when does Cotton States secure reimbursement?

The Witness: Well, from the member?

Trial Examiner Hier: Yes.

The Witness: Direct from the members to the Cotton States' office.

Trial Examiner Hier: When?

The Witness: Approximately the 7th or 8th of the month.

Trial Examiner: Succeeding the date of the shipment?

204 The Witness: Yes, sir.

Trial Examiner Hier: Very well. Proceed.

Q. (By Mr. Mayer.) Mr. Post, has there ever to your knowledge been a direct order by Cotton States, Inc., to C. E. Niehoff?

A. I think twice, yes, sir.

Q. Has there ever been a direct shipment to Cotton States, Inc., from C. E. Niehoff?

A. No, but I recall some shipments from C. E. Niehoff to Cotton States, Inc., that we have reshipped to members of Cotton States, Inc.

Q. Would that be the regular method of handling?

A. No, sir.

Q. Handling purchases, I mean?

A. No, sir.

Q. Mr. Post, perhaps to clarify it, what particular point in the—

A. Would you repeat that?

Q. At what particular point in the business transacted by Cotton States, Inc., and C. E. Niehoff & Company, is the volume discount considered?

A. I don't quite get your question. At what particular point?

Q. Yes.

A. We don't have a rebate schedule or rebate contract for the schedule with the aggregate or the total of the

205 Cotton States Members purchases. We would get into a higher bracket immediately. Does that answer your question?

A. Partially so, sir. Now is there any individual method of the members of the Cotton States group in 1949 which would have attained, purchasing as an individual, the discount bracket which the group attained in 1949?

A. Would not have attained?

Q. Would have, is there any one member that would have attained it?

Mr. Sprowl: I don't fully understand your question.

Trial Examiner Hier: The question is, as I understand it, and you correct me if I am wrong, "During the year 1949 did any individual member of the Cotton States, Inc., obtain the volume individually, which Cotton States did, in purchasing from there respondent, C. E. Niehoff & Company?"

A. I took the question to be exactly as you have stated it. Not having my records with me, I couldn't answer that truthfully.

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206 Q. (By Mr. Mayer) Mr. Post, we are leading ourselves now to the C. E. Niehoff & Company line. How many of the members of the Cotton States, Inc., before the formation of Cotton States, Inc., were purchasing this line as individuals?

A. I would say perhaps fifty percent.

Q. Now, sir, since the formation of the Cotton States, Inc., and particularly in 1949, how many members of Cotton States, Inc., were purchasing the C. E. Niehoff line?

A. In the year 1949?

Q. Yes, sir.

A. I expect 100%.

Q. All right, sir.

A. Without records I would be guessing, though.

Q. Mr. Post, is there any agreement between the members of Cotton States, Inc., with regard to every member handling every line which is carried by the group?

A. No, sir.

Q. Is there any agreement between the members of the group and the group, concerning carrying competitive lines with the lines which are under contract to the group?

A. No, sir, we have a classification of lines that are handled by Cotton States. We classify them as A, B and C lines. We try to get the membership to handle at least 80% of the lines by numbers. Does that answer your question?

Q. Yes, sir.

207 Trial Examiner Hier: Does that mean through persuasion or by agreement?

The Witness: Agreement.

Trial Examiner Hier: Agreement?

The Witness: Yes, sir.

Trial Examiner Hier: Well now, wait a minute. Do I understand you correctly then, that in your opinion that the agreement between Cotton States and its members, requires the members to purchase 80% of the lines which Cotton States recommends, or has contract for?

The Witness: No, sir, only of the classified line.

Trial Examiner Hier: Only of classification A?

The Witness: That is right.

Trial Examiner Hier: How about B and C?

The Witness: Those are optional.

Trial Examiner Hier: All right, proceed.

Q. (By Mr. Mayer) Will you tell us, Mr. Post, whether B line and C line is under your classification?

A. Well, without my records I would be more or less guessing, as to B line or C line.

Mr. Sprowl: I think we should have the witness to quit guessing. These questions are addressed to written contracts, or policy or written records, and I have been very reasonable, but I think we are getting well without the ability of the witness to answer of his own knowledge.

208 Mr. Mayer: Your Honor, this is a group organization, concerning the activity of the group. The question is directed to why they are classified in various lines, and the difference in the various lines. I think he would be the witness most likely to know that, sir.

Trial Examiner Hier: If he knows. He says he is guessing, though.

Mr. Mayer: I am not asking him specifically about lines, or specific manufacturers which fall into any group or any line, but rather the general classification what A, B and C lines are.

Trial Examiner Hier: Can you tell us, Mr. Post, without your records with you, what you generally put in Line A and what you generally put in Line B and what you generally put in Line C? Can you tell us that without your records now?

The Witness: Not definitely, no, sir. I couldn't give you a true picture of the status of it, because I would be guessing.

Trial Examiner Hier: Objection sustained.

Q. (By Mr. Mayer) Mr. Post, can you ascertain that

for us on checking your records on return to your headquarters, and submit that information to us?

A. Could I?

Q. Yes, sir.

A. Yes, sir.

209 Q. Will you do that, sir?

A. Yes, sir.

Q. Mr. Post, I believe you have testified that in 1949 all of the members of the Cotton States, Inc., were handling C. E. Niehoff line, is that correct, sir?

A. I think so, yes.

Q. Now, sir, are they engaged in the resale of any of the Niehoff lines, and in competition with all of the other Niehoff non-group members in your same trade area?

Mr. Sprowl: I object to the form of the question as leading and suggestive.

Trial Examiner Hier: The question is leading and suggestive. Objection sustained.

Q. (By Mr. Mayer) Mr. Post, did you have a member of the Cotton States, Inc., handling the Niehoff lines in Dallas, Texas?

A. A member in Dallas, Texas?

Q. Yes.

A. No, sir, we do not have a member in Dallas, Texas.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

Q. (By Mr. Mayer.) Mr. Post, do you have a member of the Cotton States, Inc., which handles the Niehoff lines in New Orleans, La.?

210 A. Yes, sir.

Q. Mr. Post, is that outlet of Cotton States, Inc., or Cotton State members, a peak?

A. I don't get your question, sir.

Mr. Sprowl: I object to the form of the question. It calls for a conclusion, and is leading.

Trial Examiner Hier: I think you might go ahead and finish the question, and loud enough so the witness can hear.

Q. (By Mr. Mayer.) Does that member of the Cotton States, Inc., in the resale of C. E. Niehoff products, compete with automotive wholesalers of New Orleans, and John M. Balton of New Orleans, in the resale of those products?

Trial Examiner Hier: Just a moment.

Mr. Sprowl: I object to that question on the ground it is leading, and calls for a conclusion.

Mr. Mayer: He has testified as to general competitive area for his local jobbers.

Trial Examiner Hier: That has nothing to do with whether it is leading or not.

Mr. Sprowl: I don't see how the question of competition can be elicited—

Hearing Officer Hier: Mr. Sprowl, I don't see how the question of competition can be any less leading, from your viewpoint. I don't see how it is possible to ask the question to elicit the information unless you say "competing".

I am going to overrule your objection, and allow the
211 witness to answer the question if he can answer it, of his own knowledge.

A. To my knowledge, I don't know.

Q. (By Mr. Mayer.) Now, Mr. Post, does the D. & N. Auto Parts Company, in its resale of C. E. Niehoff product, compete with any non-group purchasers of C. E. Niehoff products in the resale of those products?

Mr. Sprowl: Mr. Examiner, so I won't be interrupting all the time, may it be understood that my objection will be the same and your ruling will be the same?

Trial Examiner Hier: That is right. Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record. Let the record show that Mr. Sprowl objects to any questions which seek to elicit from the witness his knowledge on competition, on the ground the question is leading. You may have a continuing objection. Now you may go ahead. Repeat your question.

(Last question read by the reporter.)

A. Not to my knowledge.

Q. (By Mr. Mayer.) Mr. Post, are you familiar with the competition the D. & N. Auto Parts Company meets in the resale of its merchandise?

A. I didn't get your question.

(Last question read by the reporter.)

A. Competition which he meets?

212 Q. Yes, the D. & N. Auto Parts Company?

A. On Niehoff's line, or all lines?

Q. On any line, sir.

A. Oh, on any line?

Q. Yes.

A. By whom? What form of competition?

Q. Competition in the resale of merchandise?

A. Naturally, we all have a lot of competition.

Q. Now, Mr. Post, are you familiar with the competition which the D. & N. Auto-Parts Company met in the resale of C. E. Niehoff's line of merchandise?

A. No, sir.

Q. You don't know?

A. I don't know of any jobber traveling our trading area that handles any Niehoff's lines, to my personal knowledge. I may be wrong.

Q. Mr. Post, as the D. and N. Auto Parts Company, what class of trade to you sell your merchandise to?

A. Various classes, road-graders, farmers, truck and car dealers.

Q. What would be the largest type purchaser to whom you sell your merchandise, sir?

A. I expect—without my record I expect the percentage the independents and fleets.

Trial Examiner Hier: Pardon me just a moment. 213 You mentioned farmers. Do they buy for consumption, or resale?

A. They buy for consumption in our section of the country, sir. They have plantations, and they may have 150 tractors or 200 tractors, and they maintain their own repair facilities on their own plantations.

Q. That is for consumption?

A. Yes, sir.

Trial Examiner Hier: All right.

Q. (By Mr. Mayer.) Mr. Post, as the D. & N. Auto Parts Company, approximately how many automotive lines do you carry?

A. Lines?

Q. Yes.

A. I think the record shows 106.

Q. Now, sir, can you approximate for us the number of items that includes individual parts?

A. I would be afraid to guess, sir. Your guess would be as good as mine.

Q. All right, sir.

Trial Examiner Hier: I would like to know something of a rough approximation. Does it run into the hundreds, the thousands, or what?

The Witness: It would run into hundreds of thousands.

Trial Examiner Hier: That is just a rough guess?

The Witness: A rough guess, yes, sir.

Q. (By Mr. Mayer.) As I understand, Mr. Post,
214 these lines may consist of any one part of one thousand parts, is that right, in making up the line?

A. That is right.

Mr. Mayer: That is all. Your witness, Mr. Sprowl.

Cross-Examination by Mr. Sprowl.

Q. When you spoke of D. & N. Auto Parts Company having no competition on the Niehoff line in its own particular area, you meant competition of other persons selling the Niehoff line?

A. That is exactly what I had reference to; two-line houses, I think I had it.

Q. Now are there competitors in that area which are competitors of yours, which carry similar lines, not made by Niehoff?

A. That takes in many competitors.

Q. How many of those competitors would you estimate there would be in your area?

A. Well, I think the News record shows that we have 130 in the State, and I think they are all over our trade area.

Q. Selling lines competing with the Niehoff lines which you carry?

A. Yes, sir.

Q. And are they competitive with your own companies?

A. Yes, sir.

Q. That was true also in 1949, all through 1949?

A. To my knowledge, yes.

215 Q. Does that include the competition that I heard you talk about earlier, from dealers that carry original lines?

A. Yes, sir.

Q. And what would the original lines be?

A. Well, all lines; Delco principally, and Ford.

Q. Well, by "original", what do you mean?

A. Original equipment.

Q. Where does that originate from?

A. Well, car manufacturing equipment.

Q. Installed on the car at the plant?

A. That is right, sir.

Mr. Mayer: Mr. Examiner, may I ask the reason for that line of questioning?

Trial Examiner Hier: You went into it. I don't understand that original equipment on motor vehicles is involved in this case. Perhaps it is.

Mr. Mayer: I don't think I mentioned the word, "original."

Trial Examiner Hier: That may be, but you did mention that he had some customers that he sold to, or that he had lost sales recently, to car dealers.

Mr. Mayer: On replacing equipment sales, sir.

Hearing Officer Hier: I know, but this is cross-examination, and if that was an objection it is overruled, and you may go ahead.

216 Q. (By Mr. Sprowl.) Do you sell the Niehoff lines to other garages that don't have the original equipment line?

A. In some cases, yes.

Q. And in the cases where you didn't sell them, why didn't you sell them?

A. Because car competition, as I think was brought out before, placed some of it in there by car dealers on the steel bin part arrangement.

Q. In other words, you just aren't able to compete, because the price that they can acquire on the same equipment from your competitors is less, is that right?

A. Very competitive, yes, sir.

Mr. Sprowl: That is all.

Redirect Examination by Mr. Mayer.

Q. Mr. Post, we just discussed in that last question, the difference in price which your competitor was able to purchase a competing line at. Perhaps you could tell us the importance of the price in this line, of what you pay for merchandise, and what your competitor pays for merchandise on which you compete in the resale market?

A. Over a period of years, see, practically all ignition manufacturers, of the independent manufacturers group, see, like Niehoff or P. & D. or Vance or Standard or Autumn, they all have what you gentlemen know, in some cases, as fleet discount over the Niehoff lines, being 217 offered, see. Does that answer your question?

Q. No, sir, I asked the question on just how important to you is the difference in price which is paid by your competitor for an article under yours, which compete in the retail market?

Mr. Sprowl: I object to the form of the question. It is leading, and calls for a comparison; a comparative answer.

Trial Examiner Hier: I don't think it is leading. Your objection is overruled. You may answer it. Do you have the question, Mr. Post?

The Witness: I didn't get the clarification of the question, your Honor. The question has reference to what price differential that I pay, that he pays, is that your intended question, or do you mean what the retail price is to another jobber?

Q. (By Mr. Mayer.) No, sir, I will withdraw that question, Mr. Examiner.

Trial Examiner Hier: That is one thing I am interested in. Now gentlemen, pay attention. What I want to know, Mr. Post is, as the jobber, doing business as D. & N. Auto Parts Company, how important in your commercial operation is any difference in price on a particular item in the Niehoff line, in the resale of that item?

The Witness: How important it is?

Trial Examiner Hier: Yes.

218 The Witness: It is definitely one we need to stay in business.

Trial Examiner Hier: Now what difference there, 2¢, 6¢, 10¢, 5¢ or what?

The Witness: I think the record shows that. The list price of an item would be by the manufacturer, $1.00; the dollar cost of that particular item would be 40¢ or 60¢ off, perhaps. The independent manufacturer's resale, getting to a jobber may break that down to 37¢, see, and that is the importance, that little 3¢ difference between our cost and the resale competitive cost. That is how important it is. I hope I have clarified that question.

Trial Examiner Hier: While I have got the witness, I want to ask him a question which is not on the point. Does the jobber operate on what some concerns call an operating cost, or rather operating margin?

The Witness: Yes, sir.

Trial Examiner Hier: What is your operating margin in the D. & N. Auto Parts Company?

The Witness: The difference between doing business. Our cost last year was 23.78 with an average of 27.52.

Trial Examiner Hier: Now are those percentage figures?

The Witness: Those are percentage figures.

Trial Examiner Hier: Figured on what basis, gross?

219 The Witness: Gross business, yes, sir.

Trial Examiner Hier: That is your operating margin?

The Witness: That is right, 23.78 to 27.52.

Trial Examiner Hier: Any further questions?

Mr. Sprowl: I have no further questions at this time, your Honor.

* * * * *

220 Trial Examiner Hier: Come to order. You may proceed.

Mr. Mayer: I will call as our next witness, Mr. Jack R. Fenberg.

*

JAKE R. FENBERG, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Mayer.

Q. Will you state your full name, sir?
A. Jake R. Fenberg.
Q. And your business address, sir?
A. 1017 Union.
Q. That is in Memphis, Tennessee?
A. Yes, that is right.
Q. What is your present occupation, sir?
A. Manager of that business.
Q. And give us the name of that business, please, sir?
A. Union Auto Electric Service.
Q. Union Auto Electric Service?
A. That is correct, sir.
Q. Is that a corporation?
A. No, sir.
Q. How long have you been manager of, Mr. Fenberg, the Union Auto Electric Service?

221 A. Since 1936.

Q. Mr. Fenberg, in what territory do you sell your merchandize?
A. Within a 75 mile radius of Memphis.
Q. Do you employ salesmen, sir?
A. Yes, sir.
Q. And what territory do they cover?
A. Well, two of them are local salesmen.

Q. How many do you have?
A. Three.
Q. Two of them are local salesmen?
A. Yes, sir, and one travels the territory.
Q. Are you here today, sir, in response to a subpoena?
A. Yes, sir.
Q. What general business is the Union Auto Electric Service engaged in, sir?
A. Well, anything in supplies.
Q. How many lines of merchandise do you handle, Mr. Fenberg?
A. Well, if you consider all the United Motor Service line as one—
Q. Yes, consider that as one.
A. I would say approximately twenty.
Q. And those 20 items, Mr. Fenberg, compose about how many items?
A. About 15,000.

222 Q. Mr. Fenberg, do you purchase automotive parts from the C. I. Niehoff & Company, of Chicago, Illinois?
A. Yes, sir.
Q. Were you a purchaser from C. I. Niehoff during the year 1949?
A. Yes, sir.
Q. Did you purchase, Mr. Fenberg, during the year 1949, according to the terms of any contract with C. I. Niehoff & Company?
A. Yes, sir.
Q. Was that a signed contract with the company, sir?
A. I believe it was, sir.
Q. Mr. Fenberg, what is your classification as a customer of C. I. Niehoff & Company?
A. Well—
Mr. Sprowl: I object to that question, Mr. Examiner. The contract speaks for itself. He said he had a signed contract for 1941 and now he is seeking to elicit what the contract states.
Trial Examiner Hier: A copy of the contract is already in evidence as Commissioner's Exhibit 47-D, and shows that he is classified by your client as a jobber within the agreement, so the question is superfluous. Objection will be sustained on that ground only.

223 Q. (By Mr. Mayer.) Mr. Fenberg, do you sell the C. I. Niehoff & Company lines in the Memphis area?
A. Yes, sir.

Q. Can you tell us the names of the jobbers with whom you compete generally, in the resale of automotive products in the Memphis area?

A. Yes, the Automotive Electric Service, Bowers, Inc., A. & B., and I would say possibly J. B. Cook, and Stratton-Warren Sales.

Q. Mr. Fenberg, is it a policy of the Union Auto Electric Service to take advantage of the cash discounts which are offered Union Auto Electric Company on its purchases of merchandise from the various manufacturers?

A. It is.

Q. Do you consider the 2% for cash item, an important item in your business?

A. I do.

Q. Can you tell us why you consider that an important item to your business?

Mr. Sprowl: Your Honor, I object to that question on the ground it is calling for a conclusion of the witness, without proper foundation.

Trial Examiner Hier: I don't agree with you, Mr. Sprowl, so your objection is overruled. Why is it important? You said it was important. Why is it important?

The Witness: Because of the dollar value of the 2% discount: the dollars involved.

Q. (By Mr. Mayer) Mr. Fenberg, can you tell us the amount of your purchases during the calendar year 1949 from C. I. Niehoff & Company?

A. About $1,300.00, sir.

Q. Can you tell us what discount or rebate you received on those purchases?

A. It was 5%, sir.

Q. What was that—was that in accordance with the contract into which you entered with C. I. Niehoff & Company?

A. Yes, sir.

Q. Mr. Fenberg, in the general operating range of the business of the Union Auto Electric Service, is there established a percentage-wise figure of profit upon which you operate?

A. You mean is there a mark-up that we use?

Q. Yes, sir.

A. Well, I would say possibly 25%, sir.

Mr. Sprowl: I move the answer be stricken, aside from being objectionable.

Trial Examiner Hier: Well, he can give his approximation, which I understand you did, did you not?

The Witness: Yes, sir.

Trial Examiner Hier: Overrule the objection.

Mr. Mayer: That is all of Mr. Fenberg, Mr. Examiner.

Trial Examiner Hier: All right, cross-examination,
225 Mr. Sprowl.

Cross-Examination by Mr. Sprowl.

Q. Mr. Fenberg, do you buy any ignition parts from C. I. Nichoff & Company?

A. I buy Ford ignition parts from them.

Q. Ford ignition parts?

A. Right.

Q. Do you handle any other ignition parts?

A. Yes, sir.

Q. And what other lines do you handle?

A. I handle the Delco line, which is General Motors' ignition line, and other allied lines within the Chrysler range.

Q. Does Nichoff also handle ignition parts for General Motors and Chrysler cars?

A. Yes, sir.

Q. Do you buy your ignition parts for those cars from either Delco or Auto-Lite?

A. That is right.

Q. On what discount do you buy your Ford ignition parts from Auto-Lite?

Mr. Schrup: I object to that as immaterial.

Trial Examiner Hier: Objection overruled. Go ahead and answer.

A. Well, they don't make it.

226 Q. (By Mr. Sprowl.) In 1949, what was the dollar value of your purchase of ignition merchandise from Auto-Lite?

Mr. Schrup: I object to that as being immaterial.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record. Objection overruled.

A. I can't give you the exact figure.

Q. Can you approximate it?

A. Around $15,000.

Q. And in the year 1949, what was the dollar value of your purchases from Delco?

A. About $35,000.

Q. And with respect to your purchases from Auto-Lite, did you receive a cash discount?

A. No, sir.

Q. A discount for cash payment?

A. Oh, yes, 2%, if that is what you mean.

Q. Did you receive any other discounts?

A. No, sir.

Q. Two percent was all you received?

A. Yes, sir.

Q. Did you receive any rebates?

A. No, sir.

Q. Similarly with Delco, did you receive a dis-
227 count for prompt payment?

A. Two per cent.

Q. Did you receive any discount other than that, or rebate?

A. No, sir.

Q. Now with reference to the Nichoff lines, you have mentioned that you received a 5% discount. Now was that a discount or a rebate?

A. Well, it was in the form of a credit.

Q. And you also received a discount for cash, of 2%?

A. That is right.

Q. Did you receive any quantity discount on Auto-Lite purchases in 1949?

Mr. Schrup: If your Honor please, may I have a continuing objection to this line of questioning, on the same grounds?

Trial Examiner Hier: That is right. Let the record show that you have a continuing objection so far as this entire line of questioning is concerned, with the same ruling.

A. What was the question again?

Trial Examiner Hier: Read the question.

"Question: Did you receive any quantity discount on Auto-Lite purchases in 1949?"

A. No, sir.

Q. In other words, if you had bought only $1,000.00
228 worth of merchandise, you paid the same price as you paid for $15,000 worth of merchandise?

A. That is right.

Q. Now are there any other companies from whom you

could buy the ignition parts which you purchased in 1949 from Niehoff?

Mr. Schrup: Now if the Examiner please, I have an objection to that. We are going into a hypothetical state of facts here, when the facts before us are the purchases from Niehoff, and that is what we are concerned with. What he could have purchased from someone else—

Mr. Sprowl: I understand that, you are charging the effect on competition, and if this man is just buying as a fill-in, and I could put it in by ten other people, and it doesn't make any difference to him. There is certainly no effect on competition, and I am entitled to show it.

Mr. Schrup: That is a matter of argument.

Trial Examiner Hier: Let's go off the record for a moment.

(Discussion off the record.)

Trial Examiner Hier: On the record. The objection is sustained to this line of question he seeks to develop from the witness, what other sources he could buy from, for it involves possible activities, and we are interested in actual activities. Go ahead.

229 Q. (By Mr. Sprowl.) Mr. Fenberg, as I understand it, you are outlining the nature of the merchandise you carry in the ignition field. I take it that you buy the Niehoff line for Ford Automobiles to round out your line that you are offering to your customers?

A. That is true.

Q. Is that correct?

A. That is right.

Q. I assumed that you have customers that occasionally ask you for Ford ignition parts, is that correct?

A. That is correct.

Q. You could not buy those from your Delco line or your Auto-Lite line?

A. That is also true.

Mr. Sprowl: I believe that is all.

Trial Examiner Hier: Anything further of this witness?

Redirect Examination by Mr. Mayer.

Q. Mr. Fenberg, do you handle any other Ford ignition parts line?

A. We handle the Holley.

Mr. Mayer: That is all I have.

Trial Examiner Hier: I have a question or two from him. Now Mr. Fenberg, what are your approximate gross sales a year? I want to get an idea of your annual volume.

230 A. The Witness: I can't give you any entire volume figure. We also have a service department, we have a parts department.

Trial Examiner Hier: Give me that figure?

The Witness: In 1949 I think it was around $380,000.

Trial Examiner Hier: All right, according to Commission's Exhibit 47-D, you purchased from the respondent in this case for that year around—they are shown to be $1,313.00, on which you received a cash discount of 2%, amounting to $26.26. You stated on the stand a moment ago that that 2% was important to you, because of the resulting figure of $26.26. I want to know why that is important to you? The disparity, in my mind, between the $26.26 and the total volume that you do, is quite wide.

The Witness: Well, that is true, but that isn't the only line that we buy, and of course the total business we pay for, a discount of 2% would run into a nice dollar and cent figure.

Trial Examiner Hier: Well, $26.26 is the discount you got on $1,313.00 worth of business.

The Witness: That is right.

Trial Examiner Hier: Why is that important to you, commercially or economically in your business?

The Witness: You mean in regard to my ability to do business?

231 Trial Examiner Hier: Yes, or any way you may wish to answer it.

The Witness: Well, only in the way it shows up at the end of the year in what I have left; I mean, any profit for my total volume output.

232 Room, 304, Chamber of Commerce Building, 315 Camp Street
New Orleans, Louisiana
March 20, 1951

Met, pursuant to notice, at 10:00 a. m.

Before: Frank Hier, Trial Examiner.

Appearances:

E. P. Schrup and F. C. Mayer, Attorneys for the Federal Trade Commission.

Charles R. Sprowl, Attorney for the respondent, 134 South La Salle Street, Chicago, Illinois.

233 Proceedings.

Trial Examiner Hier: On the record.

Mr. Mayer: Mr. Kiefer.

ARCHIE B. KIEFER, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Mayer:

Q. Will you state your name, please?
A. Archie B. Kiefer.
Q. And your business address?
A. 762 St. Charles.
Q. What is your occupation, sir?
A. Owner of the Automotive Wholesalers, owner-operator.
Q. In what line of business is the Automotive Wholesalers Company engaged?
A. Wholesale automotive parts and supplies.
Q. Are you here today in response to a subpoena?
A. I am.
Q. Do you travel salesmen?
A. Yes.
Q. How many, sir?
A. One.
Q. What general area, Mr. Kiefer, do you offer your merchandise for sale in?

234 A. City of New Orleans.

Q. To whom do you offer your products for sale?

A. Automotive repair shops, car dealers, fleet operators, service stations.

Q. Could you tell us approximately the total amount of sales made by automotive wholesalers in 1949?

A. Is it necessary to state that in public?

Q. Approximately, yes sir.

A. Well, that is a private answer.

Mr. Schrup: Just give us a round figure.

The Witness: Roughly, about a hundred thousand.

Mr. Sprowl: That is 1949?

The Witness: Yes, that is approximately.

By Mr. Mayer:

Q. In 1949 did you purchase products from the C. E. Niehoff Company of Chicago?

A. Yes.

Q. Did you offer these products for resale?

A. Yes.

Q. Did you resell these products in the New Orleans area?

A. Yes.

Q. Do you have competition?

A. Yes.

Q. Do you have competition in the sale of automotive parts in the New Orleans area?

235 A. Yes.

Mr. Sprowl: I object to the question as asking for a conclusion of the witness; move the answer be stricken.

Trial Examier Hier: Objection is overruled. The motion is denied. The answer may stand.

By Mr. Mayer:

Q. With whom do you compete in the New Orleans area?

A. With the automotive car manufacturers' representative, automotive jobbers, autowreckers, oil companies, Western Auto chain stores, ring specialists; I guess that is a pretty good coverage.

Q. Do you take advantage of the cash discounts offered by various manufacturers for prompt payment of your bills?

A. Always did.

Q. Is this an important item in the conduct of your business?

Mr. Sprowl: I object as leading and asking for a conclusion.

Trial Examiner Hier: Sustained. Don't answer the question.

By Mr. Mayer:

Q. Why do you take the cash discounts which are offered by various manufacturers?

Mr. Sprowl: Object to the form of the question.

Mr. Mayer: The witness stated he did.

Trial Examiner Hier: The question was "Why do
236 you?" I don't see any objection to the form of the question. The objection is overruled.

A. To save that difference.

By Mr. Mayer:

Q. What difference is that, sir?

A. Usually—you mean with Niehoff or with all manufacturers?

Q. With all manufacturers.

A. It is approximately two percent.

Q. Is your over-all profit or loss an accumulation of a number of small items?

Mr. Sprowl: I still object to that as a leading question. I think he ought to let the witness testify.

Trial Examiner Hier: Sustained. I think is is leading.

The Witness: Would you mind repeating that?

Mr. Mayer: You don't have to answer that.

By Mr. Mayer:

Q. How many lines of merchandise do you offer for sale, Mr. Kiefer?

A. Would that be major lines or would that be all the lines?

Q. All of the lines that you handle.

A. I'd say roughly about—I know the major, but—I'd say around 35, approximately.

Q. If you know, could you approximate the number of items that would entail, the number of parts?

237 A. I never did total them really. I really wouldn't know. I'd really be merely guessing. I know the majors because you count them, I mean, count them individually. I couldn't say. I'd say maybe about 10,000 some-

thing. I mean, different items in the same line, like if it was hose clamps. If you would carry a thousand clamps, that would be a thousand items.

Q. Yes.

A. I guess about 10,000.

Q. Are you a member of a buying group?

A. No, I am not.

Mr. Mayer: That is all we have from Mr. Kiefer.

Cross-Examination by Mr. Sprowl.

Q. You buy principally the ignition line from Niehoff?

A. I do.

Q. That was true in '49?

A. Correct.

Q. Now, you stated that in your answer to the question about with whom do you compete in the New Orleans area, you mentioned automotive dealers.

A. Correct.

Q. What do you mean by that?

A. I think I said automotive car distributors. Is that what you are referring to?

Q. Yes. Who are they?

238 A. Well, the different car factories' representatives like the Buick people, the Ford people, Chevrolet people, Nash, Packard, Hudson; I guess you can keep on enumerating.

Q. Each of those dealers perform a jobbing function such as you perform?

Mr. Schrup: I think he is leading the witness.

Mr. Sprowl: I am cross-examining.

Trial Examiner Hier: It is cross examination. Objection is overruled.

The Witness: Would you mind repeating that question?

(The reporter read the question as follows:

"Question: Each of those dealers perform a jobbing function such as you perform?")

A. I'd say "Yes."

By Mr. Sprowl:

Q. And your customers are what type of people, in the main?

A. What is referred to as a garage or repair shops, fleet owners, and really car dealers themselves.

Q. They sell as jobbers to that class of people, and you do also?

A. Yes.

Q. You have gas station competition?

A. Correct.

Q. By that you mean the parent organization, like Standard Oil?

239 A. Do you mean when I stated the classification of competition?

Q. Yes.

A. Yes, Pan-American Petroleum, Standard Oil Company.

Q. They carry out a jobber's function with reference to their gasoline stations; is that what you mean?

A. Yes, that is correct.

Mr. Schrup: I have an objection here as to the witness' opinion. There has been no qualification which would enable us to determine whether his characterization of people outside of this business are jobbers or not. We have no basis for that information, no foundation.

Trial Examiner Hier: Are you testifying as a matter of opinion or matter of fact?

The Witness: I'd say as a matter of fact. Each one of the major car distributors are in the wholesale business.

Trial Examiner Hier: The objection is overruled.

The Witness: In other words, they—let me supplement that by stating that they extend a discount to the garage in about the same percentage that we do.

Mr. Schrup: That is no proof that the man is in the jobbing business.

The Witness: I merely stated that as a qualification, because I do know that they are competition to us.

Mr. Schrup: Competition is one thing, and characterization of whether they are jobbers or not is another.

240 Trial Examiner Hier: He can't draw any hard and fast line. Some of his answers to you were characterizations. I don't think the objection is well taken. Go ahead.

By Mr. Van Sciver:

Q. When you speak of a car dealer, you mean like a Pontiac dealer or a Ford dealer, franchised by the factory?

A. Yes.

Q. How many car dealers are there in the New Orleans area of that character?

A. Well, I know them but I'd really—
Q. Something between 30 and 40, would you say?
A. I thought around 25. I might be wrong.
Q. How many people other than car dealers are there in this jobber classification with whom you say you compete?
A. Besides the automotive jobber?
Q. Besides what you might call the factory automobile dealers that have franchises.
A. And the automotive jobber too?
Q. Excepting the car dealers.
A. I'd say about around 35 real automotive jobbers, and there must be at least 10 or 15 wreckers; about 50.
Q. They are all within the New Orleans area in which you sell?
A. I'd say so.
Q. Now, do you have any salesmen out?
A. Yes.
241 Q. How many?
A. One.
Q. Is that true in 1949?
A. Yes.
Q. He limited his activities to the City of New Orleans?
A. Correct.
Q. You limit your entire business activities to the city limits?
A. Yes.
Q. You have handled other ignition lines, haven't you, in your shop, other than the Niehoff line?
Mr. Schrup: I object as immaterial.
A. Not to represent any percentage, really. I'd say we are exclusively—
Mr. Schrup: It is academic.
A. I don't—
Trial Examiner Hier: I don't think it is competent.
Mr. Sprowl: I think that is all.
Trial Examiner Hier: Redirect?

Redirect Examiner by Mr. Mayer.

Q. Do any of these car dealers that you have been testifying about, to your knowledge, offer the Niehoff ignition line for resale?

A. No, they do not.

242 Mr. Mayer: That is all.

(Witness excused.)

JOSEPH N. GREINER was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Redirect Examination by Mr. Mayer.

Q. Would you state your full name, please, sir?

A. Joseph N. Greiner.

Q. Your business address, sir?

A. The Greiner Auto Parts, Incorporated, 2929 Magazine Street, New Orleans, Louisiana.

Q. What position do you hold with the Greiner Auto Parts Company, Mr. Greiner?

A. Vice-president.

Q. How long have you held that position?

A. Approximately three or four years.

Q. In what area do you offer your products for sale?

A. In the New Orleans area and a hundred-mile radius of New Orleans.

Q. Do you travel salesmen?

A. Yes, sir.

Q. How many?

A. Four.

Q. Do these salesmen cover the general area you just described?

243 A. The general area, yes, sir.

Q. To whom do you offer your products for sale, Mr. Greiner?

A. To car dealers, independent garages, service stations, fleets.

Q. Did you purchase merchandise in the year 1949 from the C. E. Niehoff Company of Chicago?

A. Yes, sir.

Q. Did you in 1949 belong to a buying group?

A. Yes, sir.

Q. Did you purchase the C. E. Niehoff products through the buying group?

A. Yes, sir.

Q. Do manufacturers of automotive parts offer you a cash discount for prompt payment of your bills?

A. Yes, sir.
Q. Do you take advantage of their offer?
A. Yes, sir.
Q. Why?
Mr. Sprowl: All right.
Trial Examiner Hier: I don't see anything leading.
Mr. Sprowl: I didn't object. It is all right.
Trial Examiner Hier: Go ahead and answer the question.
A. Well, I pass on a two percent cash discount to my customers, and theoretically I have a loss on it to start
244 with, because I try to work on a 33⅓ markup. If I give them two on that, I actually go in the hole for one percent. If I don't get the two percent, I go in the hole five percent.
Q. How many manufacturers' lines do you carry?
A. Approximately, to the best of my knowledge, about 75.
Q. Also approximately then, Mr. Greiner, how many parts does that amount to?
A. Around 10,000.
Q. What was your total volume of business in 1949?
A. Approximately 400 thousand. I sure hate to answer that.
Mr. Sprowl: Pounds or dollars?
The Witness: Dollars.

By Mr. Mayer:

Q. Have you competition in the resale of automotive parts in the New Orleans area?
Mr. Sprowl: I object as leading.
Trial Examiner Hier: I don't agree with you. It seems to be leading, but I don't see how you can develop that fact in any other way.
Mr. Sprowl: I appreciate that. I know your ruling. I want to put that in the record.
Trial Examiner Hier: Answer the question.
The Witness: What is the question?
Trial Examiner Hier: Read the question.
(The reporter read the question as follows:
245 "Question: Have you competition in the resale of automotive parts in the New Orleans area?")
A. Yes, sir.

By Mr. Mayer:

Q. With whom do you compete?

A. The original car manufacturer and his agents and oil companies, tire companies, and the other jobbers.

Q. Does the Greiner Auto Parts Company make sales to accounts known as sub-jobbers?

A. On the Niehoff line?

Q. On any line.

A. You talking about 1949?

Q. Yes sir.

A. If I did in 1949, it was very, very small.

Q. What is the trade area in which these sub-jobbers offer their products for sale?

Mr. Sprowl: What sub-jobbers are you speaking of?

Mr. Mayer: The sub-jobbers to whom he made sales in '49.

Mr. Sprowl: I object to the question. I don't think it is established he sold any sub-jobbers in '49, at least, any plural number.

Trial Examiner Hier: Mr. Greiner, you said, if you made any, they were very few. What does that mean?

The Witness: I don't know whether I made any 246 or not. I don't know. I'd have to check my records. I'd rather not say "Yes" because I don't like that kind of business, and I have never dealt in it. I don't know.

Trial Examiner Hier: The objection is sustained.

Mr. Mayer: That is all we have from Mr. Greiner.

Cross-Examination by Mr. Sprowl.

Q. You stated you had four salesmen covering this territory, Mr. Greiner?

A. Yes, sir.

Q. And I believe you said their territory was a hundred-mile radius of New Orleans?

A. Yes, sir.

Q. Is that west, north and east?

A. A little ways down south, but not too far.

Q. Where do you carry your stock of merchandise?

A. In my place of business.

Q. That is in New Orleans?

A. Yes, sir.

Q. And when you make a sale to a customer in this area you mentioned, is it delivered from that stock of merchandise in New Orleans?

A. Yes sir, we deliver it to his door.

Q. How do you do that?

A. Well, we either ship it by parcel post, freight
247 line, or we have our truck take it.

Q. Do you bear the shipping charges or does he?

A. I bear the shipping charges on those shipments.

Q. In every instance?

A. 99 percent of them.

Q. That was true in 1949?

A. Yes, sir.

Q. You mentioned you passed on a two percent discount to your customer. Is that a two percent discount of your sale price to the customer?

A. Yes, sir.

Q. And I gathered from your answer that since the sale price to the customer was higher than your purchase price that that two percent to the customer exceeded the two percent discount which you receive for cash on your purchases?

A. That's right.

Q. Is that the way you arrive at that computation?

A. Yes, sir.

Q. Now, you mentioned as those people whom you considered as your competition original car manufacturers and their agents. What specifically is that classification?

A. That is primarily car dealers in my trading area.

Q. Like the Buick dealer?

A. Buick, Pontiac, Chrysler dealer, and you can name so many of them.

248 Q. Now, you say you are competition—

A. That's right, sir.

Q. You don't mean to infer from that that you can sell to their customers in the sense that those who patronize the Buick service station—sell their parts to them for use on the customers that come to the Buick service station?

A. I don't understand the question.

Q. I take it from your answer that as a typical example, the Buick dealer in New Orleans would be a competitor of yours.

A. That's right.

Q. All right. Now, I assume that that dealer runs a garage and service station.

A. That's right, sir.

Q. And he, in the performance of automobile service

and repairs, he sells replacement part to people that come in their to have their cars repaired?

A. That's right, sir.

Q. Now, do you compete for any of that particular kind of business?

Mr. Schrup: I think, in the absence of a showing in the record that those replacement parts sold by the car dealers were manufactured by the respondent in this case, that that question is incompetent.

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250 Trial Examiner Hier: He may be—well, I guess I'd better not say it. I don't want to give anybody any ideas around here.

I will overrule the objection. You may pursue the inquiry as to what he means by competition.

Now, read the question.

(The reporter read the question as follows:

"Question: Now, do you compete for any of that particular kind of business?")

251 A. No.

By Mr. Sprowl:

Q. This Buick dealer, as I gather from your testimony, on the other hand, does compete against you for other types of business with the independent garage and fleet owner and so forth?

A. Definitely.

Q. How many of these car dealers are there in New Orleans proper. By "car dealer," I mean automobile manufacturers' representative or dealer or agent.

A. There must be between 30 and 40.

Q. How many of these car dealers are there outside of the City of New Orleans in the area in which you sell your products?

A. I would say between 40 and 50.

Q. These car dealers then, as I understand it, have a dual function; they compete against you in the market in which you compete and also sell at retail to their own customers?

A. That's right, sir, exactly right.

Q. And it is as to these customers of their own whom they sell to at retail that you do not compete with at all because you can't compete?

A. That's right, sir.

Q. Now, outside of these car dealers you mentioned in the New Orleans area, how many jobbers are there,
252 other jobbers that you compete with, in the City of New Orleans?

A. I think the last count we had was 37, I believe somebody mentioned. There is probably about 50 if you count every guy that is in direct competition with you, with ignition.

Q. Well, outside of the City of New Orleans, how many of these jobbers are there other than car dealer classification we have spoken of?

A. Probably another 20 to 25, approximately.

Q. And all of these people you have described, the car dealers in New Orleans and outside of New Orleans in your area, and the jobbers in New Orleans and outside of New Orleans in the area in which you sell your products, carry an ignition line, do they not?

A. That's right, sir.

Q. What ignition lines do the car dealers carry?

Mr. Schrup: I think that is immaterial. I don't believe that it is proper at this time to go into that. If counsel is now attempting to put in any defense under Section 2(b) of the Act, I don't think this is the proper time.

Trial Examiner Hier: I don't see any materiality, Mr. Sprowl, to what competitors of Niehoff do except as a defense, and you will have to wait until you get on into your side of the case to go into that.

I will sustain the objection at this stage.

By Mr. Sprowl:

253 Q. How many electrical equipment lines are sold in the area in which you compete?

Mr. Schrup: Same objection as previously made.

Trial Examiner Hier: Seems to me it is the same thing. Same ruling.

By Mr. Sprowl:

Q. What was the dollar volume of your Niehoff purchases in 1949?

A. Approximately 12,000.

Q. What was your average inventory of Niehoff electrical equipment or ignition equipment on hand during 1949?

A. I would say approximately $3,500 to $4,500.

Q. That was throughout 1949?

A. Yes.

Q. We were speaking a minute ago of car dealers; that is, the original car manufacturer and his dealer. From what source does that car dealer get his merchandise with which he competes against you?

Mr. Schrup: I object to that as being entirely immaterial, from what source, unless there is some connection between this car dealer and this particular respondent.

Trial Examiner Hier: I agree with that. I don't see the materiality of that. The objection is sustained.

256 Trial Examiner Hier: Then the examination of this witness as a witness for the Commission is concluded. (Witness excused.)

He is now recalled and put on the stand as a witness for the respondent, with the understanding that this is respondent's testimony only.

JOSEPH N. GREINER, was thereupon recalled as a witness for the Respondent and, having previously duly sworn, testified as follows:

Direct Examination by Mr. Sprowl.

Q. What ignition lines are handled in the New
257 Orleans area in which you compete, by your competitors?

A. Auto-lite, Delco Remy, and Ford, guaranty parts, Eichlen, Standard, Sure-Hit, P&D, Wells, Ampco, Tungston; there are so doggone many.

Q. I just want the ones that are handled down here by your competition.

A. Philco, Bosch.

Q. What is the fact as to whether or not the Valley Forge line is handled in this area?

A. Yes, there is some Valley Forge ignition in this area.

Q. What is the fact as to whether or not any Standard Parts ignition lines are handled in this area? I am speaking of 1949.

A. They have two lines of Standard. You have Standard and then you have Standardized, who make only Ford parts. That is two different manufacturers, that's right. They both handle in this area.

Q. What is the fact as to whether or not Sorenson ignition lines were handled in 1949?

A. Sorenson, yes sir.
Q. Mapco?
A. Mapco.
Q. Mallory?
A. Mallory.

Q. Speaking of the car dealers, that is, the distrib-
258 utors of automobiles manufactured in this country, calling them car dealers, what line of ignition systems do the car dealers handle in your area of competition?

A. Well, the car dealers either handle one of three ignition lines, Auto-lite, Delco Remy, or Ford.

Q. Do they all handle all three?

A. No sir. You have your Ford dealer who handles only Ford. Then you have all your General Motors who handle Delco Remy. You have all your Chrysler products that have Auto-lite, and then you get into your Nash and Packard and some of those that have Delco Remy, and some are Auto-lite, but they are all one or the other.

Q. Are Auto-lite and Delco Remy handled by any other class of your competition other than the car dealers? I am speaking again of 1949.

A. Yes sir, they are handled by jobbers like myself, who are appointed by United Motor Service, which is—it is all one and the same. One goes out the front door and one the back door.

Q. Did you in 1949 handle Delco Remy or Auto-lite?

A. No.

Trial Examiner Hier: I don't understand that. What do you mean, "all one and the same"?

A. When the jobber comes to buy, they might give it out the front door, and the car dealer, when he comes in
259 and buys, it's the back door, because they don't want the jobbers—let them know they are getting the merchandise.

Trial Examiner Hier: I thought you mentioned Auto-lite and United Motors were one and the same.

The Witness: Oh, no. United Motor Service—

By Mr. Sprowl:

Q. Did your company—could your company in 1949 have bought any of the ignition lines you just mentioned at a lower net price than it paid for the Niehoff ignition lines?

Mr. Schrup: Object as immaterial.

Trial Examiner Hier: Why?

Mr. Schrup: He stated he didn't buy them, didn't handle them.

Mr. Sprowl: We concede that. I have asked him—

Mr. Schrup: There is no question whether they are offered to him, first.

Trial Examiner Hier: As I construe this Section 2(b), it is meeting an offered price, offered by a competitor. I think your question is jumping over a couple of hedges at once.

By Mr. Sprowl:

Q. In the year 1949, was any ignition line offered to your company at prices lower than the prices you were then paying for the Niehoff ignition line?

A. Yes, sir.

260 Q. Can you name one of those lines?

A. Tungston is one.

Q. Is that one you previously named as being handled in your area?

A. Yes, sir.

Q. What about Valley Forge?

A. Yes sir, you can buy that line cheaper than you can Niehoff. You want more than one?

Q. No—if there were more than one.

A. Ampco and Tungston, and I am not sure, but I think Sorenson was cheaper. I know the others were.

Mr. Sprowl: That is all.

Cross-Examination by Mr. Mayer.

Q. You have been asked some questions about the numerous ignition lines which are offered in this general area. Would you tell us how many ignition lines you handled in 1949?

A. 1949 I handled one.

Q. What line was that?

A. Niehoff.

Q. Do you have any physical evidence such as price lists or price offers in your possession which would indicate that Tungston prices, Valley Forge prices, Ampco prices, Sorenson prices—I think those are the four you mentioned—were lower during the year 1949 than the

261 prices which you were offered by Niehoff?

A. It is general knowledge in the automotive business.

Q. I asked you a question, if you had physical—

A. I don't have the price lists in my possession, but I would bet my bottom dollar that they were cheaper.

Trial Examiner Hier: May I ask you this: Were those prices on which you were willing to bet your bottom dollar made to you in a special offer, or is that a generalized offer?

The Witness: This is a generalized offer. He comes in with his catalog and he says "I can sell you a set of points for so much," and I can either buy it or I don't have to buy it.

By Mr. Mayer:

Q. In 1949, Mr. Greiner, were you purchasing the C. E. Niehoff & Company line through a buying group?

A. Yes, sir.

Q. What was that group, sir?

A. Cotton States, Incorporated.

Mr. Mayer: Your Honor, without any corroborating evidence as to the prices offered by competing manufacturers of ignition parts, I move to strike this witness' testimony, which was based upon his knowledge of what those prices were and what the offers were from the competing manufacturer, unless the respondent can produce the physical documents which were published, or show us some
262 means by which the competitor was publishing these prices to the entire automotive field.

Mr. Schrup: May I add, subject to a later objection on the part of the respondent to the Trial Examiner that the prices allegedly offered to this respondent and which were allegedly met, as I anticipate they intend to show, by this respondent, were legal prices on the part of respondent's competitors.

264 Trial Examiner Hier: That's right. The motion then is denied at the moment with the privilege to counsel supporting the complaint to renew the same at the appropriate moment.

Anything more from this witness?

Mr. Mayer: Nothing further.

Trial Examiner Hier: All right.

(Witness excused.)

266 Room 802-A, New Post Office Building,
433 West Van Buren Street,
Chicago, Illinois,
May 16, 1951.

Met, pursuant to notice, at 10:00 a. m.

Before: Frank Hier, Trial Examiner.

Appearances:

Eldon P. Schrup and Francis C. Mayer, Attorneys supporting the complaint.

Charles R. Sprowl, Attorney for the respondent, 134 South LaSalle Street, Chicago, Illinois.

267 Proceedings.

Trial Examiner Hier: This is the reconvening of the hearing in Docket 5768, C. E. Niehoff & Company, for the purpose of receiving evidence that may be offered by the respondent in defense of the complaint.

I think the record should show that on April 23, 1951, counsel for the complainant notified me that they rested their case and I in turn notified counsel for respondent.

Mr. Sprowl: Do you want Mr. Niehoff to take the stand? I think that would be easier.

Trial Examiner Hier: He was sworn once?

Mr. Sprowl: Yes.

C. E. NIEHOFF, was thereupon called as a witness for the Respondent, and having been previously sworn, testified as follows:

Direct Examination by Mr. Sprowl.

Q. Mr. Niehoff, you have testified previously in this matter?

A. I have, yes, sir.

Q. And you are the President of the C. E. Niehoff Company, the respondent in this case?

A. I am, yes, sir.

Q. When was the C. E. Niehoff & Company organized?

268 A. C. E. Niehoff & Company was incorporated in December, 1923.

Q. And what part did you have in its organization?
A. Well, I was the instigator of it and President of the corporation, and have been since that time.
Q. Where was the company's office or place of business located at the time of its organization?
A. Here in Chicago, on West Ohio Street.
Q. And has it had its place of business continuously located in the City of Chicago since its organization?
A. Yes, sir, it has.
Q. Just as a matter of background, Mr. Niehoff, what was the nature of your company's business immediately following its organization?
A. Well, our business was started on Model T Ford parts, vibrator parts and small items that were replacements for the Model T Ford in those early days. Actually we did no manufacturing but we purchased our parts or had them made for us and we assembled them and sold them to the jobbing trade throughout the country, or that part of the country that we were able to cover at that time.
Q. In other words, you had the parts made for you by others at your specifications, is that correct?
A. Yes, we had the parts made for us by others.
Q. And what would you do with them?
269 A. We would assemble them and package them under our brand and sell them to the jobbing accounts.
Q. What do you mean by assemble?
A. Well, package them.
Q. Now, first of all, what type of parts were these that you handled for the Model T Ford?
A. Well, they were really vibrator parts, they might be termed ignition at that time, because they were on the electrical system of the car.
Q. That was the old magneto type?
A. No, it was the vibrator type.
Q. And how long did your company operate in the manner you have just described?
A. Well, I believe it was 1927 that the Model T was discontinued in production, and we continued to supply the parts for the after market for a period of years, and then there was the introduction of the Model A car, which involved a different type of ignition system and other items that were not on the Model T, such as a lighting system, generator and battery system, in other words.

Q. You used the word "after-market," which I have heard from time to time in this proceeding. Could you explain to me what you mean by—the word after-market?

A. Well, the after-market represents the sale of parts that go onto the car after it has been in use, as a replacement.

270 Q. As distinguished from what?

A. As from that of an original, as distinguished from that of the original part that the manufacturer of the car, or the system used by the car manufacturer, would apply. We do not sell the car manufacturer, if that is the point you wish to make.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Sprowl:

Q. Do you want to clarify your answer about the distinction between after-market and original part?

A. Well, the after-market is the replacement parts business, or the replacement of the item that replaces the original part that comes on the car and is worn out and has to be serviced.

Q. And the original part is the one that is put on the car by the manufacturer?

A. Correct.

Q. Now, I take it you had an after-market business in the Model T Ford for a while in 1927?

A. Yes, we did.

Q. And when did you start handling ignition lines for the Model A Ford?

A. Well, usually the replacement part market
271 develops within two years after a new car is out. I assume, if my memory serves me right, we started to supply those parts within that period of time.

Q. Now, when you started handling replacement parts for Model A Fords, did you change the character of your business in any respect?

A. Well, we developed replacement parts for other makes of cars, such as General Motors cars and Chrysler.

Q. What is the fact as to whether or not you were doing any actual manufacturing in 1928 and 1929?

A. Well, I don't think we did any manufacturing until probably 1935, 1936, because our parts were made for us and we had no manufacturing facilities at the time.

Q. So until that time the products which you handled were still manufactured for you by others and you went through the process that you just described?

A. Yes, sir.

Q. And when did you get into the actual manufacture of any of your products?

A. Well, in a moderate way we got into the manufacturing of it in 1936, probably, 1937, 1938, but we built our plant in 1939 and we expanded our manufacturing from there on out, to a considerable extent.

Q. Was there any reason for not getting into the actual manufacture of the parts in the 30's earlier

272 than the time you mentioned?

A. Yes. There were quite a number of patent suits, both by Electric Auto-lite and General Motors on replacement parts items, and that litigation extended over a period of yours, probably five or six years, during the 30's, in which we were involved, and many other independent manufacturers. Until that question was cleared up, we didn't feel justified in developing our manufacturing too far.

Q. Well, was that litigation directed at your right to participate in the business you were then in?

A. The litigation appied to ignition items that went into the ignition system, such items as we are now applying.

Q. Was the issue some kind of unfair competition on the part of your company and other companies in making parts which would fit and apply to an automobile that was nationally advertised, which you didn't manufacture?

Mr. Schrup: Well, we have an objection.

* * * * *

274 By Mr. Sprowl:

Q. Was that litigation directed only at your company?

Mr. Schrup: Same objection all the way through.

Trial Examiner Hier: All right, you can have a continued objection.

It was directed only at your company?

The Witness: No, it was directed at the industry in general, or other manufacturers.

By Mr. Sprowl:

Q. In the replacement parts field?

A. Yes, sir.

275 Q. And when did you say you built your first manufacturing plant?

A. In 1939.

Q. Where was that located?

A. At our present address, 4925 West Lawrence Avenue.

Q. And you have been located at that address continuously since that time?

A. Yes, sir.

Q. Now, do you manufacture any of your products at the present time?

A. Yes, we do.

Q. And was that true during the year 1949?

A. Yes, sir.

Q. And what, roughly speaking, what portion of your products do you actually manufacture yourself?

A. Well, we have a complete manufacturing set-up so that I would say that we make a great part of our items, tooling and machine work, bakelite moulding, all of those facilities we now have in this operation.

Q. And that was true in the year 1949?

A. Yes, sir.

Q. Now, in the year 1949, what types of products did you sell, that is, did the C. E. Niehoff Company sell?

A. We sold a complete line of automotive electrical parts, that is, ignition,—we also sold equipment, we
276 did rebuilding of distributors, regulators, we also had a line of hydraulic brake parts.

Q. When you speak of ignition, are you including things like generators, spark plugs—

A. No, we do not make spark plugs or generators. We make small replacements for the ignition system, for the starter and generator, such as generator brushes, cut-outs, starter switches, dimmer switches and ignition coils, electrical parts generally classified as that.

Q. During the year 1949, what percentage of your domestic sales did these various lines represent?

A. Well, ignition represented 85% to 90% of our total volume, hydraulic parts represent 5% or 6% of our total volume, equipment items probably 2% to 3%, and rebuilding probably 2% of the volume.

Q. That was true in 1949? You are speaking of 1949?

A. Yes, I am talking about 1949.

Q. In that year 1949, how did the Niehoff Company handle the sales of its products?

A. We sold our line of parts through the automotive parts jobbers throughout the United States and also foreign countries.

Q. How did you contact these so-called jobbers?

A. We had our salesmen in their respective territories calling upon the jobber.

277 Q. And did you sell to the ultimate retailer?

A. We sold to the jobber, not to the retailer. The jobber redistributed the product to the garage, service station, filling station and other accounts. I doubt whether he could sell very many of them, if any, to the car dealers, because—

Q. Well, let's get at it this way: Who are these so-called jobbers or distributors?

Mr. Mayer: Just a moment. I make a motion to strike what he said about not selling anything to the car dealers as being a conclusion of the witness.

Mr. Sprowl: Well, I will agree that can go out. We will meet you head-on on that a little later on.

Trial Examiner Hier: All right.

Mr. Sprowl: Just that portion of the answer.

By Mr. Sprowl:

Q. Now, who are these so-called jobbers and distributors of which you just spoke? I shouldn't say who, but how did they fit into the distribution picture?

A. Well, it is the only means we have of selling our products and distributing them to the trade—garages, service stations, etcetera.

Trial Examiner Hier: He wants to know what function they perform?

By Mr. Sprowl:

Q. To whom do they sell your products?

278 A. They stock our merchandise and re-sell to the independent garage, probably, the filling station and other independent service outlets. That is their primary trade.

Q. Well, do these jobbers and distributors, generally speaking, do any automobile repair work which involves the installation of any of the parts which you sell to them?

A. No. The jobber does not repair the ignition system.

Q. Their function is solely re-selling it to—

A. They act as wholesalers or distributors or jobbers, whatever you wish to call them.

Q. Who makes the actual installation of your replacement parts?

A. The service garage, independent service station or filling station.

Q. And they are in turn, the customers of whom?

A. They are the customers of the jobbers.

Q. Directing your attention again to the year 1949, to what extent did the C. E. Niehoff Company advertise its products in that year?

A. It did trade paper advertising in the principal trade papers in the automotive field. We also provided catalogs, other service data, decorative information to the jobber and to the salesmen for use in presenting our product to the trade accounts.

Q. Did you have any catalogs?

279 A. Yes, we published a catalog.

Q. And those are the catalogs which have been introduced in evidence here and you have already testified about?

A. Yes, sir.

Q. How frequently do you bring out a new issue of a catalog of that type?

A. Well the catalog, under normal conditions, is brought out annually.

Q. And do you, in the course of the year in which a catalog is issued, make any changes from time to time?

A. Yes. The catalog must be maintained up to date as to specifications and as to the type of product which is distributed by the jobber to his trade, and there is extensive work in compiling these catalogs.

Q. During the year 1949 did you advertise your products in any local newspapers?

A. No, we didn't do any newspaper advertising.

Q. Now, these trade publications you spoke of as being the media in which you placed your advertising, to whom are those distributed, generally speaking?

A. The automotive trade papers are distributed to the jobber and to all classes of the entire trade—garages, service stations, filling stations, battery stations, any kind of a service man would probably get these magazines.

Q. How was the sales organization of the C. E.
280 Niehoff Company set up during the year 1949?

A. Our operation was through, primarily through

our salesmen whom we had in their respective territories, and they made continuous contact with the jobber in the process, and the salesman has to carefully review the line of the Niehoff set-up and to take the inventories, whenever such calls were made, and to make certain that the jobber's stock is in balance and in good shape. This is a highly important operation, we believe, in the development of our distribution.

Q. How many times a year—first, how many salesmen did you have in the year 1949?

A. We had fifteen direct salesmen.

Q. How many times a year does a salesman of the C. E. Niehoff Company call upon each established customer of the company?

A. Well, the salesman is requested to call at least a minimum of four times, or probably an average of six to eight times. The situation varies a little bit in the territories. I would say that the average calls are six times a year.

Q. What is the purpose of those calls?

A. The purposes of the call are manyfold, because the salesman has to review the line with the buyer and the sales-manager of the respective accounts, jobbing accounts, as one phase of his call, to introduce him to any new products or merchandising features of the line. Secondly, to
281 check, taken inventory, if at all possible, of the line, and to determine that the jobber's stock is in good, balanced order, probably to make recommendations if they have any obsolescents, and thirdly, to inform the jobber salesman as to the selling points of the line.

Q. Have you, at my request, Mr. Niehoff, respecting the year 1949, prepared a compilation from the books and records of the C. E. Niehoff Company of the aggregate amount of direct expense incurred by the C. E. Niehoff Company for salaries, commissions and expenses of its salesmen during that year?

A. Yes, we did make that tabulation.

Mr. Sprowl: I should like to have marked for identification as Respondent's Exhibit 1, this document.

I will ask some more questions about it.

Trial Examiner Hier: What do you call that document, Mr. Sprowl?

Mr. Sprowl: I guess it is Respondent's Exhibit 1.

Trial Examiner Hier: I mean what is the short name for it?

Mr. Sprowl: Selling expenses.

Trial Examiner Hier: Selling expenses. It may be marked.

(The paper referred to was marked Respondent's Exhibit 1 for identification.)

282 By Mr. Sprowl:

Q. I show you the document which has been marked Respondent's Exhibit 1 for identification and ask you if, on the first line, that shows the total amount expended by the C. E. Niehoff Company in the year 1949 for salesmen's salaries, commissions, travel expenses—is that what it shows?

A. Yes. That figure of $186,170—

Mr. Schrup: The exhibit will speak for itself. We may have an objection here and there is no use reading from the exhibit until we find out what it is about.

Trial Examiner Hier: Strike the figure.

By Mr. Sprowl:

Q. And the second line shows your total number of salesmen?

A. Yes. It shows fifteen—

Mr. Schrup: Just a moment. We have this continuing objection.

Mr. Sprowl: I will agree it will all go out if the exhibit is excluded from the record, but it is difficult for any witness not accustomed to the procedure here to talk about something and not tell about it.

By Mr. Sprowl:

Q. What does the third line show?

A. The third line shows the number of accounts and the number of average calls made on these accounts.

Q. I see a 6 and an X and an 866. What is the 6?

283 A. 6 is the average number of calls by the salesman per account.

Q. And what is the 866?

A. 866 represents the number of jobbing accounts we had in 1949.

Q. So that X is a multiplication symbol?

A. Right.

Q. And the extended number is what?

A. It is 5,196.

Q. I have forgotten my mathematics. When you multi-

ply you get what? The product. If you divide you get the quotient. So that is the product, is that right, of those two figures?

A. Yes, sir.

Q. And the last line, called average cost per call, how was that figure arrived at?

A. The figure is arrived at by taking the total number of calls and dividing by the full cost, or the direct selling expenses, which brings the average cost per call to $35.83.

Mr. Schrup: Mr. Examiner—

Trial Examiner Hier: He said he would let it all go out if the exhibit is excluded, so we have that understanding.

By Mr. Sprowl:

Q. So, as I understand it, your final line is achieved by dividing the total number of salesman calls by the
284 total direct selling expenses of the Company in the year 1949?

A. Correct.

Q. Ad the last line is the average cost to the C. E. Niehoff Company of each salesman call on a customer?

A. That is also correct.

Q. That figure is $35.83 per call?

A. Correct.

Mr. Sprowl: I offer this in evidence as Respondent's Exhibit 1.

Trial Examiner Hier: Any objections, gentlemen?

* * * * *

286 (The paper referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 1, was received in evidence.)

* * * * *

By Mr. Sprowl:

Q. Directing your attention to the year 1949, did the C. E. Niehoff Company have as one of its customers in New Orleans, Louisiana, an individual named Archie Keever, who does business as the Automotive Wholesalers Company?

A. Yes, we had such a customer.

Q. Did the C. E. Niehoff Company also have among its customers in New Orleans in the year 1949 the Greiner Auto Parts, Inc.?

A. Yes, we did have Greiner there.

Q. Can you tell me what the total sales of the C. E.
287 Niehoff Company were to each of those concerns in the year 1949? If you want to refresh your memory I will show you the Steele exhibit.

Trial Examiner Hier: 47-A—

Mr. Sprowl: 47-A to E.

Mr. Schrup: 47-B I think it is.

Trial Examiner Hier: 47-B is right.

The Witness: Their net proceeds was $1,117.20.

By Mr. Sprowl:

Q. That is $1,117.20?

A. For the year 1949, according to the Exhibit, the Steele Exhibit.

Q. And the Greiner account?

A. The net proceeds were $10,306.02.

Q. The figures which you gave from the Steele Exhibit, Mr. Niehoff, were the net proceeds received by the C. E. Niehoff Company, and I call your attention to Column 3 of the same exhibit, which is the total sales at jobber prices?

A. In the case of Automotive Wholesaler there is $1,266.67. In the case of Greiner Auto Parts it was $12,477.78.

Q. What territory does the Automotive Wholesalers cover in the resale of your products?

Mr. Schrup: Just a minute. We have an objection to that.

Trial Examiner Hier: What is the objection?

288 Mr. Schrup: It is already in the record, in the testimony of the man himself. He has testified as to what his territory is. It is already in.

Trial Examiner Hier: If he knows, he can answer. Let his answer. Objection overruled.

The Witness: May I get the question again?

By Mr. Sprowl:

Q. What territory does Keever cover in the resale of your products which he purchases?

A. He operates locally in New Orleans, the City of New Orleans.

Q. And in what area does the Greiner Auto Parts, Incorporated sell the products which it buys from C. E. Niehoff & Company?

A. The Greiner Company operates in New Orleans and in a radius of seventy-five to a hundred miles within that where he has, I understand, a number of salesmen.

Q. Do you know how many salesmen the Greiner Company has?

A. Well, the M. E. L. A. record shows six salesmen for the Greiner Company.

Trial Examiner Hier: What is the M. E. L. A.?

The Witness: That is the Automotive Credit Report.

Mr. Schrup: Mr. Examiner, this man is testifying to something apparently not here in the files.

Mr. Sprowl: It is agreeable that the last answer 289 is hearsay and may go out.

Mr. Schrup: Yes, but I think this gentleman should testify of his own personal knowledge. If he is reading from the record, it is already in the record.

Trial Examiner Hier: Well, it is up to you gentlemen to bring that out on cross-examination. He may, after all, want to rebut what Greiner has testified to. He has a right to do it, provided he has testified of his own knowledge. The last answer, the past part of the answer can go out, that is, that the M. E. L. A. record shows six salesmen.

Go ahead.

By Mr. Sprowl:

Q. How many times a year does the Niehoff Company salesman call on the Automative Wholesaler account—that is, the Keever account?

A. He would call on Automotive Wholesalers every time he was in New Orleans, which would be probably four to six times a year.

Q. And how many times does he call on the Greiner Company account?

A. He would call on the Greiner account four to six times a year.

Q. Would he call on one account four times a year and the other account six times a year?

A. I don't believe so.

290 Q. What does he do, make a trip to that area?

A. That is correct. He calls on all the accounts, or is supposed to call on all the accounts, active accounts of the territory.

Trial Examiner Hier: On each trip?

The Witness: On each trip, yes.

By Mr. Sprowl:

Q. So if he got to New Orleans four times a year, he would make how many calls on each one?

A. Four calls.

Q. And if he got to New Orleans six times a year, it would be how many calls on each one?

A. Six calls.

Q. Now, how is the Greiner account classified in your pricing method?

A. The Greiner account is on a distributors' agreement and received our extreme discounts based on volume of purchases which were in excess of $12,000.00.

Q. Now, how would you classify such a customer in the Nichoff Company discount plan? Do you have a name for that classification?

A. We classify them as a distributor with an agreement.

Q. Now, as I understand it, Greiner is a member of this Cotton States group, is that correct?

A. That is correct.

291 Q. But what is the fact on the actual volume the Greiner Company purchased from you as to what its classification would be were it not a member of that group?

A. He would receive the extreme discount of seven percent, as indicated on the report, on the Steele report.

Q. That is in addition to the ten percent?

A. In addition to the ten percent, that is correct.

Q. And everybody gets the two percent if they pay their bill in time?

A. That is correct.

Q. I think we might clear that up for the record.

I would like you to assume an item on your jobbers price list at $1.00, to which the discount applies. Where do you first take off the ten percent you are talking about?

A. The ten percent discount is given off of the base price.

Q. What would that bring the dollar item to?

A. It would bring the dollar item to 90¢.

Q. And then, as I understand it, in the case of Cotton States, their additional discount is given on the invoice?

A. That is correct.

Q. And that would bring the 90¢ down to 7% less, or what figure?

A. That is 90¢—

Trial Examiner Hier: 83¢.

The Witness: 83¢.

292 Trial Examiner Hier: You said on a dollar?

By Mr. Sprowl:

Q. Is it 7% off of the dollar or off the 90¢.

A. The 7% is off the 90¢.

Q. So it would be an additional 6.3?

A. I believe so, yes.

Q. 7% of 90¢, whatever that is?

A. I might add that in our agreement, there are exceptions on the 7%.

Q. What do you mean? We have your agreements. Those are the ones that have been identified?

A. In other words, there are items that Greiner may purchase, or any other distributor under a distributors agreement, that does not get the 10% off.

Q. I understand that. My whole hypothesis was a discount item on your jobbers list, not one to which these discounts do not apply.

What would be the invoice price, then, on a dollar item to the customer after you have taken off the 10% and the 7%?

A. 83¢—no, 83¢ and a fraction.

Trial Examiner Hier: 83.7 wouldn't it?

Mr. Sprowl: I think that is right, 83.7.

By Mr. Sprowl:

Q. Then where does the 2% come into the picture?

293 A. The 2% discount is taken off the net amount.

Q. Of 83.7, is that correct?

A. Yes. That is correct.

Q. If what? He doesn't get it unless he pays in time, does he?

A. Our terms are 2% ten, approximately.

Q. And what discount arrangements are extended to Keever—were extended to Keever in the year 1949?

A. Automotive Wholesalers received a 10% discount from the base price or jobbers price schedule.

Q. Now I show you—

A. He also received—pardon me—the 2% cash discount.

Mr. Sprowl: Yes.

Mr. Hier, my photostat of the Steele Exhibit doesn't show the pencilled number on sheet 2, I can't refer to it.

Trial Examiner Hier: That is 47.

By Mr. Sprowl:

Q. A moment before, you had called to your attention,

Mr. Niehoff, the two lines on Commission's Exhibit 47-B which related to Automotive Wholesalers and the Greiner Auto Parts accounts: I will ask you to look at that again and ask you if those two lines correctly reflect the effect of the discount arrangement which was in effect with each of those companies during the year 1949?

A. In the case of—

294 Q. You don't need to give me any figures. Are they correct, to your knowledge?

A. Yes; I believe they are correct. They are so close to correct, there wouldn't be any argument.

Q. And what does it show as a percentage figure in the very last column as the price paid by Mr. Keever, the average price paid by Mr. Keever to the C. E. Niehoff Company as its jobbers price for all items?

A. 82.2%.

Q. No. Mr. Keever—I have that corrected copy—

Trial Examiner Hier: 88.2.

Mr. Sprowl: 88.2%.

The Witness: That is right.

By Mr. Sprowl:

Q. And what is the similar percentage figure in that last column for the Greiner account?

A. The corrected figure here shows 82.6.

Q. Now on the basis of the volume sales which the Niehoff Company made to the Greiner Company in the year 1949, how much more money would the Niehoff Company have received, in dollars, from Greiner, if it had obtained from it 88.2% of the jobber price rather than 82.6%?

Mr. Schrup: I object to that. It is immaterial.

Mr. Sprowl: I think we will connect it up, Your Honor.

293 Trial Examiner Hier: Well, I will let it go and we will see if you connect it up. I don't see the materiality at the moment.

The Witness: I think it is $557 or $577, I don't recall.

By Mr. Sprowl:

Q. In other words, it would be an additional 5.6%?

A. It would be the difference, which would be—

Q. It would be, you think, around $570, is that it?

A. Around $575.

Q. All right. Now, what is the fact, Mr. Niehoff, as to

whether or not the C. E. Niehoff Company would have been able to retain the Greiner Company as a customer in the year 1949 if it had not granted to it the additional 7% discount?

A. Well, the fact of the matter is, we wouldn't have been able to keep the account.

Q. In the year 1949 were the prices, net prices at which you were selling to Greiner—I will rephrase the question. What was the relationship between the net prices at which you were selling to Greiner in the year 1949 to the prices at which he could have bought the same products from your competitors?

A. Our prices were higher.

Q. Than those of your competitors?

A. Yes, sir.

Q. Even with the additional 7% discount?

A. Yes, sir.

Q. Now, if the Niehoff Company lost the Greiner account, how many customers would it have required in that area to recover the volume which it lost thereby?

Mr. Mayer: I object to that. I don't see any materiality to that question, how many customers he would have gained or lost. Whether he held or lost Greiner doesn't affect this case in the least bit.

Trial Examiner Hier: I don't see the purpose at the moment, but—

By Mr. Sprowl:

Q. All right. How many customers would you have had to have to replace the Griener volume?

• • • • •

Trial Examiner Hier: I will overrule the objection. What is the question?

By Mr. Sprowl:

Q. If you lost the Greiner account as a customer, how many new accounts would you require, the size of Mr. Greiner's in the New Orleans area which the Greiner account served in 1949, to recover the lost volume?

A. Well, Mr. Greiner's account did ten times as much business as the Keever or Automotive Wholesaler account did, and we would have to obtain ten accounts.

Mr. Schrup: Can we have a short recess?

Trial Examiner Hier: Yes. We will take a five minute recess.

(A short recess was taken.)

Trial Examiner Hier: Proceed.

By Mr. Sprowl:

Q. Mr. Niehoff, have you, at my request, prepared a compilation of the books and records of C. E. Niehoff & Company applicable to the year 1949, showing the percentage relationship between the cost of your salesman's calls on the Greiner account in that year in comparison to the percentage that cost bore to the sales to the Keever account in that year?

A. Yes, we have the figures available.

301 Mr. Sprowl: I would like to have this document marked as Respondent's Exhibit 2.

(The paper referred to was marked Respondent's Exhibit 2, for identification.)

By Mr. Sprowl:

Q. I hand you Respondent's Exhibit 2 for identification and I ask you if the figure which appears in the first two lines of that exhibit was taken from Respondent's Exhibit 1 which you have already identified?

A. Yes.

Q. That is the cost per call, is that correct?

A. That is correct.

Q. Dropping down, you show under Automotive Wholesalers, sales for the year 1949, $1,266.67, and that is the figure you testified about earlier, from the Steele Exhibit?

A. That is correct, yes, sir.

Q. And which tallies with your Company books and records?

A. Yes, sir.

Q. And dropping down a little further in the exhibit, I call your attention, under the name Greiner, to the figure, being sales for the year 1949, $12,477.78, and is that again the figure respecting sales which was taken from the Steele exhibit, that is, Commission's Exhibit 47-B, and which tallies with the books and records of the C. E. Niehoff Company?

A. That is correct, yes, sir.

302 Q. And then the percentage extensions which appear in the right column, the third and fourth figures down, are the percentages derived by determining the relationship of the two figures in each case that appear immediately to the left, is that right?

A. That is correct, yes, sir.

Q. And then the balance of the material in the exhibit is multiplied by ten, in line with your previous testimony, as to the number of accounts of the size of Mr. Keever's you would have to obtain to replace the Greiner account should you lose it, is that correct?

A. That is correct, yes, sir.

Mr. Sprowl: We offer this in evidence as Respondent's Exhibit 2.

Mr. Schrup: We have the same objection as we have previously made in Exhibit 1 offered in evidence. We understand that the basic material will be supplied to us in conjunction with Respondent's Exhibit 2 for identification as was offered to us with regard to Respondent's Exhibit No. 1 for identification.

Mr. Sprowl: Yes. I would like to say, Mr. Schrup, that the only figures on this exhibit which I think need any vertification are the $35.83 figure which was taken from Exhibit 1, because the sales volume tallies with the Commission's Exhibit and everything else is merely a per-
303 centage or a multiplication determined from those figures, but we will make it all available.

Mr. Schrup: Do I understand these exhibits were drawn up and based on Commission's Exhibits 47-B through—

Trial Examiner Hier: 47-B.

Mr. Sprowl: Just B, yes.

Mr. Schrup: Yes, drawn up and based on 47-B?

Mr. Sprowl: There are only two figures taken from that exhibit—that is the sales for 1949 for these two accounts.

Trial Examiner Hier: There are two figures in question that you may go after on cross-examination or other examination here—the 83¢ figure and the six calls. Those matters.

Mr. Schrup: We have continually made our objection to the figures at the botton of the paragraph as to—

Trial Examiner Hier: At the bottom of the Exhibit. That is speculation, that is right, but the exhibit is admitted in evidence on the same basis as Respondent's Exhibit No. 1 was admitted. I mean the objection is overruled for the same reason.

(The paper referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 2, was received in evidence.)

By Mr. Sprowl:

304 Q. So far, Mr. Niehoff, you have limited your testimony on cost to the direct selling cost, that is, salesmen's expense, commission and so forth, and to the net savings which the C. E. Niehoff Company experiences in handling a larger account as against a smaller account. Does the C. E. Niehoff Company realize any other savings in the handling of an account the size of the Greiner account as compared with a smaller account the size of the Automotive Wholesalers account?

A. Why, I believe we do, inasmuch as we spend slightly over $100,000 in advertising.

Q. Was that true in 1949?

A. That was true in 1949, yes, sir.

Mr. Sprowl: I think, for the record, I have the figure here, Mr. Hier, that came from the Company's books and records. I think it would be better to be precise. It is $100,437.

Trial Examiner Hier: All right. Subject to check, we will take that.

By Mr. Sprowl:

Q. Does that refresh your recollection as for the book figure?

A. That is correct.

Q. All right. Proceed, then. I am sorry.

A. Will you repeat the question again?

305 Q. Well, you were telling us about your advertising cost and the savings you have experienced in larger accounts as against smaller accounts in that cost field.

A. In that advertising cost is the distribution of catalogs per account and factors of other indirect and direct advertising material that would be proportionate to each of the accounts.

Q. How many customers, domestic customers of the jobber and distributor variety did the C. E. Niehoff Company have in the year 1949?

A. 866, the total number of customers.

Q. And have you calculated the per customer cost of your advertising on strictly a division of the number of customers into your total advertising expenditures?

A. Yes, I believe we have.

Q. That was done by merely dividing the number of customers into the total advertising budget?

A. Yes. I just don't recall the exact figure.

Q. Well, subject to the long division being checked, I have that figure here and it is $115.97. Is that the figure you determined for me?

A. That is correct, yes.

Q. Now, did you determine in what percentage that per customer cost of advertising bore to net sales in the case of the Automotive Wholesaler account?

306 A. Well, the actual difference would be, I think in the case of Automotive Wholesalers it is approximately—it is 9%, and in the case of Greiner it would be 9/10 of 1%.

Q. In other words, that is, doing the same operation as to each account on the basis of their purchases from Nichoff in 1949?

A. Correct.

Mr. Schrup: May I get that number of Wholesalers?

Mr. Sprowl: It is 9%, the advertising cost per customer in the case of Automotive Wholesalers in the year 1949, 9% of sales to that company, and in the case of Greiner, it was 9/10 of 1% of sales.

By Mr. Sprowl:

Q. Now, what is the fact as to the amount of advertising you are required to do for each customer, as to each uniform, total, routine customer, irrespective of size?

A. Well, it is generally the same. There might be some difference in the number of catalogs distributed to each account, depending upon the number of salesmen in each organization.

Q. As I understand it, however, in the calculation you have just made for me, you just arbitrarily divided the number of customer accounts into the total advertising cost?

A. That is correct, sir.

Q. And what comes under the heading of advertis-
307 ing cost, in addition to catalogs and these trade magazine advertisements?

A. Well, the principal item is trade paper advertising, catalogs, technical circulars.

Q. How are those sent?

A. Those are two nut charts and general literature that is gotten out, including special merchandising circulars, things of that sort.

Q. How many of these so-called catalogs, circulars and two nut charts do you send to each customer?

A. We send to each customer their required number for their binders.

Q. What are the binders?

A. Binders—usually each salesman has a binder.

Q. I see.

A. And we of course give them a few extra catalogs for their needs, upon their request.

Mr. Sprowl: Now, I had some material, your Honor, at this point, on the cost of filling orders, but as I indicated earlier, in our off the record discussion, that is, we discovered a very highly technical field in which experts in the field would qualify to make the required time studies and other studies and will have to, I think, supply the required testimony, and I don't think there would be any point in pursuing that portion of what we have pre-
308 pared here today, because I don't believe that anybody presently in the room today has gone through the steps that would have to be undertaken to qualify themselves to testify.

I might add, it is a good stopping point, before we launch into another phase of our testimony. I don't know how you want to handle the noon adjournment.

Trial Examiner Hier: It is up to you gentlemen.

Mr. Schrup: It is a good stopping point. It is satisfactory to us.

Trial Examiner Hier: All right, we will recess until 1:30.

(Whereupon, at 12:10 P. M., a recess was taken until 1:30 P. M., this day.)

309 Afternoon Session.

1:30 P. M.

Trial Examiner Hier: Come to order. You may proceed.

C. E. NIEHOFF resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Sprowl.

Q. Mr. Niehoff, directing your attention to the year 1949, what were the net sales of the C. E. Niehoff Company, in dollars, to the so-called jobber and distributor account type of customer?

A. I can give you that figure in a second. $2,086,499.
Q. $2,086,499?
A. That is right.
Q. What percentage of that total volume of sales was made to the classification that you call jobber?
A. 7¼%.
Q. That is the jobber without an agreement?
A. That is correct.
Q. And what percentage of those sales were to the so-called classification of jobber with agreement?
A. The percentage was—to carry out the decimal, 18.7, or rather 78.
Q. 18.788, is that it?
310 A. That is right.
Q. Percent?
A. Yes.
Q. And what percentage of those total sales were made to the distributor classification?
A. 25.8%.
Q. And to the last classification, distributor with agreement, what percentage?
A. 47.8%.
Q. 47.8%?
A. 47.8% is correct.
Q. And what was the average annual sale to the jobber without classification?
A. The average per account is $524.
Q. That is in 1949?
A. Yes, sir.
Q. And what is the annual average per account for the jobber with agreement?
A. $1,719.00.
Q. And for the distributor?
A. 224.
Q. 224 dollars?
A. 224 dollars—I beg your pardon, $2,241.
Q. $2,241?
A. Correct.
311 Q. And what was the annual average of sales to the distributors with agreement in 1949?
A. $10,128.
Q. I notice you have been refreshing your memory as to these figures from papers you are holding in your hand. Where did you in fact determine these figures?

A. Well, this is the breakdown on our actual sales account records.

Q. Is that from your books and records?

A. Yes, sir, it is.

Q. Now, what does the Niehoff Company do, what process does it go through, in filling each order which is received from a customer, and I would like you to direct your testimony to the method it followed in 1949.

A. Well, each order, as received from the jobber or through our salesmen, has to go through the process of twenty-one different operations to be completed. These operations consist of the recording of the order—

Q. Well, I don't think you need to give us all twenty-one, Mr. Niehoff, in view of the fact that we are later on going to give a detailed analysis of this, but if in a general way you would tell us what happens—

A. Recording of the order and checking over the orders by the sales manager and recording the contents of the order as to our statistical records or inventory records
312 and through the shipping department, where the order has to be assigned to an order filler, and from there they go to the packer and so on down the line until they come back to the billing process, pricing policy, et cetera. There are numerous different operations in each of these categories.

Q. And what is the physical function of the order picker, I think you called him, order filler?

A. The order filler is the operator that takes the stock or assembles the stock to fill the items on the order.

Q. And do you keep, for instance, distributor points for a 1948 Ford in one location in your stockroom?

A. Yes, we have a systematically arranged stockroom so that they can select their stock efficiently.

Q. Well, say the order calls for only three points, sets of points, what does that require the order filler to do?

A. Well, the order filler would get the order, he would have to go to the stock department that had the point section and select those particular points.

Q. In the quantity called for in the order?

A. Yes, the points.

Q. What if the order called for a gross of points, or some larger number?

A. He would go through the same process.

Q. He would still make one trip to the place in your inventory of parts that has that particular part?

313 A. That is correct.

Q. What is the fact as to the comparative ease of filling an order calling for a broken lot and filling an order calling for a standard number?

A. Well, the operation is more delayed or slower, more complicated, because in broken lots, it would not be in standard lots.

Q. Is that because of the method of pre-packaging?

A. That is right.

Q. What is that method?

A. Items are packed in standard packages usually of ten or more, or a multiple thereof.

Q. So anything less than the standard package would require what effort on the part of the order filler?

A. It would require some time to disassemble the package and count out the items, get the exact number of pieces required.

Q. I see. What is the fact as to the uniformity of procedure through which an order is processed as between a small order on the one hand and a large order on the other?

A. Each order has to go through the same process and through the same number of operations, regardless of the size of the order.

Q. It eventually arrives, I assume, in some sort of a shipping room?

314 A. Yes. The order is filled and packed in the shipping department.

Q. How many separate orders did the Niehoff Company ship to Mr. Keever of the Automotive Wholesalers organization in New Orleans in the year 1949?

A. There was actually eight orders shipped to him.

Q. In that year?

A. 1949.

Q. What was the average amount of each of those orders which the Niehoff Company filled for Mr. Keever in 1949?

A. I think it was—I will give you the figure exactly. Eight orders—they were $158.00 per order.

Q. $158.00 per order?

A. Yes. $158.00 per order.

Q. That was the average size of the eight orders?

A. That is correct.

Q. And how many separate orders did the Niehoff Company ship to Greiner Auto Parts in New Orleans in the year 1949?

A. There were twenty-six separate orders.

Q. And what was the average size of each of those orders which you shipped to Greiner in 1949?

A. $479 per order.

Q. $479?

A. That is correct, yes.

Q. Mr. Niehoff, you have been continually engaged
315 in the marketing of the products which your company manufactures since your company was organized in 1923?

A. Yes, I have.

Q. What portion of your time have you devoted to the C. E. Niehoff Company since 1923?

A. All my time.

Q. And have you, in that connection, become familiar with the national market in which your company markets its products?

A. Yes. I have been in the automotive business all my life and think I am fully familiar with it.

Q. Are you familiar with the companies against which the C. E. Niehoff Company competes in that market?

A. Yes, I am. Definitely.

Q. Directing your attention to the year 1949 in the ignition field, who were the largest competing companies in that field at that time?

A. Well, our principal competition in the field was the car manufacturers and the manufacturers that make the parts for the original car equipment.

Q. Who are those companies?

A. General Motors. The Delco Remy Division of General Motors makes the ignition parts for the General Motors cars. Electric Autolite make the original equipment for the Chrysler Automobile Company and of course
316 Ford provides its own ignition Ford parts to its dealers—

Mr. Schrup: If the Examiner please, I haven't objected to this because I presume it is to be connected up, that is, I understand that respondent will later on show that these particular sellers who are competing with respondents are selling to respondent's customers and that respondent has to meet this competition—

Mr. Sprowl: That is precisely what we propose to lead up to, Mr. Hier.

Trial Examiner Hier: You just want the record to show that you are not taking this lying down, is that it?

Mr. Schrup: Right.

By Mr. Sprowl:

Q. You say the Ford Company made its own ignition parts and supplied its own dealers, is that the way I understood it?

A. Well, the Ford Motor Company makes some of its ignition parts and I believe has some parts made for it by independent contractors or outside contractors.

Q. Would the Niehoff Company make any of that original equipment for the Ford Company?

A. No, we do not.

Q. Now, did the Delco Remy Division of General Motors and the Autolite Company confine its sales only to the manufacturers of automobiles in the year 1949?

A. Well, the Delco Remy Division of General Mo-
317 tors also sells to our jobbing trade. They also have United Motor Service Station outlets.

Q. They have what?

A. They have their own United Motor service outlets.

Q. That is the name they use for redistributing their product someplace?

A. Well, they sell both the jobber and the United Motor Service Stations, and the car manufacturers too.

Q. In the year 1949 did these companies offer their ignition lines for sale to the class of customers to whom the C. E. Niehoff Company sells its products?

A. Yes. Very definitely so.

Q. And at that time did these two companies enjoy any competitive advantages over your company in the market in which your company operates?

A. Well, the jobbers of General Motors, who has a very extensive distributing set-up through the car dealer, plus their own service outlets, the United Motor Service, plus the jobber, that he is a very potent customer of ours in the field.

Trial Examiner Hier: You mean competitor, rather than customer, don't you?

The Witness: Pardon me. Competitors.

Mr. Sprowl: Wishful thinking on the part of the witness.

The Witness: Quite true.

318 By Mr. Sprowl:

Q. What is the fact as to how they advertise their product?

A. Well, they do very extensive advertising through their various organizations.

Q. In that advertising, do they make any reference to the fact that they are the original equipment suppliers?

A. Yes. Their advertising very definitely says, "Buy genuine or original parts."

Q. How extensively do those two companies advertise?

A. Well, very extensively.

Q. Do they limit their advertising to trade papers?

A. No, definitely not. They cover the consumer field very extensively. Newspaper advertising and also extensive trade paper advertising. I don't think there is a trade paper that their advertisements do not appear at least once or twice in that section.

Q. Do they advertise in such ordinary magazines as the general public might read, such as Collier's, Post and so forth?

A. Yes, they do.

Q. Now, referring again to these two companies, in the after market competition, as distinguished from the original equipment which they sell to the manufacturers, do they enjoy any particular advantage other than the ones you have mentioned, in competing against the Niehoff Company and other independent companies?

319 Mr. Schrup: I think that should be restricted to the C. E. Niehoff Company.

Mr. Sprowl: All right, to the C. E. Niehoff Company.

The Witness: We have found that it is quite impossible to sell the official car dealer on Niehoff parts because of the prestige and the leverage that they have with their car dealers, and our jobbers have found this situation likewise to be true.

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323 Mr. Schrup: We have a continued objection.

Trial Examiner Hier: Yes.

By Mr. Sprowl:

Q. Have you ever known of the Niehoff ignition line being handled by an authorized automobile dealer?

A. No, sir. There might have been some exceptions during the critical war years when some of our merchandise got into the car suppliers' hands because of their inability to get it elsewhere.

Q. Because of the car suppliers' inability?

A. That is right.

Q. But in the market of the type we have been in since the war, that is, since 1945, what has been the case?

A. Well, in talking to the dealers myself, personally, they told me definitely that they are not permitted to handle any other but original car equipment parts.

Mr. Schrup: I object to that and ask that it be stricken from the record.

Mr. Sprowl: All right. You cannot tell what somebody else told you. Only what you know.

By Mr. Sprowl:

Q. What do you know as to the fact as to what, if any, Niehoff equipment has been handled by any automobile dealer since the normal market returned after World War II?

A. The car dealer doesn't buy Niehoff equipment
324 to supply his original needs for the car that he represents.

Q. Now, at my request, have you examined the Kroll Corollary Survey published in 1949 respecting car owners' repairs?

A. Yes, I have checked those figures.

Q. And can you give me from that survey the percentage of car owners, respectively, that take their cars to authorized dealers, to independent repair shops, to filling stations, and who do their own work?

Mr. Schrup: We still have our objection.

Trial Examiner Hier: When was this survey made?

Mr. Sprowl: It was published in 1949. Kroll Corollary.

Trial Examiner Hier: Who made it?

Mr. Sprowl: The Kroll Corollary Company.

Trial Examiner Hier: I don't think that he can testify to those figures. I doubt very much if you could put the survey itself in unless the original data is available for examination.

Mr. Sprowl: I don't want to unduly prolong these hearings. Now, there is a great latitude allowed in proving a fact that must be compiled from a national survey. As a matter of fact, I have introduced surveys of consumer facts which have been prepared in many cases where there is no other way to get the facts. If we have to go out and make our own survey, we will ask for a three year
325 continuance because that is, as I see it, the only way to do it. All the material which we propose to refer

to is sufficiently correct to permit this to be accepted in a proceeding such as this.

Mr. Schrup: I still have the objection that it is not material or relevant to the issues in this case, besides being incompetent.

Trial Examiner Hier: I don't see how it can be done without depriving them of their right to cross-examination.

Mr. Sprowl: As I understand your ruling then, even if we had the Kroll Corollary Survey we couldn't put it in?

Trial Examiner Hier: That is right.

Mr. Sprowl: All right.

Trial Examiner Hier: The record may so show.

Mr. Sprowl: I wish to make an offer of proof. Do I understand that the objection is not that Mr. Niehoff is reading from figures from the survey, but just that the survey itself would not be admissible?

Trial Examiner Hier: Not unless the man who made it were here on the stand.

Mr. Schrup: I have the further objection also that it is not material or relevant to the issues.

Trial Examiner Hier: I overruled you on that but I will do it again. I am sustaining the other objection now.

326 Mr. Sprowl: I offer to prove on the Kroll Corollary Survey that in 1949 54% of the car owners took their cars to authorized dealers for major repairs; 27% took their cars to independent repair shops for major repairs; 3% used the facilities of gasoline filling stations; 14% did their own repair work; and 2% are unclassified.

By Mr. Sprowl:

Q. Mr. Niehoff, what is the portion of the national market in which the Niehoff Company is able to obtain ultimate distribution, that is, ultimate sale of its ignition products—that is, what class of user eventually buys the Niehoff ignition product?

A. Well, the jobbers' sales go principally to the independent garage, independent service or repairman and to filling stations.

Q. And is that the portion of the market in 1949 in which the Niehoff Company achieved the ultimate distribution and use of its ignition products?

A. May I ask you to repeat that once more,

Q. Yes. Will you read the question?

(Question read.)

A. Yes. Through the regular jobbing channels.

Q. Now, in that portion of the market, I gather from your testimony you sold first to what classification of customer?

A. To the jobber.

327 Q. And by that you mean all these classifications of jobbers we have talked about—jobbers and distributors?

A. That is correct.

Q. And they made up the Niehoff customers, is that right?

A. That is correct.

Q. Now, for those customers, who were the principal competitors of the Niehoff Company in 1949 in the ignition field?

A. Well, there are quite a number of them.

Q. How many were there?

A. Considering the original equipment and the replacement parts manufacturers, there is in excess of twenty or more such concerns in the field.

Q. And excluding the large companies, Delco Remy and Autolite, how many competitors did the Niehoff Company have?

A. The partial list we have compiled was seventeen, but I don't believe that that is all the competitors in the field.

Q. And did you, at my request, compile a list of these so-called smaller competitors?

A. I did, yes, sir.

Mr. Sprowl: I would like to have this marked for identification as—

Trial Examiner Hier: Respondent's Exhibit 3.

(The document referred to was marked Respondent's Exhibit No. 3, for identification.)

By Mr. Sprowl:

328 Q. Mr. Niehoff, I show you Respondent's Exhibit 3 for identification and ask you if this is the list you just referred to which you compiled of the smaller competitors, by name?

A. Yes, it is. However, I believe there are additional ones not on this list.

Q. And calling your attention to the F & B Manufacturing Company, does it have any other common name by which it is sometimes referred to?

A. Yes.

Mr. Schrup: In the first place, the exhibits speak for themselves—

Trial Examiner Hier: The same understanding applies here as did with the other exhibits.

By Mr. Sprowl:

Q. Do they have any other name by which they are referred to?

A. Yes. Their trade name is known as Filco.

Q. How do you spell that?

A. I think it is spelled F-i-l-c-o.

Q. Now, in the column on the right I notice after some of the names you refer to Competitor 1, Competitor 2, and so forth. Am I right in understanding that that is not to identify them according to their competitive effect, but is put in there because of the way you have numbered them on a later exhibit you propose to offer?

329 A. That is correct.

Mr. Schrup: We have been giving counsel some considerable latitude in leading questions—

Mr. Sprowl: I don't mean to lead—

Trial Examiner Hier: I see no harm in those numbers being explained.

Mr. Schrup: Well, let the witness explain it.

Trial Examiner Hier: If you are objecting to the question being leading, of course I will sustain it.

Mr. Sprowl: I will withdraw the question.

Mr. Schrup: We have had that objection overruled many times and haven't persisted in it, but I don't think you should go to the extent you are in leading questions.

Mr. Sprowl: I don't even know if my question is stated right so I think it would be better.

By Mr. Sprowl:

Q. Mr. Niehoff, will you tell us what the numbers which appear after some of the names on this exhibit, Competitor 1 and 2—what does that have reference to?

A. Why, it is merely a number identifying an exhibit that we are preparing that may be used in this case, and so far as my personal point of view is concerned, I would rather see the item identified by number than by competitor's name.

Q. To what does that exhibit which is in preparation refer or deal with?

330 A. With the question of comparative prices.

Q. And as I understand it, you would prefer, with a proper showing to counsel supporting the complaint and the Examiner, some method that could be kept under suppression whereby you could name who the competitor is, but from there on use a key or code number to identify that price and that competitor?

A. That is correct, yes, sir.

* * * * * * *

332 (The paper referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 3, was received in evidence and directed to be sealed.)

* * * * * * *

333 By Mr. Sprowl:

Q. In selling the Niehoff ignition line to the jobbers and distributors, or in achieving sales of those products, I should say, to your jobbers and distributors, what means are available to the Niehoff Company to overcome the competitive advantage which you have just discussed, which is enjoyed by Delco Remy and Autolite Companies?

* * * * * * *

337 (The reporter again read the question.)

The Witness: We have various competition, original parts manufacturers, both Autolite and Delco Remy, who sell to our jobbers in many instances, and we also have their competition with all of our accounts, and we have to give our jobbers an incentive to merchandise our line, and that incentive is to provide for them a slight additional margin of profit, based upon their applying themselves to the business which they do on this line. Our jobbers require more sales effort in selling Niehoff parts than they would in selling genuine or original parts to their trade, and in all the years of my experience, fully twenty-five years or longer, it has always been a strenuous battle to get the jobber to accept our line, merchandise it
338 and sell it to the trade in competition with that original parts competition, and our hope—or, rather, our profit picture to the jobber is one of our means of giving them an added inducement or incentive to handle our line.

By Mr. Sprowl:

Q. Now, to whom are these volume discounts you just spoke of available?

A. They are available to any jobber or distributor who buys the required volume of business, who purchases the required volume.

Q. And was that system generally in use by the Niehoff Company in the year 1949?

A. Yes it was, sir.

Q. Was that system also generally used by the so-called smaller competitors of the Niehoff Company putting out ignition lines in the year 1949?

A. Yes, sir, it was.

Q. And to your knowledge, how long has that volume discount method been in use by the general suppliers of ignition lines?

A. Well, it has been extensively used in the automotive industry for a great many years.

Q. In other words, it wasn't first adopted in 1949?

A. No, sir, it was not.

Q. How many years back of that would you say this general plan of discount went?

339 A. Probably ten or fifteen years, maybe further, I don't know.

Q. Now, you testified earlier today that six per cent of the Niehoff volume in 1949 had to do with hydraulic brake equipment, am I correct?

A. That is correct, sir.

Q. Now, what was the general condition of the domestic market in the year 1949 in that field as distinguished from the ignition field?

A. Well, we had the competition of Chrysler Motor, General Motors and their subdivisions, and also Ford Motor, and likewise, in the replacement field, we had a number of other manufacturers. Wagner Electric is one of the competitors in the brake field.

Q. Have you prepared an exhibit at my request, of the names of these competitors in the hydraulic field, brake field, excluding the large manufacturers, General Motors, Chrysler and Ford?

A. Yes, I have. I believe there are seven of them.

Mr. Sprowl: I would like to have this list marked as Respondent's Exhibit 4.

(The paper referred to was marked Respondent's Exhibit 4, for identification.)

By Mr. Sprowl:

Q. I show you Respondent's Exhibit 4 and ask you if

this lists the manufacturers who competed in the year
340 1949 with the Niehoff Company in the hydraulic brake field in addition to the car manufacturers such as General Motors, Chrysler and Ford?

A. Yes, that is correct.

Q. And these are, I understand, referred to as the smaller companies in the field?

A. Well, they all run small except probably Wagner Electric.

Q. I should like to ask you, just to clear up any doubt that might be in the record, Mr. Niehoff, with respect to Exhibit 3, is that limited to the smaller manufacturing competitors in the ignition line?

A. That present list is, yes.

Q. And what are the large competitors in that field, or I should say, who were the larger companies in the ignition field with whom the Niehoff Company was in competition in 1949?

A. Electric Autolite, Delco Remy Division of General Motors and Ford Motor Parts.

Mr. Sprowl: If we make a price and make up a key and keep that suppressed—

Mr. Schrup: May I ask just one thing. I notice in Exhibit 3 you have no comparison with Exhibit 3 and Exhibit 4. You have on Exhibit 3 competitors, followed by a number which is not on Exhibit 4. Why is there an absence of that on Exhibit 4 as compared to Exhibit 3?

341 The Witness: Merely an oversight.

Mr. Schrup: That is, Exhibits 3 and 4 will show exactly the same thing?

The Witness: That is different. The competitors in the hydraulic field and ignition.

Mr. Schrup: Exhibit 4 is limited, as I understand your testimony, to sellers who have customers who compete with your customers, is that right?

The Witness: They compete with us at the jobbing level.

Mr. Schrup: That is, their customers compete with your customers?

The Witness: No, we compete with them.

Trial Examiner Hier: For the jobbers business?

The Witness: For the jobbers business.

Mr. Schrup: For the general overall trade business?

The Witness: That is right.

Mr. Schrup: And this is going to be connected up by

counsel as showing specific offers by these people on Exhibit 4 to present customers of the C. E. Niehoff Company?

Mr. Sprowl: I don't know if that is necessary.

Mr. Schrup: If that isn't so, I renew my objection most strenuously again.

Mr. Sprowl: On that we have an ideological departure with you on what we have to show in the way of
342 meeting competition.

Mr. Schrup: I rely on the cases that have been decided. I refer to the Standard Oil decision.

Trial Examiner Hier: Respondent's Exhibit 4 received in evidence.

(The paper referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 4, was received in evidence.)

By Mr. Sprowl:

Q. Directing your attention to the year 1949, what was the annual dollar volume of the auto equipment market?

A. The Bureau of Census figures show that—

Mr. Schrup: We have a continuing objection to all this testimony, Your Honor.

Trial Examiner Hier: Do you wish to make any special objection to this particular question?

Mr. Schrup: I don't think it is material. I don't know if it is competent.

Trial Examiner Hier: Overruled.

The Witness: I think the Bureau of Census in 1949 compiled the sales figures in automotive parts at $1,912,000.

By Mr. Sprowl:

Q. I think the Bureau of Census figures is enough. Would you know of any different individual figures?

A. No, the same figures—

343 Mr. Schrup: I think the best evidence would be to bring in those figures ourselves and see that, in the first place, the witness would be giving them correctly.

Mr. Sprowl: I will agree that certainly we should have no figure reportedly coming from a Government Census compilation that is not accurate, and I will certainly have no objection, Mr. Schrup or Mr. Mayer, if you find that we have used an improper figure from that report, to correcting it to the proper figure, but I don't think there is any doubt but that is the precise figure of the parts market.

Trial Examiner Hier: We certainly can check these as to what is the correct figure.

By Mr. Sprowl:

Q. Taking the 1949 sales figure for the Niehoff Company in the domestic market in the year 1949, what percentage of the total market did the Niehoff Company have in the year 1949?

A. Well, the figure showed that we would be doing slightly over one tenth of one per cent of the total business.

Q. In what year?

A. 1949.

Q. How did the Niehoff Company determine its prices for the year 1949?

A. Well, in establishing our prices to the trade, we necessarily have to take into consideration the original parts prices, because we must contain our prices within a
344 competition level. Our list prices generally cannot be higher than the original prices. We also have to be competitive in our price schedule and in the discounts or the net prices with the original parts manufacturers and other manufacturers and in our jobbing level, we have to have our prices so that the jobber can make a fair margin of profit. In our pricing based upon the volume which is obtainable to a large percentage of our accounts, we have an additional incentive that will give them additional earnings as per our contracts that we have offered to this trade.

Q. Does your cost of manufacture enter into this pricing?

A. Well, the cost of manufacture does enter into it, but it is secondary, so far as the establishing of our prices to the trade and the jobber is concerned, but we have to meet competition. That is our most difficult problem, or at least try to meet it the best we know how.

Q. Now, to what extent do you educate yourself as to the prices at which your competition offers the same product to your customer in determining prices?

A. Well, it is not difficult to establish the prices as quoted by the competitors, as they all issue price lists which are offered to our jobbers and to the other trade.

Q. And in that connection, do you have available the discounts offered by your competition?

A. We generally do, yes.

345. Q. And do you make any effort to stay competition with those prices and discounts.

A. Yes, we do make an effort to stay competition.

Q. What is the fact as to your relative position in the

prices—I withdraw the question, I lost my predicate. Where does the Niehoff Company endeavor to place its prices with relation to the prices of its competitors on the same items?

A. I would like you to repeat that.

Trial Examiner Hier: Read the question.

(The reporter read the question.)

The Witness: Well, in general, we necessarily have to be competitive, at least with today's price, and although we have many competitors that have lower base prices than we quote, we have other competitors that give larger discounts from base prices than we do, and we endeavor to be what I would term reasonably competitive.

Trial Examiner Hier: What do you mean by being competitive? I think that what he wants to get at, his last question, is, do you place your prices below, above or at what you call competitive level?

The Witness: Well, the prices are not uniform because there are some instances where our prices might be definitely higher, and maybe some instances where they may be the same or close to being the same, and some in-
346 stances where they may be lower.

Trial Examiner Hier: There is no general policy on that?

The Witness: The question of prices is a fluid one and changes according to competition, and we have to be able to show a consistent margin of profit to our jobbers in order for them to compete with the trade, and in no instance can we be higher in price than the original parts people. That sets our pattern for us.

Trial Examiner Hier: I took what you just said to mean any competition. Were you excluding the parts manufacturers, original parts manufacturers, in that type of competition or not?

The Witness: Well, I think that it is not uniform because there may be instances where our prices would be, well, slightly higher than original, but that would be the exception to the rule.

Trial Examiner Hier: Go ahead.

By Mr. Sprowl:

Q. That last answer would be limited to a comparison of your prices with the original parts manufacturers?

A. That is right.

Q. Now, as between your cost of manufacture, the

prices of your competitors and any other factor which might enter into pricing, what is the most important
347 factor that you consider in establishing your prices?

A. Well, the incentive that we give to our jobbers to enable them to meet a certain volume of business and give them a better profit is one of the essential things of the picture, I believe.

Q. What about the prices of your competitors?

A. Well, the competitors have in many cases—

Q. I mean, what consideration do you give to those prices, in establishing your own?

A. What competitors?

Q. The sixteen smaller competitors.

A. Well, they are also a factor competitively. I mean, you have to be within reason. Although our prices are generally higher than the average, our prices at the base level are generally, you might say, sort of in the middle between the extreme accounts that give low prices and those that give somewhat higher prices.

Q. Do you consider these competitor's prices at the time you establish your own prices?

A. Well, I think we do, because we want to remain in business.

We have to consider competition, because it is a highly competitive field.

Q. And similarly, in establishing your discounts, what enters into your consideration in determining what those should be?

348 A. Well, competitively, we of course have a lesser discount than is generally quoted to the major accounts of the field.

Q. Now, there is in the process of being prepared, as I understand it, a comparative price study between the Niehoff prices and certain competitors' prices in the year 1949, is that correct?

A. We are compiling that information.

Q. And when do you establish your prices for an account?

A. Well, the prices are fluid. They are subject to change, and usually prices are issued at the time a catalog is issued.

Q. What time of the year is that?

A. It doesn't necessarily follow that it is the same time every year, but usually in the fall of the year, in time for the automotive trade shows.

Q. I think it might be well, Mr. Niehoff, if you could once more go through the discount system available to your customers by customer classification which was in force in the year 1949. Could you do that?

A. Yes. We have a sliding scale price—

Q. A sliding scale what?

A. A sliding scale discount, rather, from the base price known as the jobbers price or pink schedule, allowing 5% on purchases to accounts purchasing in excess of $1,200, and 7% to those purchasing—

Q. What classification do you call that group of customers?

349 A. Those would be on a jobbers agreement.

Q. That get the 5%?

A. 5% on $1,200; 7% at $2,400 and 10% at $300.

Q. At how many?

A. $300.

Q. A month?

A. Or $3,600 a year.

Q. I see. Do you have a classification higher than $3,800 a year?

A. Yes, we do. The accounts that do business in a volume in excess of $6,000 a year get a distributors agreement, which allows them on the majority of the items a discount of 5%; on a volume in excess of $8,400, 6%; and on a volume in excess of $12,000, 7%. Exceptions are shown in the distributors agreement on record.

Q. Now, everybody gets the 2% discount for prompt cash payment, am I right?

A. 2% is the regular trade allowance, cash discount allowance.

Q. Mr. Niehoff, would it be any particular effort to prepare a short exhibit which would crystallize once and for all these various jobbers agreements, distributors and distributor with agreement classifications and the discounts they receive, so that there will be something that we can refer to other than narrative testimony, which 350 would put this before everybody? Would such an exhibit be simply prepared?

A. You mean samples of the agreement?

Q. No, just a paragraph dealing with each customer classification and the discount available to him in that classification.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Sprowl:

Q. I would like to ask you one question further about the Steele Exhibit 47, Mr. Niehoff. Does the fourth sheet of that exhibit—that must be 47-D, am I correct?

Trial Examiner Hier: D.

By Mr. Sprowl:

Q. The second line of that exhibit refers to Auto Parts Warehouse Company. You told me you had some explanation you wished to make of that customer's account. What is that?

A. Well, Automotive Parts Warehouse Company does not buy our line of ignition. They might of one of our competitors, but they have sent us during that year distributors for rebuilding and the only work we did with them was on the rebuilding of distributors.

Q. By distributors, you don't mean electrical distributors?

A. I mean Ford distributors, a redistributor that goes on a service Ford car. Therefore they are not prop-
351 erly classified here as an account.

Q. They bought none of your general ignition lines?

A. No, they did not.

Q. Did they buy—.

A. I think they buy Standard Motor products line.

Q. Would they buy any of your hydrauiic brake line?

A. No, they do not.

Q. That was just a repair service account?

A. That was rebuilding, what we call rebuilding. We supplied them. You actually rebuild their distributors for them.

Q. And the figures that appear on that line are the charges you made for that work?

A. That is right.

Q. You have at my request today confined your testimony, by and large, to the year 1949? Generally speaking, would that testimony be equally applicable to the year 1950 and the portion of the year 1951 that has followed since 1949?

A. Well, I think it would.

358 **Room 1500, 173 West Madison St., Chicago, Illinois**
September 4, 1951

Met, pursuant to adjournment at 10:00 a. m.

Before: Frank Hier, Trial Examiner.

Appearances:

Eldon P. Schrup, Attorney for the Federal Trade Commission.

Charles R. Sprowl, Taylor, Miller, Busch & Wagner, 134 South La Salle Street, Chicago, Illinois, Attorney for the Respondent, C. E. Niehoff & Company, Inc.

359-360 Proceedings.

Trial Examiner Hier: Are you ready to proceed, Gentlemen?

Mr. Sprowl: Yes. I think the record can show that Mr. Niehoff has already been sworn in this matter and resumed the stand.

C. E. NIEHOFF was thereupon called as a witness for the Respondent and, having been previously sworn, testified as follows:

Direct Examination (Con't.) by Mr. Sprowl.

Q. You have testified previously, Mr. Niehoff, concerning the volume discount plan of the C. E. Niehoff Company. What were the circumstances which surrounded the original adoption of that discount plan by the Niehoff Company?

A. Well, that goes back to some period in the early thirties when the pattern was set more or less by the industry. Now, originally back in the Twenties, the discounts were handled on a little different basis, that is, they were on the volume per item and that, of course, enabled us to make a more specific cost study on production and the savings based on specific volume per item.

Mr. Schrup: May I have that answer read back?

Trial Examiner Hier: Read it back.

361 (The reporter read the answer as follows:

"Answer: Well, that goes back to some period in the early Thirties when the pattern was set more or less by the industry. Now, originally back in the Twenties, the discounts were handled on a little different basis, that is, they were on the volume per item and that, of course, enabled us to make a more specific cost study on production and the savings based on specific volume per item.")

By Mr. Sprowl:

Q. In other words, in the Twenties your discount relates entirely to a volume of the given item; if you would buy a certain quantity of a given item you would get a discount?

A. Yes. That applied particularly on the popular items of the line, a cost study on the particular items of the line giving us or reflecting the production costs of these numbers and that indicated substantial savings in the price of the article.

Q. Well, now, when did you—when did the Niehoff Company adopt its volume discount plant which is presently in force whereby the annual sales volume of each customer was on all purchases, was the criterion, rather his volume of purchases on any single item?

A. Well, that was in the Thirties.

Q. And did the Niehoff Company originate that
362 discount method in this industry?

A. No, we did not.

Q. Well, now, what was the circumstances surrounding the Niehoff Company's adoption of that type of a discount plan?

A. Well, going back to my prior statement with regard to quantities, these quantities were such that the average smaller account couldn't take advantage of the volume of these numbers and only the larger accounts would really be able to enjoy these volume prices, so in the subsequent period when the pattern was set, probably through the period of the NRA days, that a more equitable arrangement was made to allow the smaller customers also to get the advantage of this volume discount and it was that that led into the arrangement that we now have. I think that our prices with our contracts were first conceived probably around 1934, '35 or '36, in that period.

Q. And what is the fact as to whether the Niehoff Com-

pany or your competition first adopted this volume discount method?

A. It was first adopted by the competition and—

Q. In speaking of your competition you are referring to the Companies you have heretofore testified about?

A. In the ignition field and also in the automotive parts field.

Q. It was after their adoption of such a discount method that the Niehoff Company adopted a simpler method?

363 A. Yes, it was.

Q. Now, when the Niehoff Company first adopted that discount method of the type that is now in force, that is the total volume of annual purchases being the criterion rather than the volume of any single item in the line, how did the Niehoff Company determine what discounts would be applicable to what particular volume of purchases?

A. Well, the method wasn't materially different than it is at the present time, if I understand your question right.

Q. Was any consideration given to the levels at which your competitors discounts were attached?

A. Well—

Mr. Schrup: Just a minute. I think that the question was an intelligible question that the witness can answer without being led.

Trial Examiner Hier: The witness didn't understand the previous question. I will overrule the objection. He wants to know the basis.

Mr. Sprowl: I will withdraw.

The Witness: Well, the competition is really what forced the issue on us.

By Mr. Sprowl:

Q. Now, speaking of the type of discount plan that you first inaugurated in '34 or '35, that is which related to the annual volume of your customer's purchases, did that
364 plan differ in any essential respects from the plan that was in force in the year 1949?

A. Yes, there was some slight differences. It was first applied to the customers whose volume was in the larger brackets in the sense that under the competitive conditions prevailing at that time, I believe nearly every one got the 10% discount and then we effected what we term the present distributors agreement that we gave this to the larger discounts who had branch houses and whose

volume was substantial and they received a differential ranging from five to eight percent.

Q. In addition to the 10%?

A. In addition to the 10%, but in that period, if my recollection serves me correctly, we quoted 10% to a majority of our discounts for the reason that competition forces us to do so.

Q. Now, you have already testified, as I recall your testimony, that annually or once each year the Niehoff Company reviews all price relating to its various products?

A. Yes, that has been the procedure.

Q. Now, in that connection, what consideration is given in that review to your competitors prices for similiar items?

A. Well, naturally in reviewing our basic prices we must study the prices of all competitors. Our original parts people such as General Motors, Chrysler and Ford really set the pattern for the industry and then we also
365 have to contend with many replacement parts, manufacturers whose schedules we also have to study and we have to be competitive.

Q. Now, you are speaking of what you would call your jobber price or your pink-sheet price in 1949, is that correct?

A. That is correct.

Trial Examiner Hier: Now, these prices that you say you compare your prices with, they are the list prices, are they not, published list prices of these competitors?

The Witness: Well, yes. We must compare list prices of the original manufacturers because it would be impossible for us to remain in business unless we were competitive not only in this but also at various trade levels.

By Mr. Sprowl:

Q. Now, after you have established your pink-sheet price or your jobbers price in that method, what if any consideration do you give to your competitors volume discount plans in establishing your own volume discount plans for the particular year?

A. Well, naturally, we have to give consideration to that as competition. We find that in most cases their discounts are somewhat longer than our present discounts are.

Q. In other words, you have a less generous discount than some of your competitors, is that my understanding?

A. That is correct, yes, sir.

Q. Well, now, have you in setting up your pink-
366 sheet prices and in setting up the discounts that will be applicable from those, off of those pink sheet prices, at various volume levels where, generally speaking, does your price level come out in comparison to the prices offered by your various competitors?

A. Well, we have an important factor to consider in the competition of the original parts manufacturer and we have to make every effort to bring our prices in line with theirs and naturally the jobbers will not handle our line unless we give them a profit incentive in our line over that which they might receive from Delco-Remy and Auto-Lite Electric. Then beyond that fact, of course, we have in the field of competition probably thirty other concerns that are to be considered from the competition angle of it.

Q. Are you ever able to achieve the lowest price on all items offered by any of your competition?

A. No. We have not been able to achieve those prices.

Q. Are any prices on any single item lower than that of your competitors?

A. Well, it might be, yes, in some instances.

Q. Are any of yours the highest?

A. Yes, that is also true.

Q. The average of your prices is what, higher than rank and file competitor?

A. Yes.

367 Q. Now, when you are speaking of prices, you are speaking of just your pink-sheet prices or your pink-sheet price as reduced by the discounts that you extend to various volume levels?

A. I am referring to our base price which is the jobbers pink-sheet price.

Q. Then how do your discounts compare at various volume levels with the discounts offered by your competitors?

A. Well, our discounts are somewhat less than our competitors discounts.

Q. That is less favorable to your customers?

A. Yes, sir.

Trial Examiner Hier: Mr. Niehoff, I don't understand your use of the word "achieve." You said a moment ago you have not been able to achieve a lower price than all of your competitors combined. What do you mean by that? You mean that to do so you must go below cost?

The Witness: Yes.

Trial Examiner Hier: It would be below cost?
The Witness: Yes.
Trial Examiner Hier: All right.

By Mr. Sprowl:

Q. Now, as I understand the previous testimony, these volume discounts that the Niehoff Company has are automatic and they are available to each customer of the
368 Niehoff Company who attains the required annual volume?

A. Yes.

Q. That is something that you review annually and if that volume requirement has been achieved, the discount is extended, is that correct?

A. That is correct. There have been exceptions, I think, but that is only exceptions.

Q. That would be caused by—if it was not extended, it was because of an oversight?

A. Oversight, I would say, yes.

Q. All right. Now, in your opinion, would it be feasible in the sale and distribution of the Niehoff line to eliminate all volume discounts and to have your salesmen sell those lines only at the pink-sheet or jobbers price?

Mr. Schrup: Just a minute. I have an objection.

Mr. Sprowl: You wait until I ask the question and then you object.

Trial Examiner Hier: Go ahead, finish the question.

By Mr. Sprowl:

Q. (Continued) and to reduce those prices only at the actual point of sale when they found it necessary to do so in order to meet the equally low price of a competitor?

Mr. Schrup: I think it is speculative to start with. What we are concerned with here is the justification for the present prices.

371 By Mr. Sprowl:

Q. Have you such an opinion?

A. Yes. I don't know just how any concern could maintain itself in business under that kind of a procedure. First of all it would be difficult to determine from the customer's point of view as to what his actual price is and secondly, you would have the problem of—well, probably having as many different prices as you have customers.

Then you have to be in the picture, bring into the picture the question of cost as to whether you were able to meet those prices and all those factors enter into the discussion. It would be, I think, very disastrous to any business to operate that way.

Trial Examiner Hier: Your answer is conditioned on any business. What I am interested in is can your business operate that way?

The Witness: No, our business could not operate that way and succeed.

372 By Mr. Sprowl:

Q. Would it make any difference instead of having the thousands of items or hundreds of items you have for sale in your catalog if you dealt in one or two items in rather large quantities?

A. That would materially change the picture as far as meeting prices on that basis is concerned.

Trial Examiner Hier: You say it would materially change the picture. Which way? Would it then be feasible or still less feasible?

The Witness: It would be somewhat simpler than it is when you have a line of many items.

Trial Examiner Hier: All right.

By Mr. Sprowl:

Q. If you had to operate in that fashion, that is from a single price, and only granting a reduction in that price when at the point of sale you found you had to do so to meet a competitor's lower price, what effect in your opinion would that have on the personnel you would require to handle that type of price competition?

Mr. Schrup: Same objection as to its being speculative.

Trial Examiner Hier: Overruled.

The Witness: May I have the question again?

* * * * *

373 A. Well, I don't think the salesmen in the field would be competent to determine as to the extent he may be able to go to meet this price and it would have to be referred back to the office for some form of analysis and many factors would have to be weighed in order to determine whether it would be practical costwise to accept such business and you also have the question therefore as to—confronting you as to if you meet the competition at one

level, you have all your other customers to consider in the picture.

By Mr. Sprowl:

Q. Would you require more personnel or less personnel?

A. Well, it would be very expensive because it would require more personnel. Possibly the sales manager too would have to be on the job with these salesmen for all important discounts or critical discounts to help to analyze the situation.

Q. Well, I understand in your opinion the only
374 feasible method of meeting the price competition in the field in which the Niehoff Company operates is the method which the Niehoff Company now follows of volume discounts?

A. I believe that is the best method, yes, sir.

Q. What discretion do the Niehoff Company salesmen now have in changing the prices which are published annually in your price sheets and in altering the discounts which you grant at various volume levels?

A. None whatsoever. They may make recommendations, but they have no authority to make any changes whatsoever.

Q. In other words, the salesmen have no other course to follow than to follow the prices that you set down?

A. That is correct.

Q. Now, is that any reason why the Niehoff Company has not granted as liberal a discount as many of the competitors who sell their products at a lower net price than the Niehoff Company?

A. Well, from the Niehoff company's operating costs, it hasn't been possible to do so.

Mr. Schrup: You will have to excuse me. I didn't get the answer. Will you read it back?

Trial Examiner Hier: Read it back.

(The reporter read the answer as follows: "Answer: Well, from the Niehoff Company's operating costs, it hasn't been possible to do so.)

375 Trial Examiner Hier: Do you infer in that that the Niehoff Company's operating costs are too high to permit you to do so?

The Witness: I don't think our costs are too high, no.

Trial Examiner Hier: I don't understand the answer.

The Witness: Well, the answer is still the same as far as my point of view is concerned.

Trial Examiner Hier: I will leave it to Counsel.

Mr. Schrup: Let's have the question and answer read back, please.

(The reporter read the question and answer as follows:

"Question: Now, is there any reason why the Niehoff Company has not granted as liberal a discount as many of the competitors who sell their products at a lower net price than the Niehoff Company?

"Answer: Well, from the Niehoff Company's operating costs, it hasn't been possible to do so.")

By Mr. Sprowl:

Q. Mr. Niehoff, in your opinion, if the Niehoff Company were compelled by an order of the Federal Trade Commission to discontinue its volume discount plan and to adopt a uniform price system for its products to all of its customers irrespective of the annual volume that any such
376 customer might achieve while at the same time all or most all of your competitors who now use a volume discount method were not under a similar injunction, what would be the effect of such a compulsory single price system on the business of the Niehoff Company?

Mr. Schrup: I have an objection. If the Federal Trade Commission issues an order in this case, it will be only on the basis that the prices charged by Niehoff to its different customers are discriminatory and have an effect on competition. What competitors may do or may not do is of no particular importance.

* * * * *

379 By Mr. Sprowl:

Q. Do you recall the question well enough to answer it?

A. Well, I think I can answer it.

Trial Examiner Hier: All right.

The Witness: I think it would be disastrous to our company.

By Mr. Sprowl:

Q. On what do you base that opinion?

A. Well, I base it upon years of experience in this industry, upon the fact that these discounts or sales allowances are given by other competitors and that in itself would preclude us from maintaining our trade that we now have and it particularly applies to the larger customers

or the big percentage of our present volume. So the ultimate result would be that our costs would be higher due
380 to lower volume and I don't think we could successfully maintain ourselves in business under those kind of marketing circumstances.

Q. Where would you have to put your single price in relation to your present net price structure?

A. Well, if we want to retain our volume of business, we would have to put it at the extreme discount.

Q. That is your list price less ten, seven and two percent respectively?

A. Jobbers' price and seven and two percent.

Q. And you have had some studies made at my request by your accountants to show what that would have done to your business in 1949 if you adopted that price method?

A. Yes, we have.

Q. And that will be exhibited here later?

A. I believe so.

Q. And did you have a similar study made at a lower discount level such as jobbers' price less 10%?

A. Yes, I believe those figures will be available.

Q. And if you had to adopt a single price of say your jobbers' price less only 10%, how much of the business which you now enjoy from customers who receive a greater discount because of the volume of their purchases and jobber's price less 10% would you retain?

A. Well, it would effect over 50% of our volume.

Q. By effecting do you mean you would?

381 A. We would not be on a competitive basis on 50% of our volume of business.

Q. Would you lose that volume in part or in toto?

A. Well, I am sure we would lose it, yes.

Q. Because your price was too high?

A. Because of price differential, yes.

Q. And these hypothetical studies based on the year 1949 will be available for introduction into evidence here later on, is that correct?

A. Yes.

Mr. Sprowl: I believe we are up to Exhibit No. 5, is that correct?

Trial Examiner Hier: That is right. Which one do you want marked?

Mr. Sprowl: Let's have the Greiner and Auto Wholesalers as Exhibit 5 and Stratton-Warren and Union Electric as Exhibit 6.

(The papers referred to were marked Respondent's Exhibits Nos. 5 and 6 for identification.)

Mr. Sprowl: No. 5 is a comparison of Greiner and Auto Wholesalers?

Trial Examiner Hier: That is right.

By Mr. Sprowl:

Q. Mr. Niehoff, I show you Respondent's Exhibit 5 and ask you to tell me what that exhibit represents?

382 A. It represents the sales to two customers, Greiner Auto Supply of New Orleans and Automotive Wholesalers of New Orleans.

Q. And that is in the first column, that is their annual net sales of those two people in the year 1949?

A. The Greiner sales were $10,036.02. Those are the net sales.

Q. All right. Now, what does the next column show?

A. Well, this also shows the Automotive Wholesaler's sales of $1,117.20.

Q. Now, in the column immediately to the right, what does that show?

A. That shows the number of sales made during the year of 1949 to Greiner and the number of sales made to Automotive Wholesalers.

Q. And is the extension in the third column, that is the column on the extreme right hand side of the page the quotient of dividing 26 into the $10,036 in the case of Greiner and 8 into $1,117 in the case of Auto Wholesalers?

A. That is the average amount per sale of Greiner $386 per order and with Automotive Wholesalers $139 per order.

Q. And turning now to Respondent's Exhibit 6—

Mr. Schrup: Mr. Sprowl, before you leave that exhibit, there is a discrepancy in the amount of the Greiner, probably a transposition of the figure, from Commission's
383 Exhibit 47-B.

Mr. Sprowl: These should have been taken from Mr. Steel's exhibit.

Mr. Schrup: Well, there is a transposition. It would be $10,306.02.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record. While you are getting that straightened out, I want to take a recess.

(A short recess was taken.)

Trial Examiner Hier: Back on the record.

Mr. Sprowl: In Exhibit 5 the net proceeds to the Niehoff Company of sales to Greiner for the year 1949 should be $10,306.02 in lieu of the figure that is typed in there and I will correct that in ink.

Trial Examiner Hier: It is corrected.

Mr. Sprowl: It is? All right. Then the extension in the last column, the average amount per sale would be $396.

Trial Examiner Hier: That has been corrected.

Mr. Sprowl: Fine and I think we can state for the record that we thought we were taking the net proceeds figures in the second column from the Steel exhibit at page 2, Exhibit 47. Mr. Steel and Mr. Schrup pointed out our error in the Greiner figure and that has now been corrected so those are our figures for the steel 384 exhibit.

By Mr. Sprowl:

Q. Mr. Niehoff, the number of sales were taken from the records of the Niehoff Company for the year 1949?

A. Yes, they were.

Q. And the extension is merely a division?

A. Correct.

Q. Turning now to Exhibit 6, does that show with respect to Stratton-Warren and Union Electric Company the same information respecting the year 1949 that the Exhibit 5 shows respecting Greiner and Auto Wholesalers?

A. Yes. It shows the sales to Stratton-Warren of $21,895.86 and to Union Electric of $1,221.09.

Q. Then the number of sales were again taken from the books and records of the Niehoff Company?

A. That is right.

Q. And the extension in each case is a case of long division with the quotient appearing in the last column?

A. That is right, sale per order to Stratton-Warren was $608 and the sales per order of Union Electric were $53.

Q. Now, where is Stratton-Warren located?

A. In Memphis, Tennessee.

Q. Where is Union Electric located?

A. In Memphis, Tennessee.

Q. Where is Greiner Company?

385 A. Greiner Company is located in New Orleans.

Q. Where is Auto Wholesalers?

A. Also New Orleans.

Q. Auto Wholesalers, is that Mr. Keifer?

A. Yes, Mr. Keifer.

Mr. Sprowl: I should like to offer these two exhibits as Respondent's Exhibits 5 and 6.

Trial Examiner Hier: Any objection?

Mr. Schrup: Yes. We have the same objection as to the previous exhibits of this type and I presume they will all be connected up, but as regards the number of sales, the invoices and those particulars, they will be offered subject to our inspection.

Mr. Sprowl: You may look at them.

Trial Examiner Hier: Respondent's 5 and 6 are admitted in evidence.

(The papers referred to, heretofore marked for identification as RESPONDENT'S EXHIBITS 5 and 6, were received in evidence.)

By Mr. Sprowl:

Q. Mr. Niehoff, at the risk of repetition, the first 145 pages of the record have rather numerous references to three companies you deal with. I believe it is the Paul Niehoff Company on the West Coast, the House of Peaslee in Boston—

A. In Boston, yes.

386 Q. And a third company called Bigelow in New York?

A. New York City.

Q. I think Mr. Schrup shares my confusion. We both agree that we were confused in the hall a few minutes ago. At the risk of repetition, I wish you would in an orderly fashion, the best you can, explain your relation, the Niehoff Company's relationship to those three companies. I would suggest perhaps you take them up one at a time and how that relationship differs from your, the Niehoff's relationship to what you call jobbers and distributors who have the various discount plans that have been the major part of our discussion in the last two or three sessions.

A. Well, our general—

Q. Do you need any notes or can you do it from memory?

A. I think I can describe the situation. Our general plan of sales to the jobbers throughout the United States is handled through company salesmen with the exception of the territories that these sales representatives cover. In other words, the House of Peaslee in Boston is a sales representative sometimes referred to as the factory representative carrying a number of lines that they sell in a given territory and they also, as a matter of convenience to the jobbers in that territory, carry a warehouse stock. This operation is wholly their own and has no connection whatsoever with the C. E. Niehoff Company.

Q. What precisely is the territory served by the
387 House of Peaslee?

A. The New England territory is covered by the House of Peaslee and they travel salesmen in this territory and contact the trade regularly and most of their sales are directly for the company. They obtain the orders and they are shipped from Chicago to their respective customers. Approximately 90% of their volume is handled in this manner. They carry a warehouse stock as a matter of convenience at their own expense to service the customers that are locally situated more or less as a matter of convenience on fill-ins, you might say.

Trial Examiner Hier: Does the title of that stock rest in the C. E. Niehoff Company or House of Peaslee?

The Witness: The title of warehouse stock is in the House of Peaslee.

Mr. Schrup: May I suggest that you see if his testimony applies to all years?

Mr. Sprowl: Yes.

By Mr. Sprowl:

Q. Does this apply to '49 or just a general description?

A. Well, this applies to '49 and subsequent periods. The warehouse, I think, was established late in '48 and their parts competition became more keen in their territory. They had to find some way to service the accounts, the fill-ins. You might say in the case of Peaslee that he does perform a dual service in the selling of their jobbing
388 trade by virtue of the fact that they do carry a warehouse stock. The merchandise they buy from C. E. Niehoff Company and when they service such accounts, the pick-ups, the billing is done by the House of Peaslee and the collection of such accounts is done by the House of Peaslee and they direct their own salesmen. We have nothing to do in the handling of their sales force.

Q. You mean the Niehoff Company has nothing to do with it?

A. None whatsoever.

Trial Examiner Hier: Peaslee remuneration does not come in the form of commissions on each sale. It comes on whatever mark-up they see fit to make on your products which they have bought from you, is that right?

The Witness: That is not correct. Peaslee compensation is on the base of a commission, based on all factory sales which is over 90% of his volume and on the warehouse sales he is allowed a sales commission plus a warehouse service allowance and that is the basis for his cost of the merchandise that he carries in that warehouse.

Trial Examiner Hier: Yes.

Mr. Schrup: Mr. Sprowl, there will be one other question. Does Peaslee do any jobbing by itself?

The Witness: Peaslee does no jobbers business. He sells to the jobber only.

Mr. Schrup: He is then what would be known actu-
389 ally as a purchase distributor?

The Witness: He is a factory representative, yes, carries other lines and sells to the jobbers in the territory in question.

By Mr. Sprowl:

Q. Now, you mentioned that he did sell from his own warehouse stock of Niehoff products. When Peaslee makes a sale from that warehouse stock and it is on credit, who carries the risk of that credit, the Niehoff Company or Peaslee?

A. The House of Peaslee has complete jurisdiction over the merchandise he has in the warehouse.

Q. And if that person who bought it on credit doesn't pay for it, that is Peaslee's concern?

A. That is right.

Q. All right. Now, on the other type of transaction where Peaslee's salesmen have originated an order out of this territory which is not filled from the warehouse stock maintained by Peaslee, which is sent to the Niehoff plant in Chicago, how is that order filled?

A. That is filled through the factory and shipped to the customers and the company carries the risk and handles all the details in connection with the credit and collections.

Q. The Niehoff Company?

A. That is correct.

Q. And you send a bill to the customer in New
390 England that the House of Peaslee has delivered up to you?

A. We bill the customer directly from the factory.

Q. All right. Then where does the House of Peaslee—how does it receive its ultimate commission on that order?

A. They get a commission allowance.

Q. On the—

A. On the sale of merchandise in the New England territory.

Q. And is that determined from what level of price?

A. From the level of the billing price.

Q. Of the net billing to the customers?

A. Of the net billing to the customers, yes.

Q. In other words, if I am a jobber in New England that the House of Peaslee has procured an order from and sent to you and your net billing to me is $90, then does the House of Peaslee get a commission on the $90 net billing to me?

A. On the $90 is correct, yes, sir.

Q. Now, does Bigelow operate in any of the Peaslee territory?

A. No. The territories are adjoining, but they do not operate in the same territory.

Q. And so Peaslee has a territory in which the Niehoff Company sends no salesmen, is that correct?

A. That is correct.

Q. And no other factory representative of Niehoff sends a salesman?

A. I didn't get that.

391 Q. Does any other factory representative of Niehoff send a salesman into this territory other than Peaslee?

A. No—no.

Q. All right. Now, turning to the Bigelow account, where is that located?

A. The Bigelow Company is in New York City proper and covers the New York, greater New York area including New Jersey.

Q. Will you tell us how that account operates?

A. The Bigelow Company travels their own salesmen in this territory and sells to jobbers only. They also operate as a factory representative, having other lines that they sell to jobbers in that community or territory that they cover. They warehouse Niehoff merchandise and do all of

the billing, all of the collecting and handle all sales expense in that territory.

Q. They have a warehouse supply?

A. Yes, they have.

Q. And you are speaking now of the Niehoff price?

A. Of Niehoff price, yes, sir.

Q. And who owns that warehouse stock?

A. They own the warehouse stock the same as in the case of our other account in Boston.

Q. You sell it to them?

A. Yes, sir.

Q. They pay you for it?

A. That is correct.

392 Q. When I say "you", I mean the Niehoff Company.

A. Yes.

Q. Now, do they fill all their orders from this warehouse stock?

A. In the case of Peaslee, yes. They fill all the orders from the warehouse stock.

Mr. Schrup: Excuse me, you said "Peaslee." Did you mean to say Bigelow?

The Witness: Pardon me, Bigelow, yes. There might have been an exception or two, but that is the general operation.

By Mr. Sprowl:

Q. Now, the other day you called my attention to a Commission Exhibit which was a special order that seems to have been filled from the Niehoff Company plant in this territory which the Bigelow Company acts as your representative. Was that transaction typical or was it a special transaction?

Mr. Schrup: Mr. Sprowl, may we have the name of the exhibit?

A. It is not typical. It is an exception to the procedure.

Mr. Sprowl: I will get it in just a second. Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Sprowl:

393 Q. Mr. Niehoff, I show you Commission's Exhibit 43-B and 43-A. 43-B is a purchase order—well, tell me what that is?

A. Well, apparently it is a purchase order of the L. C. Bigelow & Company for one of its customers.

Q. Is it on what company's form?

A. On the Bigelow Company's form.

Q. And what is the name of the customer?

A. South Bay Auto Parts.

Q. All right, that is Commission's Exhibit 43-B. Now I show you 43-A and ask you what that is?

A. That is the invoice showing shipment in behalf of the L. C. Bigelow Company to this special customer.

Q. And this is the Niehoff Company invoice form?

A. That is correct.

Q. I call your attention to the word script at the top of this Exhibit "Spec." What does that indicate?

A. Well, that would indicate that is special because we don't have that kind of a handling of orders for Bigelow Company and it's an exception to the rule and that is why it was marked special and the reason for it I don't know, but there must have been some specific reason.

Q. All right. I call your attention again to the Commission Exhibit 44-B—

Trial Examiner Hier: 44-A and B.

Mr. Sprowl: I wish to call his attention to 44-B and ask if that is another transaction of a similar type?

A. Yes, it is, sir.

By Mr. Sprowl:

Q. And is 44-B an order on which Niehoff Company received from the L. C. Bigelow Company?

A. That is correct.

Q. And with instructions that you ship the subject of the order where?

A. To Van Ness Auto Parts of New York, Bronx, New York.

Q. All right. Commission Exhibit 44-A is the Niehoff Company's invoice covering the subject on that order?

A. That is correct.

Q. And to whom does that invoice go?

A. To L. C. Bigelow Company.

Q. And I call your attention to the script word "Special" appearing at the top of this Niehoff invoice. What does that indicate?

A. Well, that is an exception to the general procedure and a special handling of this order.

Q. So both of these—

Mr. Schrup: May I ask one question while we are on this exhibit? I am calling your attention to Exhibit 43-A and 44-A and to the names South Bay Auto Parts on 43-A and Van Ness Auto Parts on 44-A. I would like to ask you, Mr. Niehoff, if you could state, if you know, whether 395 either one of those parties are retailers or jobbers?

The Witness: Why, they are Bigelow Company jobbers.

Mr. Schrup: They are jobbers of Bigelow Company, you are certain of that?

The Witness: Well, I assume they are.

Mr. Schrup: You do not know exactly?

The Witness: I don't personally know the customers, no.

By Mr. Sprowl:

Q. Now, are these two transactions that you have just testified about from Commission's Exhibits 43-A and 44-A and B, are they typical of your transactions with the Bigelow Company or are they exceptions?

A. Well, they are definitely exceptions because I don't know that you could find any more of such orders in the files where they were handled in this manner, by mistake or as to the reasons of this special handling, I am not able to verify.

Q. But the ordinary procedure would be for Bigelow to sell out of its own warehouse stock of Niehoff products in New York?

A. That is correct.

Trial Examiner Hier: Then you don't pay Bigelow any sales commission, do you? I mean it is a straight purchase and sale transaction between your Company and the Bigelow Company?

The Witness: That is correct. We pay them for 396 the services that they render to us as a factory representative and as a warehouse service, allowing them the difference in the cost of the product.

Trial Examiner Hier: Is that a separate rebate or name or is it taken after the invoice for products?

The Witness: It's not a rebate. It's a direct allowance on their cost of the product.

By Mr. Sprowl:

Q. And they travel their own salesmen in this territory?

A. They travel their own salesmen and do all of their

own warehousing, do their shipping, do their collecting and our reason for employing their services is primarily an economic one because they are in contact with these jobbers and they have been established there in that field for a period of years before they took on the Niehoff line.

Q. And the Niehoff Company bears none of that type of overhead directly in this territory?

A. We do not; no, sir.

Q. But the discount at which Bigelow purchases your items is designed to reflect the costs saving which you realize because of the Bigelow Company performing these functions of the Niehoff Company?

A. That is correct. If we had to have our own salesmen and our own warehouse there, the cost would be substantially higher to us.

397 Trial Examiner Hier: You sell to one else in that territory except Bigelow?

The Witness: We will sell only to Bigelow Company and he handles the sales to the jobbers.

Trial Examiner Hier: The same thing is true in New England? Now, you sell—no, that is a different arrangement.

By Mr. Sprowl:

Q. In New England they sell only through Peaslee, but some are handled direct, is that right?

A. That is right.

Q. Now, does Bigelow ever get into the New England territory assigned to Peaslee?

A. Not on Niehoff lines, no.

Q. Similarly Peaslee doesn't get into the Bigelow territory on Niehoff lines?

A. It does not.

Q. Now, turning to the—by the way, did we establish precisely how large the Bigelow area is?

A. It is the greater New York area and New Jersey.

Q. All right. Now, turning to the West Coast, you have an arrangement with the Paul G. Niehoff Company that you have testified about?

A. Yes, we have.

Q. Will you give us the detail as to that arrangement?

A. Well, that also is an economic factor because
398 Paul G. Niehoff Company acts as a factory representative for C. E. Niehoff Company and somewhat in line with what the House of Peaslee does, they perform

a dual service, maintains salesmen in the territory which covers the entire Pacific Coast area and the intermountain section usually traveling from four to five men in the territory, contacting the jobber.

Q. Will you name the states specifically, if you can, that Paul G. Niehoff Company serves?

Mr. Schrup: It is all in the record.

Mr. Sprowl: I know it is. If you are satisfied with it, all right. You don't need to repeat that. Go ahead.

A. Well, it's the Pacific Coast and Intermountain territory. Now, his men contact the jobbers in this area and sell Niehoff merchandise and we also ship direct to these customers.

By Mr. Sproul:

Q. Now, is there a warehouse stock maintained in the West Coast?

A. Yes, there is a warehouse stock maintained in Los Angeles.

Q. Now, who has title to that stock when it first arrives in California?

A. It is a consigned stock to C. E. Niehoff Company.

Q. And in whose warehouse is it placed?

A. It is placed in the warehouse of Paul G. Niehoff Company. He operates the warehouse and the sales organization and the office and manages the entire sales of the Pacific Coast.

399 Q. Now, can the Paul Niehoff Company make sales out of this inventory?

A. Yes. They are privileged to make sales out of this inventory.

Q. All right, assume that a sale is made out of this inventory by Paul Niehoff Company, is that portion of the inventory then billed to the Paul Niehoff Company by C. E. Niehoff?

A. Yes. The procedure is precisely that.

Q. All right. Paul Niehoff Company then owns that portion of the inventory, is that correct?

A. That would be correct, yes.

Q. And does it then resell it as part of the same transaction to one of the jobbers customers?

A. Yes, it does.

Q. And if that is a sale on credit, who has the risk of that credit?

A. The Paul G. Niehoff Company has the risk of the

credit and the sale of its company and shipping in connection with it.

Q. And it would deliver the merchandise, whatever the arrangements were, with its own customers?

A. That is correct.

Q. Now, what percentage of the Paul Niehoff Company's annual sales are handled in that fashion out of this warehouse?

A. Well, the majority of the Paul G. Niehoff sales are made direct to the customer.

400 Q. By direct, what do you mean?

A. And shipped by the factory.

Q. In other words, the more typical Paul Niehoff transaction would be for a Paul Niehoff salesman to originate an order from the jobber in this territory, have that order sent to the C. E. Niehoff Company in Chicago, is that correct?

A. That is correct. It is shipped from Chicago and billed from Chicago.

Q. And is it billed to whom?

A. To the customer, to the jobber.

Q. Billed to the jobber customers of the Paul Niehoff Company?

Mr. Schrup: Now, just a minute. Let's not lead the witness. Let the witness testify.

Mr. Sprowl: If I am wrong, he will pull me up.

Mr. Schrup: I am sure he will, but you will help—

Trial Examiner Hier: It is harmless.

A. It is the C. E. Niehoff customers to whom it's billed.

By Mr. Sprowl:

Q. That is the customer that was found by the salesman of the Paul Niehoff Company?

A. Well, the Paul G. Niehoff Company solicits the business of the trade their factory represents and cover the territory and they are also given the benefit of all sales that come from their territory.

Q. Now, who has the credit risk, if that is a sale
401 credit for that type of customer?

A. For the shipment sold out of the factory, the C. E. Niehoff Company assumes the credit risk.

Q. And how is Paul Niehoff Company compensated on that type of transaction?

A. It is compensated by commission allowance.

Q. As your other factory representative in Boston is compensated?

A. Operates on the same principle.

Trial Examiner Hier: Now, on that type of transaction who fixes the discounts which a particular customer may purchase at, is it C. E. Niehoff Company or Paul G. Niehoff?

The Witness: You asked—may I ask a repetition of that question?

Trial Examiner Hier: You may read it back.

(The reporter read the question as follows:

"Question: Now, on that type of transaction who fixes the discounts which a particular customer may purchase at, is it C. E. Niehoff Company or Paul G. Niehoff?")

The Witness: So far as the customer is concerned, the jobber, the same prices prevail that prevail in all other territories. In other words, our regular jobbers prices and the discounts are based upon the volume of purchases of such customers.

402 Trial Examiner Hier: Volume only.

Mr. Schrup: I think the Examiner wanted to know who set the volume.

Trial Examiner Hier: It's the volume setup. Naturally you have a record of the volume and quantity, discount setup, don't you?

The Witness: We have our regular contracts which would apply to that, to those customers.

Mr. Schrup: That is the price Paul Niehoff gets, I mean that he solicits? The C. E. Niehoff Company has a regular contract of those accounts solicited by Paul G. Niehoff?

The Witness: Paul G. Niehoff, that is right.

By Mr. Sprowl:

Q. Are those volume discounts the same as the volume discounts arrangements that you grant to your other customers throughout the middle west?

A. Yes, the same procedure is followed.

Q. They go up to a certain discount, up to $1200 annually and so on up to $3600 annually and $6000?

A. That is correct, yes, sir.

Q. The uniform method used in the rest of your business?

A. Yes, it is.

Mr. Schrup: Mr. Sprowl, I don't like to interrupt but

while we are on the subject, before we leave, will we find out if that same information applies to the Bigelow account?

403 Mr. Sprowl: Let's do it the other way, Peaslee first.

Mr. Schrup: All right.

By Mr. Sprowl:

Q. What about the volume discounts at which jobbers originating from the New England territory served by the House of Peaslee, do they receive the same volume discounts that your other customers receive?

A. Yes, they do.

Q. Now, what is the situation with respect to the Bigelow Company?

A. Well, the Bigelow Company handles its own purchases of the warehouse stock and does its own reselling.

Q. You have no control over how that is done?

A. No, we do not.

Mr. Schrup: Is there any contract, I was going to ask Mr. Sprowl?

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Sprowl:

Q. All right, the jobber customers in the territory served by the House of Bigelow are whose customers?

A. L. C. Bigelow Company's customers.

Q. Does the C. E. Niehoff Company have any job-
404 ber customers in that territory?

A. No, we do not sell the jobbers, only through the distribution of the Bigelow Company. They handle the accounts and do the collecting and do the sales work.

Trial Examiner Hier: And fix the prices, is that right?

The Witness: And fix the prices.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Sprowl:

Q. Now, referring again to your arrangements with the Bigelow Company, does the Paul Niehoff Company suggest to the Bigelow Company—does the C. E. Niehoff Company give any suggested resale prices to the Bigelow Company respecting the Niehoff products?

A. The Bigelow Company sells the Niehoff line. They have our catalog and they have our price schedules, yes.

Q. They have the jobbers pink-sheet price list?

A. They do have, yes.

Q. And then they have these suggested resale price lists you have already testified about?

A. That is correct.

Q. Now, is there any requirement as to what price they resell your merchandise?

405 A. Well, we have no jurisdiction over them as to the price they sell at, but—

Q. These are the suggested prices you have testified about?

A. Yes.

Q. All right. Now, do you know how the Bigelow Company resells its merchandise?

A. I really don't, but I assume they use the regular jobber.

Q. If you don't know, don't indulge in any assumption. Do you know whether or not they use a volume discount plan such as the Niehoff Company uses with respect to its jobbers customers?

A. I don't know.

Q. All right, so far as the C. E. Niehoff Company is concerned, the Bigelow Company can either sell the merchandise or give it away as long as they pay the C. E. Niehoff Company is that right?

A. Well, that isn't right. It doesn't sound right to me.

Q. At least it's no concern of the C. E. Niehoff Company, but the Bigelow Company confines its operations entirely to this territory you have testified about?

A. That is correct, yes, sir.

Q. And the C. E. Niehoff Company has no jobber customers in that territory, is that correct?

A. No, we do not.

Q. The answer is?

406 A. No.

Q. The answer is it is correct or it is not correct, which? I had better rephrase the question so there isn't any confusion. Does the C. E. Niehoff Company have any jobber customers in the Bigelow territory?

A. No.

Q. Getting back to Paul Niehoff and Company, where is the warehouse of Paul G. Niehoff Company located as a physical proposition?

A. In the City of Los Angeles.

Q. And do you know what area is served by the Paul G. Niehoff Company out of that warehouse?

A. Well, they serve primarily out of the warehouse the local area, but there is no particular limitation so far as the territory is concerned. They might serve any customers out of the territory if the customers so desire to be served out of Los Angeles.

Q. Now, in addition to its commission as a factory representative, with respect to the merchandise which is actually placed in the Paul G. Niehoff Company warehouse, is there a further commission paid?

A. Yes. There is a warehouse allowance.

Q. And what is that designed to compensate the Paul G. Niehoff Company for?

A. Well, it compensates him for the actual ware-
407 housing of the Niehoff stock. It compensates him for the office force that he has to maintain to handle the stock, the shipping department, where I think he has two or three people employed plus two or three people in the office.

Q. In other words, that is a—

A. And also compensates him for the sales which is, of course, his major job.

Q. Now, on sales that are shipped into the Paul Niehoff territory directly from the factory in Chicago to the jobber customer, there is only the factory representative commission paid to the Paul G. Niehoff Company on that sale?

A. That is correct.

Q. All right. Now, take a sale through the warehouse of Paul C. Niehoff Company, that same factory representative commission is paid on that sale, is that correct?

A. That is correct.

Q. And in addition his further warehouse commission?

A. Is paid to him, yes, in the way—on his purchase price of his merchandise.

Q. I see and it is paid in the form of a discount on the purchase price?

A. That is correct.

Q. And you have testified earlier, in earlier hearings respecting some of those discount statements?

A. Yes. They are in the record.

408 Q. Now, again with respect to the territory served by the Paul G. Niehoff Company, does the C. E. Niehoff Company travel any of its salesmen?

A. Not in the territories where we have factory representatives.

Q. I am speaking of the Paul G. Niehoff territory?

A. That is also true in the case of Paul G. Niehoff Company. He travels his own salesmen, pays their expenses, salaries and commissions, whatever he does pay them.

Trial Examiner Hier: Does the C. E. Niehoff Company own all or a majority of the capital stock of Paul G. Niehoff Company?

Mr. Sprowl: I think that is in the record, your Honor, but he can answer it again.

The Witness: No. We own no stock whatsoever in the Paul G. Niehoff Company.

Trial Examiner Hier: No subsidiary relationship?

The Witness: None whatever.

By Mr. Sprowl:

Q. Putting it the other way around, does Paul G. Niehoff who, I understand, is your brother, is that correct?

A. That is correct, yes.

Q. And is the owner of Paul G. Niehoff Company?

A. That is right.

Q. Does he own any stock of the C. E. Niehoff Company?

409 A. No, he does not.

Q. And do you personally own any stock in the Paul G. Niehoff Company?

A. No.

Q. Does your wife?

A. No.

Q. Does Paul G. Niehoff Company handle other lines?

A. Yes, he does.

Q. He is in the business of being a factory representative for automotive lines?

A. He does handle other automotive lines, yes.

Mr. Sprowl: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Sprowl:

Q. Now, Mr. Niehoff, I want to go back to your opinion as to whether or not it would be feasible for the C. E. Niehoff Company to have a single jobbers list price with no discounts which would only be reduced at the actual point of sale where you found it necessary to do so in order

to meet the equally low price of the competitors line. You made a comparison, I gather, of large volume lines as against your type of line and I would like you to clarify your reasons for that previous opinion, if you would?

Mr. Schrup: We have the same objection as we 410 had before?

Trial Examiner Hier: Same objection, same ruling.

By Mr. Sprowl:

Q. Why such a single price would not be feasible? You understand the question?

A. I think I do, yes. I would say that in a line such as the Niehoff line consists of, many, many items, small items involving relatively a great number of small transactions and if we were to have to meet the competition so to speak at the customers level through the contact of our salesmen that it would involve us into a great deal of detail and extra work. It would necessitate the salesmen who check with the buyer of such customers on many, many items and then the salesmen would in turn have to again consult with not only the sales manager at the office, but to involve the detailed work of determining the cost of factors on the prices that would have to be met in this particular case. Such a transaction, such a situation would develop a repetition of this work many, many times and would add materially to the cost of operation through it and the added facilities we would have to have. The number of salesmen in the field would probably double or three times the number of men and the contacting of such customers in order to maintain a close surveillance of our present customers and to meet the prices that might be offered in competition. It is entirely impractical and would lead 411 to a considerable confusion from the customer's point of view because he would not be able to determine as to what actual cost prices to him would be and would reflect probably on the integrity of the company because of the variance in prices to meet this competitive situation. If we were dealing in carload lots on merchandise with figure costs, on that basis it probably would simplify the procedure or if there were one or two items involved; but with hundreds of items involved in this transaction, you have a very difficult problem. I don't know how any business based upon my years of experience in this field could successfully operate in this in meeting competition on that basis, that

is at the customer's level. You would probably have a problem as to the cost of factors or the prices that are being quoted by competitors to determine that factor, too, through experience because it would seem to me that it would be almost impossible to follow through in view of the extensiveness of the line. Basically I think the fact is that realizing that it would involve a small, relatively small transaction that it would be tremendously costly for the company.

Q. Do you think it would be feasible, that is, would the delay that would ensue from the time the salesmen discovered the low price of a competitor to the time an equally low price was approved at the home office and that thought to be conveyed to the customers, would that in anyway
412 militate against getting the business?

A. Well, it definitely would. As I looked at a salesmen's report the other day coming in from a territory like Montana, reporting that we had lost a very good account that had been on the books for several years. It was that the competitors had quoted a lower price.

Mr. Schrup: Just a moment. I didn't have a chance to get in the objection. I object to it on the grounds it is hearsay testimony, on that base.

Trial Examiner Hier: It is admissible to show what he knows and what he accounted is the picture as it appears to him. It is not proof of what actually happened in Montana.

Mr. Schrup: That is right.

Trial Examiner Hier: So the objection is overruled on the basis of that.

The Witness: Well, we know we lost an account.

Trial Examiner Hier: That you know as a matter of fact. Why you lost it you only know what was reported?

The Witness: We know we lost it on the longer discount this competitor gave to this customer.

Mr. Schrup: Just a moment. I have an objection. The witness is volunteering as to the truth—

Trial Examiner Hier: It is not stated as to what the truth of it was.

The Witness: The fact that this customer had been
413 a customer for approximately ten years indicates what may happen at the time we arrive at the point of contacting the customer, we have lost the customer. I think that is the point of importance in such a one price

policy where we would have to meet it at the customer's level.

By Mr. Sprowl:

Q. Would it be feasible to give salesmen the discretion without the necessity of communicating with the home office to reduce prices in order to meet competition at the point set?

Mr. Schrup: Same objection as being entirely speculative. There is nothing in the case that says a competitor has to sell at the same price.

Trial Examiner Hier: The same objection and the same ruling. I told you why I was overruling that objection.

Mr. Sprowl: Go ahead.

The Witness: May I have the question again?

By Mr. Sprowl:

Q. Would it be feasible to give your salesmen sufficient authority that without consulting the home office, the salesman could reduce the price to meet the equally low price of the competitor?

A. No. It would not be feasible because the salesman himself would have no means of determining what might be the cost factors involved in the products in question 414 and we know from experience that different competitors offer different prices at different times and I don't believe it would work out in anyway, shape or form.

Trial Examiner Hier: You used the expression in several answers, Mr. Niehoff, "at the customers level." Now, do you intend that to be synonymous with your Counsel's statement "at the point of sales?"

The Witness: That is what I mean, yes.

Trial Examiner Hier: All right. Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

Mr. Schrup: Mr. Niehoff, with reference to the warehouse stocks that are owned by the House of Peaslee and owned by Paul G. Niehoff and upon which you pay a warehouse allowance on the stocks of each of those two parties, plus the discounts when they purchase the product new for resale, do either Peaslee or Paul G. Niehoff resell any of those products as a jobber?

The Witness: They sell them to the jobber.

Mr. Schrup: Can you state of your definite knowledge they do no jobbing trade themselves?

The Witness: Yes, I believe I can, very definitely.

Trial Examiner Hier: All right. Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

415 We will recess for lunch until 1:45 p.m.

(Whereupon, at 12:15 noon, a recess was taken until 1:45 p.m., this day.)

416 Afternoon Session.

1:45 p.m.

Trial Examiner Hier: All right, go ahead.

C. E. NIEHOFF resumed the stand and testified further as follows:

Cross-Examination by Mr. Schrup.

Q. Mr. Niehoff, at page 309 of the record you testified that the net sales of C. E. Niehoff Company in dollars for the year 1949 to the jobbing trade was $2,086,499. Now, in addition to that sum, you made other sales of your products to customers not included in the jobbing trade?

A. That is right.

Q. And what was the sum total of those sales?

A. Well, I don't have the figures to quote, but roughly I would say $300,000.

Q. And what type of customers were embraced in those sales?

A. Principally, support customers.

Q. Support customers. Now, the figure that you gave for the year 1949, is that a greater figure than the figure for 1948 to the same jobbing trade?

A. Well, I am trying to think, but I think it's slightly higher than it.

Q. What would be the figure for 1950? Would that 416-A be larger than the 1949 figure?

A. No, it would be lower.

Q. It would be lower, and, of course, '51 is easy to ascertain. Now, in selling to the jobbing trade you place your jobber customers in four classifications, that is, a jobber without an agreement, a jobber with an agreement, a distributor without an agreement and a distributor with an agreement, is that correct?

A. That is correct.

Q. Now, these customers buy from you your products on the basis of the jobbers price list, that is the pink-sheet which is Commission's Exhibit, the last one, 6-A, August 1, 1949? I will show it to you.

A. That is the jobbers cost price.

Q. That is the list price of all products to these four jobbers classifications? I am speaking about list price now.

A. No, it's not the list price.

Q. What price is that?

A. Jobbers cost price.

Q. Well, that is the list price to the jobber? Well, it's an interchangeable term, I presume?

A. It's his base price as we term it, differentiating from the retail price.

Q. Oh, well, I am going to come to that. Now, talking about Commission's Exhibit 6-A, which is the jobbers 417 cost price for August 1, 1949, a jobber without an agreement purchasing from the Niehoff Company products on that list would purchase at that cost price without obtaining any discount whatsoever?

A. Will you repeat the question, please?

Trial Examiner Hier: Read the question.

(The reporter read the question as follows:

"Question: Now, talking about Commission's Exhibit 6-A, which is the jobbers cost price for August 1, 1949, a jobber without an agreement purchasing from the Niehoff Company products on that list would purchase at that cost price without obtaining any discount whatsoever.")

The Witness: Yes.

By Mr. Schrup:

Q. Then a jobber with an agreement purchasing the identical product from the C. E. Niehoff Company off the pink jobbers list, 6-A, August 1, 1949, he would obtain a discount on his purchases?

A. He would obtain a discount based on his volume purchases.

Q. Now, that discount he would get is termed a merchandise credit?

A. That is correct.

Q. And that is given to him at the expiration of the contract period depending on the volume of products he purchased from the C. E. Niehoff Company, is that correct?

A. That is correct.

418 Trial Examiner Hier: That is a year and cumulative?

Mr. Schrup: I am coming to that.

By Mr. Schrup:

Q. Now, that discount with the jobber agreement that we have talked about, the merchandise credit, is based on—it's retroactive; it's based on—it's cumulative purchases through the year?

A. Yes.

Q. Starting from the first dollar purchases to the amount at the end of the year?

A. That is correct. However, the contracts were not necessarily on a yearly base or calendar yearly base.

Q. They usually ran for a year, did they not?

A. That is right.

Q. Then if they ran for less than a year, were they adjusted to an annual basis?

A. If they run for less than a year, they were not necessarily adjusted to the purchase of part of the year.

Q. No, but I mean would you proportionalize it out to an estimate, what it would have been on the base at the end of the year and then he gets that proportion?

A. In most cases when they discontinued our line, they usually did it before they reached the maximum volume under the agreement.

Q. In cases where they did not discontinue the line

419 before they reached the maximum of volume under the agreement, they did then get the discount; did they, sir?

A. Well, we have been doing that for several years. I am not certain whether that applies to 1949 or not.

Q. You have been doing it for the year 1950?

A. Yes, sir.

Q. Giving the discount to the jobber who buys under an agreement that called for under that agreement proportionalized out as if he continued through the end of the year?

Mr. Sprowl: They do give it.

By Mr. Schrup:

Q. They do give that discount as I understand it. Maybe you better explain to us, sir, just how you handle it?

A. Well, on the original contracts I am not sure

whether we prorated the volume when an account discontinued our line.

Q. Which year are you speaking about?

A. 1949.

Q. All right. Confine our talk to the year 1949. Will you go ahead, please?

Trial Examiner Hier: He says he doesn't know; he doesn't remember. What is your practice in 1950? For instance, assume a jobber with an agreement qualified for a quantity discount. If he buys say $10,000 a year, in five months he reaches that $10,000 a year and at the end of seven months he discontinued your line, did you pro-
420 rate or did you give him a prorated discount on the seven months purchases?

The Witness: You are talking about 1950?

Trial Examiner Hier: Yes.

The Witness: Well, I am quite sure we did, yes.

Trial Examiner Hier: All right.

By Mr. Schrup:

Q. Now, calling your attention to the discounts that you classify as distributors, they are jobbers the same as a jobber with an agreement, are they not, sir?

A. Well, they were classified as distributors based upon their annual volume of purchases.

Q. That is right, but they do a jobbing business?

A. They do a jobbing business, yes, sir.

Q. Now, the distributor, when he buys from the pink list which is Commission's Exhibit 6-A of August 1, 1949, he receives on his invoice of every purchase a 10% discount, is that correct, sir.

A. That is correct, yes, sir.

Q. Regardless of the volume of purchases?

A. Well, yes, in a sense, but he was classified as a distributor based upon the previous history showing that he would be able to attain a certain volume.

Q. But nevertheless if he had been classified in the year 1948 as a distributor and for the year 1949 he bought less than what he had been classified for as a distributor,
421 he would have still got the 10% discount on all his purchases during 1949, is that not correct, sir?

A. For that year he would be reclassified as subsequently.

Q. Now, turning to the distributor with an agreement on his purchases from the C. E. Niehoff Company with

reference to Commission's 6-A, which is the pink jobbers cost list for August 1, 1949, he purchases in such a manner that he gets a 10% discount on each purchase similar to the distributor, is that not so, sir?

A. I would like to have you repeat the question, please?

Mr. Schrup: Will you read it back, please?

(The reporter read the question as follows:

"Question: Now, turning to the distributor with an agreement on his purchases from the C. E. Niehoff Company with reference to Commission's 6-A, which is the pink jobbers cost list for August 1, 1949, he purchases in such a manner that he gets a 10% discount on each purchase similar to the distributor, is that not so, sir?")

The Witness: I am not clear on the question, Mr. Schrup.

By Mr. Schrup:

Q. Well, the distributor with an agreement and a distributor without an agreement both get 10% of invoice price when either one purchases on the basis of Commission's Exhibit 6-A, which is the jobbers cost price of 422 C. E. Niehoff of 1949, is that correct?

A. That is right. I am sorry, I didn't understand.

Q. Now, in addition to that, the distributor with an agreement gets a merchandise credit at the expiration of the contract period on all purchases over and above the volume, is that not correct, sir?

A. That is correct.

Q. Now, when a jobber without an agreement, a jobber with an agreement, a distributor without an agreement and a distributor with an agreement resell the products purchased from the C. E. Niehoff & Company they resell those products on the basis of two price lists, one is Commission's 6-B which is entitled "Wholesale Confidential Price List" dated August 1, 1949, is not that correct, sir?

A. That is correct.

Q. Now, to what type of customers do these jobbers resell on the basis of Commission's Exhibit 6-B, the Wholesale Confidential Price List of August 1, 1949?

A. That is a suggested price schedule to be applied to their customers that stock the Niehoff line of merchandise.

Q. Now, is it any particular class of customers, sir?

A. It might be any class that the jobbers select in the automotive service field.

Q. If I recall your testimony on direct examination, I

believe you said that the wholesale confidential price
423 list of which we are talking about was with reference of sale by jobbers to dealers, car dealers and automotive concerns, trucking concerns?

Mr. Sprowl: I suggest you let him see the transcript.

Mr. Schrup: I will let you see the citation. May we take a short recess? I thought I had a notation on it.

Trial Examiner Hier: All right, recess.

(A short recess was taken.)

Trial Examiner Hier: All right.

By Mr. Schrup:

Q. I call your attention, Mr. Niehoff, to your testimony at the bottom of page 43 and the top of page 44 of the transcript.

Trial Examiner Hier: All right, the witness has read it.

Mr. Schrup: I believe there was a question pending and Mr. Sprowl asked for the identification of that passage in the record which has just been given to Mr. Niehoff. Now, I don't know whether he answered that or not.

Trial Examiner Hier: Do you want the question read back or rephrase it?

Mr. Schrup: Read the question back.

Trial Examiner Hier: Read the question, please.

(The reporter read the question as follows:

424 "Question: If I recall your testimony on direct examination, I believe you said that the wholesale confidential price list of which we are talking about was with reference of sale by jobbers to dealers, car dealers and automotive concerns, trucking concerns?")

Trial Examiner Hier: That was answered. The only answer was the direct testimony which you quoted.

By Mr. Schrup:

Q. I have called your attention in the record to a page 43 and 44, Mr. Niehoff. Now, I ask you if that list we are now talking about was not prepared by your company in connection with the jobber, various jobbers classifications of which we are speaking in connection with their resales of your products to car dealers and truck concerns?

A. You are talking about the wholesale confidential price list?

Trial Examiner Hier: That is right.

By Mr. Schrup:

Q. That is correct, sir?

A. That is a suggested list for our jobbers, used primarily to sell their stocking accounts which may include fleet accounts, may include independent service stations; it may include garages and it may include car dealers, if they sell them.

Q. Now, calling your attention to Commission's Exhibit 7-C which is, I take it from your testimony, a sug-
425 gested resale price list given to your jobbers by the Niehoff Company for the resale of your products to what classification of customers of theirs?

A. The jobbers have their choice to the classification of their own customers, but it is generally used for sales to accounts that do not stock the merchandise that might apply hand to mouth over the counter, as the instance may be. However —

Q. Now, Commission's — excuse me, do you want to complete your answer?

A. However, we have no jurisdiction in what manner in which these prices are used by the jobbing customers.

Q. Nevertheless you furnish them with the price list?

A. We furnish them with the price list.

Trial Examiner Hier: Is there one or two?

Mr. Schrup: I am going to come to that. There are two. It's Commission's Exhibit 7-B which is dated August 1, 1949, entitled "C. E. Niehoff and Company Wholesale Confidential Prices" and Commission's Exhibit 7-C dated August, 1949 which is C. E. Niehoff's dealer prices. Now, these are the suggested resale prices of the C. E. Niehoff Company to these jobbers for resale to the class of trade which you have specified, is that correct, sir?

The Witness: That is correct.

427 Trial Examiner Hier: We can assume what the record shows, namely, that 7-B is lower than 7-C. What
428 I am interested in is why you suggest lower prices to the class of customers for whom 7-B is suggested than the class of customers for whom 7-C is suggested. I am interesfed in that fact.

The Witness: You want me to answer that?

Trial Examiner Hier: From you, yes.

The Witness: The pattern has been set by competition from General Motors and Auto-Lite principally in this line and by other competitors in the replacement field where

dealer accounts that stock merchandise receive a slightly better price than when they don't stock the merchandise for the purchase through the jobber, but the competitive picture is such that that was the real reason why the two schedules of prices are issued.

By Mr. Schrup:

Q. Mr. Niehoff, why do you go to the trouble of compiling these lists and publishing them at some expense to yourself and furnish to your jobber if you don't expect to follow those price lists?

A. Well, they are suggested schedules to them and I assume that they do follow them, but it doesn't necessarily mean that they do.

Q. You expect to follow them, don't you, when you furnish them the list?

A. We suggest they use those sheets, yes.

Q. The word is "expect." I say, when you furnish
429 them those lists you expect them to follow those lists, do you not, sir?

A. We expect them to follow the list, but we have no control over the price lists the jobbers use because they have a choice. They can use either one or the other prices. We have no control over the situation.

Trial Examiner Hier: At most it's a hope on your part without power of effectuation, is that right?

The Witness: It is a hope and the competitive pattern sets the competitive picture such as described here.

By Mr. Schrup:

Q. Now, Mr. Niehoff, speaking about your customer classification of jobbers with an agreement, jobber without an agreement, distributor with an agreement, distributor without an agreement, now then, in the first instance as regards a jobber with an agreement, do I understand from your testimony that in determining the jobber with a agreement classification that two tests are made: one, the test of volume and, two, the test of complete ignition line, is that correct, sir?

A. Well, I would like to see the testimony to check my memory on that. I can't recall.

Mr. Schrup: All right. May we go off the record until we find that?

Trial Examiner Hier: Yes. We will go off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record. Read the
430 question and see if he can't answer that from his knowledge.

(The reporter read the question as follows:

• • • • •

The Witness: Well, so far as the volume is concerned, that is correct. It unquestionably follows that if they don't buy the complete line, they don't necessarily make the volume and that is not a factor as we are classifying the accounts.

By Mr. Schrup:

Q. In other words, volume is the sole test?

A. I would say that volume is the principal test, yes.

Q. And the fact that he may or may not carry a complete line is not necessary to classify him for either a jobber without an agreement or distributor without an agreement or a jobber with an agreement or distributor with an agreement?

A. I again say his volume is the test for classifying the customer.

Q. Now, calling your attention to Respondent's
431 Exhibit No. 1, I presume you are familiar with the exhibit, but I will show it to you, sir, entitled "Selling Expense," by whom is this exhibit prepared, sir? Respondent's Exhibit 1?

Mr. Sprowl: What was the question respecting that?

Trial Examiner Hier: By whom was it prepared?

A. This was prepared by our office.

By Mr. Schrup:

Q. Who in the office prepared it, do you know, sir?

A. Well, I think Mr. Kirschlager, he prepared it.

Q. And when was it prepared, sir?

A. At the time of our last hearing in May or prior to that time.

Q. May 1951?

A. That is right.

Q. Now, I notice the item direct selling expense in the sum of $186,170. Now, is that selling expense in connection with all the sales to whatever customer, type of classification, or any other purchaser of the C. E. Niehoff Company products or restricted to the sales of the jobbing trade?

A. Well, those figures would take it from—

Q. I beg your pardon?
A. Those were taken from our cost accounting records
nd it is my impression that they covered the cost of sales
o the jobber.
Q. Well, now, I would like to have a definite state-
32 ment on it, sir, because we would like to ascertain just exactly what it does represent. If you are not
n a position to tell us, say so.
A. I am not sure, but I think it covers sales to the job-
bing trade.
Trial Examiner Hier: Only?
The Witness: Only, yes.

By Mr. Schrup:

Q. By the jobbing trade, we are now confining our-
selves, as we understand it, for the purpose of this exhibit —if I am not correct tell me so—to some jobbers without an agreement, jobbers with an agreement and distributors without an agreement and distributors with an agreement?
A. All jobbers.
Q. They are all jobbers, I know that, sir. Those are the four classes of trade covered by Exhibit 1?
A. That is right.
Trial Examiner Hier: His answer is, "That is right."

By Mr. Schrup:

Q. Now, with reference to direct selling expense and in the sum of $186,170, now is that amount in that sum shown on the company's books?
A. Yes, it would be shown on the company's books.
Q. And what books would that be on, sir?
A. Well, on our regular books covering the ad-
433 ministration costs, selling costs, etc.
Q. What I have in mind, sir, if it is desired to have the commission accounts check these books, what books would he go to, what books would he call for, sir?
A. I assume he would find it in the general ledger.
Q. Yes. Would it all be in one book, sir, one account book?
A. Well, Mr. Schrup, I don't know whether it's all in one book because I don't do the accounting and our accountant might be able to tell you. I can't.
Trial Examiner Hier: Is there anyone in the hearing room who can answer that?
Mr. Sprowl: Mr. Kirschlager can.

Trial Examiner Hier: Will you accept that as his answer?

Mr. Schrup: I think Mr. Niehoff can get the answer from Mr. Kirschlager. We want the answer from Mr. Niehoff, the witness.

Trial Examiner Hier: Off the record for a moment.

(Discussion off the record.)

Trial Examiner Hier: On the record. All right, you may answer the question now, Mr. Niehoff, definitely.

The Witness: Well, the figures here are the audited annual figures for '49, showing the salaries, commissions, traveling expense and so forth to the line, all direct selling expense.

434 By Mr. Schrup:

Q. Now, directing your attention to Exhibit 1 before you, to the term salaries under direct selling expense, what is included in salaries, sir?

A. All the salesmen, sales manager.

Q. Is your salary in there, too, sir?

A. I—well, I don't believe I can answer that. I don't believe it is; but I can't give you a definite answer on that point.

Q. Again I ask you is there anyone in the hearing room who can give us the answer?

Trial Examiner Hier: Off the record for a moment.

(Discussion off the record.)

Trial Examiner Hier: On the record. The answer is, "I do not know."

By Mr. Schrup:

Q. All right. Calling your attention to the term "commissions" under direct selling expenses on Respondent's Exhibit 1, what does the term "commissions" cover, sir?

A. Commission to salesmen.

Q. And is that restricted to commission to salesmen only?

A. Yes, it is, I believe.

Q. Does that include any of the commissions to Paul G. Niehoff & Company or the House of Peaslee?

A. Yes, I believe it would.

435 Q. And calling your attention again to Respondent's Exhibit 1, the term "travel" under direct selling expense, what does that cover?

A. That covers the expense of traveling for the salesmen, calling upon the trade throughout the United States.

Q. Does that cover expenses of travel of anybody else than the salesmen of C. E. Niehoff Company?

A. It only covers the travel of the salesmen that are in the direct payroll of the company.

Q. Now, what about the salesmen, sir, and yourself? Do you not call on customers?

A. Well, I do call on customers.

Q. Does not the sales manager call on customers?

A. The sales manager calls on customers.

Q. Would that not be included in the travel?

A. Undoubtedly it would be included.

Q. It would be included?

A. I am quite sure.

Q. Now, what about the term "and so forth," what does that mean?

A. It's bad. I don't know.

Mr. Sprowl: If you can tell us what it means on the salesmen's selling account, we can give you the answer.

Mr. Schrup: This is a selling complaint. That is what we are interested in.

436 Trial Examiner Hier: His answer is he doesn't know.

By Mr. Schrup:

Q. Where will we get the answer to that?

A. Well, I think our auditor can answer that.

Mr. Schrup: Can we go off the record for a moment?

Mr. Sprowl: I would like to stay on the record for a moment. We stated at the time these were received that we renewed our offer in good faith, that these were subject to having our books checked. We will gladly entrust Mr. Steele to the tender mercies of Mr. Kirschlager and he can lead him by the hand and show him where the records are and if there is some critical differences in viewpoint of Mr. Steele I assume that can be—

Mr. Schrup: That requires merely the direct verification of the amounts. We want to find out what the exhibits mean and find out something about the allocations and things of that nature.

Trial Examiner Hier: I don't much like except for an occasional fact and figure the practice of getting the answer by using the witness as a conduit. His answer is he doesn't know. If you want the facts, let's call the man who knows and put him on the stand and find out.

Mr. Schrup: Well, I am examining the Respondent's

witness here. I am trying to find out what an exhibit he is introducing into evidence means?

437 Trial Examiner Hier: That is perfectly all right. The examination is all, but the answer is, "I don't know." Let's stop at that point.

By Mr. Schrup:

Q. Now, referring again to Respondent's Exhibit 1, I note the total number of salesmen is fifteen—is that fifteen full time salesmen of the C. E. Niehoff Company?

A. Yes, it is, sir.

Q. And they work on straight salary or salary and commission or straight commission?

A. Well, most of our salesmen work on a salary and expense basis and many of the men are given a quota on commission above a certain basic quota to their account in their territory that they cover.

Q. Then, as I understand it, the compensation and the method of compensation, that is computation of the compensation, would vary with all fifteen salesmen?

A. Oh, yes, it would vary; yes, sir.

Q. Some are paid different salaries, some get different commissions, some are on a different basis of salary and commission and so forth and so on?

A. Yes. A new man is a little different status until he acquires a territory in which he travels and establishes contacts and his accounts.

Q. Now, do you have more than one salesman in

438 any given territory?

A. Well, we have two salesmen in an area, but it's not in a given area because we usually allocate the territory. If it is divided like in Chicago to two men, if the case would be where one would travel the south side and one the north side or something like that.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: Back on the record.

By Mr. Schrup:

Q. Now, the salesmen referred to in Exhibit 1, do they restrict their sales, sir, to present jobbers accounts of the C. E. Niehoff & Company?

A. Well, I don't think so because they are supposed to call on other prospective accounts too.

Q. Now, the calls on prospective accounts, do they appear in the number 5196 on Respondent's Exhibit 1?

Mr. Sprowl: Do you understand the question?

A. Well, I think I do, but you are asking me a question that is somewhat out of my department and I would say offhand yes, but the tabulation here shows the calls only on the active accounts here, 866 that I think were active as jobbers on our books in 1949.

Mr. Schrup: Well, that was the purpose of the question, sir. That was what I was trying to find out.

439 Trial Examiner Hier: All right.

By Mr. Schrup:

Q. Now, as I understand you sir, and as I understand Respondent's Exhibit 1, the figure 6 after a total number of calls represents the average of calls on present customers according to testimony, I believe, when Respondent's Exhibit 1 was offered into evidence?

A. I believe that is correct.

Q. And 866 was the number of present accounts?

A. Right.

Q. And six times 866 arrives at the figure 5196?

A. Right.

Q. You have just testified, of course, that your customers call on prospective accounts—I mean your salesmen call on prospective accounts. Now, I have asked you whether those calls on prospective accounts enter into the figure 5196 and do I understand you to say they do or do not?

A. I don't believe they do according to this record here.

Q. I will direct your attention, sir, to Commission's Exhibit 47-A through 47-E. Now, that is the type of jobber account which your salesmen call on, is that not correct, sir?

A. That is correct, sir.

Q. Now, I further understand that your salesmen do not call on any accounts serviced by Paul E. Niehoff & Company on the West Coast, is that correct, sir?

440 A. That Pacific Coast area is covered through the services of Paul G. Niehoff Company and his salesmen. We have nothing to do with that.

Q. There is no salesmen employed by the C. E. Niehoff Company calls on the customers on the West Coast?

A. That is right.

Q. Now, with reference to the accounts serviced by the House of Peaslee up in the New England area, are there any salesmen of the C. E. Niehoff call on those accounts?

A. No. They are regularly called upon by the salesmen of the Peaslee Company.

Q. Now, with reference to the prospective accounts called on by C. E. Niehoff and Company salesmen, would you briefly characterize what type of accounts they are? Do they call on any industrial accounts?

A. No. Our salesmen call on the regular automotive parts jobbers.

Q. Well, do they call on any gasoline station accounts?

A. No, they don't call on gasoline station accounts as such unless they happen to be getting gasoline and might ask about the Niehoff line.

Q. Would they call on any such as a chain of four or five gasoline stations that were owned by one owner?

A. No. We do not call upon chain gasoline companies.

Q. Do they call on any chain stores accounts of any size?

441 A. No, we do not call upon chain store accounts.

Q. Now, directing your attention again to Commission's Exhibit 1 and the figure—

Mr. Sprowl: You mean Respondent's Exhibit 1?

By Mr. Schrup:

Q. Excuse me, Respondent's Exhibit—

Mr. Sprowl: It is a good exhibit. I don't blame you.

Mr. Schrup: I don't know. We are finding some trouble with it.

By Mr. Schrup:

Q. Directing your attention to the figure 866 which is the number of accounts covered by that exhibit, as I understand that is the number of your present accounts that are covered by that?

A. Yes.

Q. Now, that figure 866, does that include any of the accounts that are serviced on the West Coast by the Paul G. Niehoff Company?

A. Well, yes, it includes the accounts that are on the Pacific Coast.

Q. And the total number of calls 5196, that would include those accounts out there, sir?

A. Well, if it does, it's incorrect, see.

Q. All right. Now, turning to the House of Peaslee's accounts serviced by the House of Peaslee, would any

442 of those accounts be included in the figure 866 appearing on Respondent's Exhibit 1?

A. Not having prepared the exhibit, I would like to rather say I don't know.

Q. I see, and would the answer be the same to the figure 5196 in response to the same question, referring again to Respondent's Exhibit 1?

A. Well—well, as to the number of calls made on these accounts, that is an average number of calls and they may have called on the accounts more frequently. I wouldn't know. Maybe the sales manager could answer that.

Q. But the question was would the figure 5196 in Respondent's Exhibit 1 cover the accounts serviced by the House of Peaslee?

A. I don't know.

Q. Now, Mr. Niehoff, directing your attention to Commission's Exhibit 92-A, which is entitled distributor's Agreement Volume Sales Allowance; now, does that cover all the distributors without an agreement and all the distributors with an agreement sold by the C. E. Niehoff Company?

Mr. Sprowl: What exhibit is this?

Mr. Schrup: That is 92-A.

Mr. Sprowl: I have never seen it.

Trial Examiner Hier: When, in 1949?

Mr. Sprowl: Is that in evidence?

Mr. Schrup: Sure, that's one of the exhibits.

443 Trial Examiner Hier: Yes. That is in evidence, 92-A and B. Do you have the question, Mr. Niehoff?

The Witness: I would like the question read.

Trial Examiner Hier: Read the question for him.

(The reporter read the question as follows:

"Question: Now, Mr. Niehoff, directing your attention to Commission's Exhibit 92-A, which is entitled Distributor's Agreement Volume Sales Allowance, now does that cover all the distributors without an agreement and all the distributors with an agreement sold by the C. E. Niehoff Company?")

A. I believe it covers the accounts with the distributor agreement for the year of 1949.

Trial Examiner Hier: What agreement? All of them, is that right?

The Witness: I assume it's all. I didn't check the list.

Trial Examiner Hier: All right.

By Mr. Schrup:

Q. Now, this is a sealed exhibit so I am not going to

give the account name, but I am going to refer to the city and I am showing you the exhibit here, Commission's Exhibit 92-A and I point to this account in Sacramento, California. That is the distributor with an agreement, is that right, sir?

A. That is correct, yes.

444 Q. And that is one of the accounts that would be serviced by Paul G. Niehoff Company?

A. No, that is serviced out of Chicago.

Q. Now, I will point to another here, Eugene, Oregon. Is that a distributor with an agreement account and who is that serviced by?

A. That is serviced out of Chicago.

Trial Examiner Hier: Now, wait a minute. Serviced out of Chicago, you mean by your company, C. E. Niehoff Company?

The Witness: Yes, by C. E. Niehoff Company shipped directly out of Chicago directly to that customer.

By Mr. Schrup:

Q. That customer. Do the salesmen of Paul G. Niehoff & Company call on this account in Eugene, Oregon, which I am pointing to on Commission's Exhibit 92-A?

A. Yes, they do.

Q. And would the same answer apply to the account on 92-A in Sacramento, California?

A. It would, yes, sir.

Trial Examiner Hier: Then when you said serviced out of Chicago, you simply mean they would ship goods from Chicago? You didn't mean by the word "serviced" to imply you did any selling services, furnished any selling service?

The Witness: Well, I mean—

445 Trial Examiner Hier: Solicitation?

The Witness: I mean that the orders were processed and shipped and billed out of Chicago to these accounts he asked about.

By Mr. Schrup:

Q. But in all cases, it was the salesmen of the Paul E. Niehoff & Company that called on these accounts?

A. It's Paul G. Niehoff & Company.

Q. I am sorry, Paul G. Now, we refer to Commission's Exhibit 92-B and I will point to the account in Salt Lake City, Utah. Is that an account that the salesmen of Paul G. Niehoff & Company call on?

A. Yes, that's in his territory?

Q. And that account then, is the merchandise shipped from Chicago to that account and billed from Chicago to that account?

A. Yes, it was shipped, but we lost it to the competitor. The volume indicates we did have a little business with him that year.

Q. Now, I will direct your attention again, sir, to Commission's Exhibit 92-A, a sealed exhibit, and I point out to you the account in Los Angeles, California and ask you if that is one of the accounts upon which the salesmen of Paul E. Niehoff & Company call?

A. Yes, they do.

Q. And that account is so directed from Chicago?

446 A. Shipped direct from Chicago and billed direct from Chicago.

Q. And would the same answer apply to the account on Commission's Exhibit 92-A in Portland, Oregon, which I point to you here, sir?

A. Yes, it would, sir.

Mr. Sprowl: May I borrow your exhibit to put the numbers on mine in the right pages?

Mr. Schrup: Yes.

By Mr. Schrup:

Now, Mr. Niehoff, do you have distributor accounts as distinguished from distributor accounts with agreements in the West Coast area?

A. Yes, we have some.

Q. About how many would you have, sir?

A. Well, I would have to refer to the record. It's a little bit difficult for me to make a guess. Not very many.

Q. And would you have jobbers with an agreement accounts in the West Coast area?

A. Yes, I believe we had some.

Q. And would you have a jobber without agreement accounts in the West Coast area?

A. Well, I think we have a few, but I am not certain now.

Q. Now, would any of these accounts in the West Coast area be located in the same cities?

A. Well, they would be a number of accounts. Well, Portland, for instance, I believe we have several accounts there.

447 Q. And what type of customers would those accounts sell to, sir, would they be the type of accounts

which you have prepared in your suggested resale price lists?

A. I am referring specifically to Portland, the two accounts are listed right on Exhibit 92-A, I think it is.

Q. Yes. Well, I am talking about the outlets. Now, sir, I say would they sell to the outlets which would be sold on the basis of Commission's Exhibits—

Trial Examiner Hier: 7-B and 7-C.

By Mr. Schrup:

Q. 7-B and 7-C, that is confidential wholesalers price list and the dealers price list?

A. Well, they have our catalog and suggested price schedules.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record. We will have a three or four minute break.

(A short recess was taken.)

Trial Examiner Hier: On the record.

By Mr. Schrup:

Q. Mr. Niehoff, I again hand you Commission's Exhibits No.'s 92 and 93 and with reference to the territory covered by the House of Peaslee, will you briefly glance through Commission's Exhibit 92 and tell us whether there are any distributors with an agreement located in the 448 territory served by the House of Peaslee?

Trial Examiner Hier: On that exhibit you mean?

By Mr. Schrup:

Q. On that exhibit.

A. I don't see any.

Q. Well, this exhibit, as I understand it, is a complete list of all distributors without an agreement sold by C. E. Niehoff & Company, so if it does not appear on that list, there would be none, is that right, sir?

A. Is this the list without the agreement?

Q. No, that is the distributors with an agreement, is that right, sir?

A. No, there is none on that list.

Q. There would be none on that list?

A. I believe not.

Q. Now, will you tell us if there is any distributor without an agreement serviced by the House of Peaslee?

A. Yes, I think there are.

Q. And in the same territory would there be jobbers without an agreement purchasing the Niehoff products in that territory?

A. There probably are, yes, sir.

Q. Will you glance through Commission's Exhibit 93.

Trial Examiner Hier: Wait a minute. How about jobbers with an agreement?

By Mr. Schrup:

449 Q. That is what I am coming to, that is 93 and tell us whether there are any jobbers with an agreement in the territory covered by or serviced by the House of Peaslee? Would you briefly indicate, if you do find some, sir, just the cities?

A. Yes. There is one here in New Bedford, Massachusetts, Pittsfield, Massachusetts and Bridgeport, Connecticut, and in Rhode Island, Maine. There is also one in Salem, Massachusetts.

Q. That is Salem, Massachusetts?

A. Salem, Massachusetts, yes. One in Rhode Island.

Q. Pawtucket?

A. Pawtucket.

Q. Oh, yes, and how do you pronounce that?

A. I think that is North Kennebunk Port, Maine. I think that is all.

Q. Now, referring again to Commission's sealed Exhibit No. 92 which is a distributor with an agreement and referring also to Commission's Exhibit 47-C and referring again to the accounts referred to as distributor with an agreement and preceded by the letter "C" in the parenthesis, which is in the foot notes on page—

Trial Examiner Hier: 47-A.

By Mr. Schrup:

Q. 47-A indicates a member of Cotton States, Inc. Now, none of the members of Cotton States, Inc. appear on sealed Commission's Exhibit 92-A, do they?

450 A. I don't believe they do.

Q. Now, the reason for that is, sir, instead of the volume sales allowance merchandise which are computed at the end of the years, that the members of the Cotton States get a straight 7% discount in lieu thereof of their invoice?

A. Yes, that was the consideration in view of their volume. They made their volume virtually in the first month of the year.

Q. Well, it's perfectly all right. I mean I was just asking a direct question. Now, if the witness wants to volunteer a lot of information, I don't know.

A. I am sorry.

Mr. Sprowl: You don't need to be sorry.

Mr. Schrup: I think the witness should be instructed to answer the questions asked. I asked him a number of direct questions and he volunteered information.

Trial Examiner Hier: In order to avoid these objections in the future, try to confine your answers to Mr. Schrup's questions, just the question asked. Your own Counsel will bring out any of the details if they are pertinent.

By Mr. Schrup:

Q. I don't recall, Mr. Niehoff, whether I asked you the question or not, but it's true, is is not, that no salesmen employed by C. E. Niehoff & Company calls on any account serviced in the House of Peaslee territory?

A. No. Our sales manager may have called on 451 some of the customers or they may have had a sales conference. I have been up there and talked to the salesmen myself. That is also true as far as Bigelow Company is concerned.

Q. Yes, I understand that.

Trial Examiner Hier: Is that for the purpose of solicitation of orders or merely missionary and good will?

The Witness: Well, the sales manager and the president of the company is always looking for business, as a matter of fact, but you call it good will and nobody hands us an order. It's a question of stimulating and inoculating the House of Peaslee salesmen and the Bigelow salesmen and the Paul G. Niehoff salesmen whether they want to sell Niehoff products. You have got to keep them sort of educated on the line because they have other lines to sell, too, and that, I think, is not direct selling in any sense of the word. It's merely organizing the company in question who is representing us in that field.

By Mr. Schrup:

Q. Now, referring again, Mr. Niehoff, to Respondent's Exhibit 1 and the figure 6 after the total number of calls, that is an average, as I understand it, as computed of the number of calls by a salesman on each Niehoff account?

A. Yes, that is the average.

Q. And is that average meant to emphasize all five salesmen and all the territories covered by the fifteen salesmen?

452 A. I think our sales manager can answer that more specifically, but I think it does because in many cases there may be more calls than six per customer.

Q. That is right and when you state that is an average, that does not mean that each customer in each classification of the Niehoff jobber accounting business receives six calls?

A. Well, it means that they may have had more calls than six and it may have meant they might have had only five calls. That condition sometimes varies because—

Q. Now, these salesmen you testified also called on prospective customers. Could you give us any information as to the frequency of their calls on potential customers?

A. Well, I assume that if we had an inquiry from the territory that is prospective on the line that they would call on them; how frequently, I don't know.

Q. Now, referring again to Respondent's Exhibit 1 and we will now refer back to your past testimony as to the purpose of a call of C. E. Niehoff and Company salesmen on the customer's account, would it refresh your memory if I showed you your testimony on that or could you repeat it now?

A. I wouldn't know.

Q. I think you gave us three calls, three purposes of the calls of a C. E. Niehoff salesman?

A. I don't remember offhand.

Q. I thought perhaps you could give it again?

453 A. I probably could, but I don't know what the question is.

Mr. Sprowl: What is the page?

Mr. Schrup: It's 280. Would you start at line 21 and read it to yourself, sir.

By Mr. Schrup:

Q. Now, Mr. Niehoff, I will ask you this question: Referring to the fifteen salesmen listed on Respondent's Exhibit 1, does each of these salesmen spend an equal amount of time with each Niehoff jobber customer regardless of classification or the volume of purchase made of Niehoff products?

A. No. I don't believe they spend an exactly equal amount of time because conditions vary. They may spend

more time one—at one call with customer No. 1 and they might spend more time with customer No. 2, the next call.

Q. That would depend somewhat, would it not, on the area covered by the jobber, the number of salesmen he employed, the size of his inventory and matters of that nature?

A. Well, there's lots of delays in calling on a customer and it may be many different reasons. I don't know why a man takes more time on Tuesday to call on an account than it would be subsequently some other day. Maybe the buyer isn't available immediately or some other conditions.

Q. Now, do you keep any records of the amount of the time that a salesman employed by the C. E. Niehoff Company spends in his calls on any respective customer?

454 A. No, I don't believe, think we have any specific record as to the amount of time spent unless he had an occasion where they spend more than the normal time. Maybe the sales manager can tell you.

Q. Then your answer is, I take it, he would spend different amounts of time with different customers, but as 46 what that amounts to, you couldn't tell?

A. It's pretty hard to tell. I couldn't tell. Maybe he could.

Mr. Sprowl: Are you referring to Mr. Geyer?

The Witness: Mr. Geyer, yes, sales manager.

By Mr. Schrup:

Q. Do you get any sales report of that nature stating the amount of time they spend with each customer?

A. We get salesmen's reports, yes. The salesmen's report doesn't specifically designate the number of hours spent with the customers.

Q. Does it specify the number of calls he made on a customer?

A. Yes, I think he would specify the calls he made on the customer.

Q. And you keep those records? You have those available?

A. Well, we keep them currently, yes.

Q. Well, now, when you made up Commission's Exhibit—excuse me, Respondent's Exhibit 1, do you have those records currently for the year 1949?

455 A. I don't believe so.

Q. Well, what records, what salesmen's report

was Commission's Exhibit 1 compiled on?

A. From the salesmen's records as they had been established.

Q. Well, I mean—you mean by that, 1950 reports?

A. Well, I would think they were prepared from 1949 reports.

Q. Well, I just understood you to say they are not available or were not available.

Mr. Sprowl: I think you are not quoting his testimony. I suggest you show him his earlier testimony.

Mr. Schrup: I am trying to find out. There's been no testimony on this point. I want to find out.

Mr. Sprowl: Oh, yes. He testified it was an estimate. I can refer you to the page. He told you precisely.

Mr. Schrup: I don't know whether there is or not. That's what I want to find out. I want to find out on the basis of this report?

The Witness: I didn't mention it.

Mr. Sprowl: That six calls per customer was an average.

Trial Examiner Hier: No, that isn't what he said.

Mr. Schrup: Let's go back over the record and see what the testimony of Mr. Niehoff was a little bit before that. Would you read it back?

Trial Examiner Hier: My understanding was the same as yours. I understood Mr. Niehoff to say that in 1949 there were no current salesmen's reports indicating the amount of time spent per call, but currently, at the present time you are having such reports made, is that correct, Mr. Niehoff?

The Witness: Yes, that is correct. The salesmen always made a report. They made it in 1949, too.

Trial Examiner Hier: I understand that, but that report did not reflect the amount of the time spent with each customer or prospective customer?

The Witness: That is right.

Trial Examiner Hier: Just an overall report of his actvities?

The Witness: That is it.

Trial Examiner Hier: But at the present time, at least for the last year, your reports are more detailed and show the number of calls made and the time spent on each in greater detail at least than they did in '49, is that right?

The Witness: Well, the reports for '49 were not re-

tained in the file because we usually don't retain them over a year or two I think at the outset.

Trial Examiner Hier: In other words, then, there are no reports for 1949 available at the moment?

The Witness: To my knowledge not, but I think we have a record of the number of calls made by the salesmen as to the number.

457 By Mr. Schrup:

Q. On each account?

A. Well, I think it's a total number of calls made in those areas, yes, for each territory.

Q. That is the total number of accounts of total number of calls made by a salesman in each territory he covers?

A. That is right.

Q. But is not broken down into the total number of calls by that salesman on a particular account?

A. Well, I don't know about that.

Mr. Sprowl: I don't think you recall his direct testimony and here it is at page 280. The question was: "How many times a year does the salesman of C. E. Niehoff call on each established customer of the Company?" The answer: "Well, the salesman is requested to call at least a minimum of four or probably an average of six to eight times. The situation varies a little bit in the territories. I would say that the average calls are six times a year."

Now, that is the whole testimony.

Mr. Schrup: I am interested in what he is basing it on, whether there are reports? Now, I understand there are none.

Trial Examiner Hier: All right, that point is covered.

By Mr. Schrup:

458 Q. Now, if I understand you correctly, Mr. Niehoff, you have no salesmen's reports for 1949 in your files at present?

Trial Examiner Hier: Twice he has said that.

Mr. Schrup: That is right.

By Mr. Schrup:

Q. Now, do you have any other records in your files such as expense accounts or anything of that nature which would enable you to have made any compilation with reference to 1949?

A. Well, I assume we do because we paid their expenses.

Trial Examiner Hier: You assume, but you don't know, is that it?

The Witness: I haven't examined the files, your Honor, in that connection so I can't make a positive statement.

Trial Examiner Hier: Okay.

By Mr. Schrup:

Q. Now, if I recall your testimony correctly, Mr. Niehoff, you testified that in 1949 the C. E. Niehoff and Company spent $100,439 in advertising and based on the total number of 866 customers that such expenditure amounted to $115.97 per customer. I think Mr. Sprowl will find that in the record at 304, is that correct?

Trial Examiner Hier: The record shows his testimony. There is no use in asking him if it is correct.

Mr. Schrup: I just want to be sure he understands.

The Witness: That is correct.

459 By Mr. Schrup:

Q. Now what does this advertising cost embrace?

A. It covers the cost of all advertising so far as the jobbing trade is concerned, catalogs, circular matters, trade paper advertising, signs, displays, technical literature and all factors that are necessary in the supporting data to make it possible for the jobber to function in the sale of this line.

Q. Now, was any of the material you discussed, except, of course, for the trade paper advertising dispensed to any potential customers?

A. Well, it was supplied to all customers, if that is —

Q. Was it supplied to anybody that was not a present customer?

A. Well, yes, a very small percentage of it might be because invariably when you get a lead or a prospect, he would get a catalog price schedule and so forth.

Q. And a potential customer is not one of those persons embraced in the figure 866?

A. You mean a prospective customer?

Q. Yes.

Trial Examiner Hier: That is perfectly clear on this record, 866 actual customers on the books.

Mr. Schrup: I am going to get that.

By Mr. Schrup:

460 Q. Now, in distributing your advertising media to the 866 customers which are your present customers, did each customer get an exact share of that?

Trial Examiner Hier: You mean an exactly equal share?

Mr. Schrup: That is right.

A. No, sir, that he would get some variation because the number of salesmen that the larger customer would have would give them that many more catalogs and price schedules and other data, see.

Q. Now, in breaking down your advertising cost, could you give us some indication as to what the amount was expended for, catalogs and things of that nature other than trade paper advertising?

A. I don't have the figures before me, but the catalog expense is a part of the items.

Q. A very substantial part?

A. Well, it's not—it's a substantial part, but it's not the bigger part.

Q. Well, would it be the single biggest item?

A. Oh, I would say that trade paper advertising is quite a big part of that.

Q. Would that be larger than the catalog expense?

A. Well, I would have to confirm that from the figures. I just at this moment can't say.

Q. Could you tell us of any expense now, in your 461 opinion, which would be more than the catalog expense?

A. Well, other than that, there's lots of expense in the way of literature and cost of certain items that make up this advertising cost.

Q. Yes, I know, sir, but what I am trying to find out now in breaking down this cost whether any of the single items were not your cataloging most expensive items?

A. Well, the desire to have and every customer carries its particular share of the load of the advertising costs. That applies to the smaller and medium and larger size customers.

Q. I am sorry, sir, but I think the answer can be answered yes or no. I don't want any explanation now as to what your reasons are. I just ask you to answer that question.

Mr. Sprowl: I don't know any rule of law that requires a witness to answer yes or no?

Trial Examiner Hier: Let's put the question to him again. The question, as I recall it, Mr. Schrup wants to know whether or not the expense for catalogs was accounted for in the major portion of the figure $100,427?

The Witness: I would say it's a substantial part, but not necessarily a major part.

Trial Examiner Hier: Fine. Off the record a moment.

(Discussion off the record.)

Trial Examiner Hier: Back on the record.

By Mr. Schrup:

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463 Referring to Respondent's Exhibit 2, that represents, as I understand it, Mr. Niehoff, on the basis of calls on a customer at $35.83 a call, $214.98 allocated for salesmen's calls against each customer sold by C. E. Niehoff Company regardless of the customer classification, does it not?

A. It does. These figures show the calls on —

Q. Yes. It shows the figure with respect to Automotive Wholesalers and Greiner, but it is not meant to be restricted to those two buyers?

A. That is an analysis specifically made as to the number of calls and the cost per call.

Q. That is right?

A. In a given area.

Q. Now, going to Respondent's Exhibit 1, you have computed that on the basis of six calls to a customer, the figure $35.83 per call and six times $35.83 represents the sum of $214.98 and on Respondent's Exhibit 2 you have charged those calls against Automotive Wholesalers and Greiner respectively in equal amounts?

A. That is right, sir.

Q. Now, that figure $214.98 as appearing on Respondent's Exhibit 2 would be the same figure as applied to all customers of the C. E. Niehoff Company regardless of jobber classification, would it not be true?

A. Yes, it would.

464 Q. Now, I will direct your attention, sir, to Commission's Exhibit 47-A and through 47-E. Now, on going through this Exhibit, it would be simple if I went through it with you. Now, I will ask you whether or not that Exhibit does not reflect at least twenty customers of different jobber classifications sold in the area covered by this Exhibit whose annual purchases from the C. E. Niehoff & Company were less than $214.98? It starts right up there at the top, sir.

Trial Examiner Hier: If you want this on the record, talk up she is not getting it.

By Mr. Schrup:

Q. A jobber in Albertville, Alabama, purchasing $202.00; a distributor without an agreement in Birmingham; a distributor without an agreement in Decatur, Alabama purchasing $78.89. I will let the witness go down the list if he wants to.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: Back on the record.

By Mr. Schrup:

Q. If the witness will go down the list?

A. I recognize on the list there are customers whose volume of business is less than $214. There might be good and sufficient reasons for that.

Q. There may be?

A. It may be representing a partial month's purchases
465 or it may—

Q. Now, this list, as I understand it, represents the annual purchases of each jobber on that list, doesn't it? Isn't that correct, sir?

A. Well, it does in one sense of the word, but if a customer only started to do business with us in 1949, it shows the 1949 purchases of one month or two months.

Q. I think you will find, sir, if you look at the last column on this exhibit, if there is any differentiation as to being out of business or purchases for less than twelve months, you will find it so specifies; but I am going to read some other questions, sir.

A. It may also be a question of credit that might effect the volume of the customer. I don't know.

Q. Now, in addition to salesmen's cost, there are other expenses, are there not, in selling a customer?

A. Yes, we have just talked about advertising expense.

Q. Now, referring to those customers that purchased from the C. E. Niehoff Company in less than $214.98 as depicted on Commission's Exhibit 47-A through 47-E, in addition to your selling costs to those customers there would be the cost of the manufacturer of the merchandise and the cost of the goods itself?

A. Yes. Administrative costs. There's a lot of costs involved in the handling of this merchandise to the customer.

466 Q. So that any sales just for a rough category that were actually under $214.98 would be sales for below your cost, would they not, sir?

A. Obviously, so.

Q. Now, I believe that during your testimony the other day in the last hearing, I guess it was, sir, you broke down the purchases of your four different customers types of classification into average purchases, did you not, sir?

A. Yes, I believe we did.

Q. Now, with reference to Commission's Exhibit 47-A through E, if you will examine it, is it not true, sir, that there are customers in various classifications on that list who bought more than the average amount computed
467 by you for their classification and lesser than the average amount computed by you for their classification.

Mr. Sprowl: I must say that Mr. Schrup has lost me. An average to me denotes that very fact.

By Mr. Schrup:

Q. How, in his opinion, can there be cost justified on the sales to jobbers below the average who get the same discount at average and those above the average?

Trial Examiner Hier: All right, you may answer
468 that question, Mr. Niehoff?

A. Well, we have a cost justification on all of these classes of accounts because it's obviously true that the servicing of the smaller account presents a higher cost factor to us then the account of the larger purchaser and that is justified by the factor of costs that are involved both in sales administration, handling of orders, production of orders, many items of that sort that enter into the cost factor and we are, in setting our price schedule based upon volume, we have a justification for it by virtue of the volume of business such accounts do, giving preference, slight preference in prices based upon the annual volume of purchases of each of those accounts.

Mr. Schrup: Maybe you misunderstood my question. I wonder if you would read it back to him.

Trial Examiner Hier: All right, read it back.

Mr. Sprowl: Now, as I understand Mr. Schrup, it is now his position we aren't charging the jobbers without an agreement enough price?

Mr. Schrup: You just let the witness answer the question.

Mr. Sprowl: I don't understand the question.

Trial Examiner Hier: Do you understand the question?

The Witness: Frankly, I am a bit confused on it.

Trial Examiner Hier: All right, if he is con-
469 fused, you won't get an answer. I confess I don't exactly know what you are driving at with that question. I know what your ultimate object is, but I don't think that question is pertinent. Off the record a moment.

(Discussion off the record.)

Trial Examiner Hier: All right, back on the record and you put your question. It seems to me in view of Mr. Sprowl's point you better stick to the discount getting categories. The principle is the same, but it avoids the objections.

Mr. Schrup: Well, let's refer to the record at page 309 and 311.

Trial Examiner Hier: I have it here.

Mr. Schrup: I want to show it to the witness.

Trial Examiner Hier: Oh, I see.

By Mr. Schrup:

Q. To refresh your memory, Mr. Witness, I show you the record at 309 through 311. I think you will find it on 310, most of the material. Now, according to the computation—

Trial Examiner Hier: Wait until he looks at it. Have you looked at it, Mr. Niehoff? Have you looked at this record, 309 and 310?

The Witness: He has the breakdown here.

Trial Examiner Hier: All right, let's go ahead. Go on, he is ready.

470 By Mr. Schrup:

Q. The average annual sales per account to jobbers without an agreement was computed by C. E. Niehoff Company as being $524, is that correct, sir?

A. That is correct.

Q. The average annual sales account to jobbers with agreements was $1719?

A. That is correct.

Q. And the average annual sales account to distributors without an agreement was $2,241?

A. And that is correct.

Q. And the average annual sales to distributors accounts with agreements was $12,128?

A. That is correct.

Q. Now, without referring to the commission, just an

overall answer on all your business all over the country, what I would like to get from you is your opinion of how can a discount system to the upper three classifications—forget the discount—be justified on an average cost, an average sales like that. In other words, if you would for the purpose of argument justify the sales to the average, how would that be a justifiable sales below the average?

A. Well, the base is, of course, your jobbers cost; that is the jobber without the agreement and we justified the cost of that base price on the basis of what it costs us

471 to service and do business to those accounts.

Q. You misunderstood me. The jobber without an agreement gets no discounts?

A. That is correct.

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474 Mr. Schrup:

Q. Mr. Niehoff, you have testified and correct me if I am wrong, to the effect that you have found it is

475 quite impossible to sell the official car dealer on Niehoff parts because of the prestige and leverage that they have with their car dealers and and on jobbers in particular you have found that likewise to be true. That is practically a quote from page 319 of the record. Now, I will ask you, do the original parts manufacturers attempt to sell Niehoff jobbers their products on the base of a lower price than offered such jobbers by the Niehoff Company on Niehoff products?

A. Well, the original parts people have a pricing program. It varies with the manufacturer. Auto-Lite for instance have a central that redistributes and sells their products through a warehousing setup or central, as they call it, to the jobber and their prices are sometimes higher than ours and there are instances where they are lower than ours.

Q. Now, are you talking about the list price?

A. I am talking about the jobber cost price.

Q. That is after the deduction of any available discount?

A. That is right.

Now, the Delco-Remy prgram is slightly different in so far as they have their own branches set up all over the country, their own warehouses and service these jobbers in that manner and through a large sales force they generally get a price that is slightly higher than ours, yet

there may be instances where their prices are as low
476 or lower than ours. They set the pattern in other words that we have to meet.

Q. In other words, they set the price less discounts which you attempt to meet?

A. Correct.

Q. Now, I understand you further that your list price after a deduction of discounts is in some instances higher than theirs and in some instances lower than there?

A. That is correct.

Q. Now, on the average is your list price less discount higher or lower than Delco-Remy or Auto-Lite's list price less the discounts from their respective people?

A. You are talking again of the trade or the jobber himself?

Q. Let's take the jobber list price on which you attempt to sell jobbers and the jobber list price upon which Delco-Remy and Auto-Lite attempt to sell jobbers. Now that list price after the deduction of the discount you give on it, after the deduction that Delco-Remy gives on it and after the deduction that Auto-Lite gives on it may result on any given item on a higher or lower price, is that right, sir?

A. Well, yes. It may be higher or lower.

Q. That is right. Now, on the average price for all your ignition line are your prices higher or lower than Auto-Lite?

A. There again it depends on the classification of the account you attempt to sell. In so far as their regular line of jobber is concerned, our prices are more favorable than Auto-Lite as an average.

477 Q. Now, are you talking about your prices now to a jobber with an agreement or jobber without an agreement?

A. I am talking about both. The base price—you call it a list price. I call it a jobbers base price.

Q. Base price is satisfactory.

A. And have to be competitive with the Auto-Lite or Delco-Remy price in order to allow us to merchandise our line.

Q. That is very true.

A. We have to offer our accounts an incentive or a margin of profit that is justified by cost factors because if we are not able to do this, if we would be only on the

same level as Delco-Remy or Auto-Lite, there wouldn't be much of a chance to get this business.

Q. Now, if I understand you correctly, Delco-Remy, we will say, would be considered a prestige line because of the fact you find it on the car when it comes from the manufacturer?

A. That is definitely so, not only that but they have all these warehouses and they have a large force of salesmen, probably many times greater than ours.

Q. Now, the same is true of Auto-Lite?

A. Auto-Lite operates in a slightly different manner.

Q. But I mean that would be also what you call a prestige line?

A. Definitely.

Q. Now, when you are selling your line of ignition in competition to those two lines which I am trying to
478 ascertain on the average, do they offer a lower price than you offer or a higher price to customers?

A. On the base price?

Q. That is right; the base price and when we talk about price, let's take into consideration the price less the discounts because that is the net price?

A. Yes.

Q. The net price we will talk about.

A. We have to bring our prices in line with Auto-Lite. In other words, to be reasonably competitive.

Q. Well, now, by that you mean your net price is under Auto-Lite's net price considering they are a prestige account?

A. As an average, yes.

Q. And talking about Delco-Remy as an average, are your net prices under the average of the net prices of Delco-Remy?

A. Yes, they are.

Q. And that is with reference to sales to your jobbers with or without an agreement?

A. Well, that is jobbers with the agreement are given the additional incentive or margin of profit on the line justified by our cost of operation or the cost of sales to these accounts.

Q. Well, when you talk about your net lower price on the average to customers, you are talking now with reference to the fact that your net lower price as compared to the Delco-Remy and Auto-Lite as on your net price to

your jobbers without an agreement and your jobbers
479 with an agreement or is it confined to one or the other of those classifications? Let me get it clear. Now, we have arrived at net price. In effect you have a different net price to offer to all four of your customer classifications?

A. Based on the volume of purchases.

Q. That is right. I mean you have a different net price? What I am trying to ascertain, is your net price to your jobber without an agreement below the net price of Delco-Remy and Auto-Lite? In effect your highest price is your net price to the jobber without an agreement, is it not, sir?

A. That is right.

Q. Now, that highest price at which you sell, is that below the net price of Delco-Remy and Auto-Lite?

A. The average is slightly below.

Q. That is what I was trying to arrive at.

Trial Examiner Hier: In other words, Mr. Niehoff, your competition from these two companies is primarily not price competition, but is service or what he calls prestige competition or distribution competition, distribution setup?

The Witness: Well, yes. They definitely have an advantage over us due to the many factors that enter into their method of operation. First, they have the car dealer demand. They sell to the jobber in competition. They are able to render more extensive service. They have a longer line.

480 Trial Examiner Hier: They also, I presume, travel on the preference of a car owner to replace a particular worn out part in his car with the same part that wore out. Is there such a preference?

The Witness: Well, I think there definitely is, yes.

Trial Examiner Hier: And your statement, if I understand it correctly, is that you have to sell below or more cheaply to any customer or offer to sell them Delco-Remy or Auto-Lite in order to overcome these other types of competition that they, as one man said, beat you over the head with?

The Witness: That is correct, yes, sir.

By Mr. Schrup:

Q. Now, Mr. Niehoff, is that true of any other competitor you meet in the ignition line?

A. Well, in the replacement field?

Q. That is what we are speaking about.

A. That situation is more acute in competition on price basis.

Q. Well, in other words, calling your attention to Respondent's Exhibit 3, those are what you would call the smaller competitors of yours in the ignition line?

A. Well, they are competitors. I don't say that they are smaller. They may be larger.

Trial Examiner Hier: He means smaller than the original car buyer.

The Witness: Yes, definitely yes.

481 By Mr. Schrup:

Q. Now, on that list who do you consider as your stronger competitor?

A. I don't know as I could say specifically. They are all competitors. They all enter the field and compete over the same customer that we compete for.

Q. All right. Will you do this: Will you start at the top and tell me who is the American Motor Products of Fond du Lac, Wisconsin? Now, are they a full line ignition people?

A. Yes, they are a full line parts people.

Q. What is the name of their line?

A. Well, they operate under the brand name of American Company, I believe, and it's the same company as Wells Manufacturing Company.

Q. At the bottom of the page?

A. Yes.

Q. That is what I thought. Now, are they a manufacturing company?

A. Yes, I believe they manufacture.

Q. Do you know in what area you compete with them?

A. In virtually all territories.

Q. Throughout the country?

A. Throughout the country, yes, sir.

Q. And is there a list price, that is the basic cost price, higher or lower than your price?

482 A. Their prices are generally lower and the comparison will show when we present it.

Q. That means when we are talking about basic net price that is their list price, their jobber list price?

A. Jobber base price and at any discount level that you might take it at.

Trial Examiner Hier: Let me suggest, why don't you stick to the term "customer's cost?" That takes in everything the percent and everything else.

Mr. Schrup: There's four customer's cost in the setup.

Trial Examiner Hier: It is still a cost.

Mr. Schrup: The highest customer's cost is the jobber without an agreement.

Trial Examiner Hier: All right.

Mr. Schrup: All right, we will talk about customer's cost and by that we will mean the price to the jobber without an agreement.

By Mr. Schrup:

Q. Now, then, I understand that with regard to American Motor Products of Fond du Lac, which is the same company as Wells Manufacturing Corporation at the bottom of the page in Respondent's Exhibit 3, their customer cost is lower than your customer cost?

A. Yes, their selling price to the jobber is lower
483 or jobbers cost on their line is lower than the Niehoff line.

Q. Now, what about the Andrews Manufacturing Company, the second company on Respondent's Exhibit 3?

A. Andrews Manufacturing Company's prices are lower at all levels than our prices are.

Q. And are they a fairly large-sized company?

A. Well, I don't know too much about their size. They have been quite active in the field during the last four or five years. I don't think they are as large as many of the others in the field.

Q. Where do you meet your competition with them?

A. Well, we meet them pretty well throughout the country.

Q. And on the Wells Manufacturing Company do you meet the competition in California?

A. Yes, we do.

Q. In New England?

A. I judge we do.

Q. Would the same be true of Andrews Manufacturing Company?

A. That is the same.

Q. By the way, what is the brand of Andrews Manufacturing Company?

A. I think it's Andrews.

Q. Now, they are a full-line ignition house?

A. Well, they have the complete wire line which we do not have in our line. So far as they are concerned,
484 they are complete on that and I would say partially complete on the ignition line.

Q. You are a full-line ignition house?

A. Well, whatever that means.

Q. I mean you service all the cars on practically all the items?

A. Try to.

Q. And American Motor Products and Wells Manufacturing Corporation, then we turn to Echlin Manufacturing Company on Respondent's Exhibit 3. Now, is that a full-line ignition house as we understand it?

A. Yes, I would say definitely.

Q. Now, their customer's cost, is that higher or lower than your customer's cost?

A. Well, their method of distribution is somewhat different in so far as they sell their products through what is known as the N.A.P.A. which is the national association.

Q. Do you have any customers in the N.A.P.A.?

A. Well, we haven't as such because we don't sell the N.A.P.A. unless there are cases where the jobber might have handled our line, but it's not generally the case.

Q. What about the F & B Manufacturing Company? By the way, where do you meet the competition of Echlin Manufacturing Company? Is that nation wide?

A. That is nation wide.

485 Q. What about the F & B Manufacturing Company? That is the fourth on Respondent's Exhibit 3.

A. Well, F & B has lower prices than we have.

Q. That is, their customer cost to jobber is in all cases lower than yours?

A. Yes, sir.

Q. What about Guaranteed Parts Company on Exhibit 3?

A. Well, Guaranteed Parts Company's base prices are somewhat in line with ours. However, their discount allowance generally runs considerably higher than ours.

Q. In other words, when you talk about the base price, that is their jobbers list price is a bit higher than yours?

A. Jobbers cost price is approximately, I would say, an average maybe of ours.

Q. About an average of yours?

A. Yes.

Q. But the net price, that is after the deduction of the discount, that is lower than your best discount?

A. Yes, sir, it is.

Q. And is it lower than your less favorable discount?

A. Yes, it is.

Q. And you meet competition nation wide with them?

A. Oh, yes.

Q. What about the Kem Manufacturing Company on Exhibit 3?

A. Well, Kem also have a complete line of ignition.

486 I think they have a full pump line as part of their business. They have national distribution in the more limited way mostly in the East, I think there distribution is and from what I have learned from time to time, they are quite strong on the Pacific Coast.

Q. And what about their customer's price?

A. Well, I am not too familiar with their jobbers cost prices and I have some figures on their discounts; but I haven't recently studied their price schedule.

Q. Let me ask you a question, sir, when you entered into the competition, we will say, with Guaranteed Parts Company, Inc. on Respondent's Exhibit 3 were the Niehoff products price always the determining factor of that sale?

A. No, if it were, I don't think we would get very much of this business.

Q. What is your reason for that answer, sir?

A. Well, we tried to in the merchandising of our line put in other ingredients that make it possible for us to sell our line in competition with lower prices. We have to be within certain reasonable limits, but we can't go beyond a discount such as we have now because of certain cost factors that are involved in that particular picture and it leaves us where we cannot always meet these extreme discount allowances of some of our competitors in this field.

Q. Then, as I understand you, if a customer de-

487 ciding whether he would adopt the Niehoff ignition, the D & D ignition line or any of the ignition lines on Respondent's Exhibit 3, price is not always a deciding factor? There may be such things as the quality of the merchandise, the demand in that particular area for that product and matters of that nature, is that not correct, sir?

A. Well, yes. The same holds true and you allow for

he prestige of the original parts manufacturer who finds t easier to compete in the field on the higher price basis.

Trial Examiner Hier: Is there any name on Respondent's Exhibit 3, Mr. Niehoff, whose prices are lower than yours?

The Witness: I think I have testified to that fact.

Mr. Schrup: There's a considerable number of those.

Trial Examiner Hier: I put it wrong. Whose prices are higher than yours? That is what I wanted to find out?

Mr. Schrup: We are going to go down the list because I would like to find out about these various possibilities. We have talked about P & D. Now, we are going to refer to Preferred Electric & Wire Company. Will you tell us about that, whether it's a full line ignition house and whether the competition is higher or lower?

The Witness: Well, Preferred Electric & Wire Company are quite an old established organization, but I think that their type of distribution is not directed to the 488 jobber. I think their distribution goes to a different class of accounts because we don't encounter them in the field with the jobber.

Q. Do you encounter them at all?

A. No, because we discount.

Q. In other words, with the sale of ignition you are not in competition with Preferred Electric & Wire Company?

A. Well, we are in competition with them at least indirectly.

Q. What type of account do they sell?

A. I would like our sales manager to qualify that, but I am not too familiar with their operation, so I can't tell you that, about the records of people of that nature.

Q. Now, what about the Shurhit Products, Inc. on Respondent's Exhibit 3?

A. The Shurhit Products, I believe, generally handle their distribution to jobbing outlets, but they have a sort of a warehouse distribution setup and I would say, oh, generally competitive to ours.

Q. Do you know the area where you meet with their competition?

A. We meet their competition in all areas of the country.

Q. What about their customer prices, is it higher or lower than yours?

A. Well, I wouldn't be able to make a definite statement on that point because I haven't in mind now just as

to their line of prices, but it's obviously true that they
489 are probably approximately in line with our prices and that of other competitors in the field, maybe higher or lower, I can't say.

Q. Now, turning to the P. Sorenson Manufacturing Company, are they a full-line ignition house?

A. Yes, I would say they are.

Q. Where do you meet with them in competition?

A. They have national distribution.

Q. And is their customer price higher or lower than yours?

A. Well, I think their customer price is considerably lower than ours.

Q. That is, their jobber list price after all discounts have been deducted, is their customer price lower than your supreme discount price?

A. Yes, I would say definitely.

Q. It is?

A. Yes, it is.

Q. And Standard Motor P. ducts on Respondent's Exhibit 3, do you consider those people a full-line ignition house?

A. Yes, they are a full line.

Q. And what area of competition do you meet those people?

A. They have national distribution and we meet their competition in all fields.

Q. Is their customer price higher or lower than yours?

A. I would say their jobbers cost price or base price is pretty well in line or averages about pretty close to
490 our prices.

Q. I see. Now, after the discounts that they give are deducted and the discounts you give are deducted, the net price of your products is higher or lower than their products?

A. Their discount is a longer discount and therefore their price is lower than ours.

Q. Now, has Standard Motor Products ever taken customers away from you?

A. I would say very definitely they have, yes.

Q. Have you ever taken customers away from Standard Motor Products?

A. I hope we have.

Q. Now, you have stated definitely you lost some

through them. Can you state definitely whether you gained some?

A. I think we have lost in instances of certain groups to which Standard was selling their line. I think we have lost an appreciable amount of distribution in their area.

Q. What groups were you selling that you lost to Standard Motor products?

A. We were selling no group outside of the Cotton States in 1949 or any time since that time.

Q. Previous to that date what group were you selling that you lost to Standard Motor Products?

A. Well, it isn't the loss of the group. It's the loss of the individual customer who has joined the big groups.

491 Q. That is right.

A. That I was referring to.

Q. I understand how that operates. Now, would you name the groups in which these original customers operate?

A. I think Mr. Geyer would be able to give you that information because he covers the territory while I know of the groups such as the southwest group operating in the southeast and there's several groups in Texas. There are some groups out west I am not specifically apprised of there.

Q. Well, is it my understanding from you, Mr. Niehoff, that when a competitor of yours makes arrangements with a group that you are selling who either joins their group or belongs to that group that you will lose those accounts?

A. Well, it doesn't necessarily follow, but we have lost some.

Q. Now, what about the accounts—Mr. Geyer will be the gentleman who can tell us about the accounts obtained from Standard Motor Products?

A. I said we hope to obtain some of theirs. I couldn't tell you momentarily. I think we obtained one I know of in Chicago several years ago.

Q. Is that a basis of price?

A. No, because they had a better price than our cost to them.

Q. That is the net cost to the customer?

492 A. Yes.

Q. You are speaking about Standard Motor Products, Inc.?

A. I am talking about the jobber that we acquired.

Q. That is right.

A. Who had a standard line.

Q. He had the Standard line and he was paying a lower price for that line that what he paid you when he became your customer? He paid your higher price when he became your customer than he was previously paying the Standard Motor Products people, is that correct?

A. I think that is true, but I would like to have Mr. Geyer verify that because he is familiar with the account and I am talking about the Chicago distributor now.

Q. Now, the Automotive Specialty Corporation on Respondent's Exhibit 3, who are they?

A. Automotive Specialty are a full-line ignition house established a long time. They are good people and I don't know too much about their competition, but I would think they have national distribution, but not extensive distribution in this area.

Q. Now, is their net price to the customer higher or lower?

A. I am not familiar with their price schedules whatsoever.

Q. What about Tungsten Manufacturing Company on Respondent's Exhibit 3?

493 A. They are manufacturers of, I would say, a fairly complete line of ignition parts and I think their distribution is mostly through mail order house and chain stores.

Q. And is their net price to the customer lower?

A. They sell some few selected jobbers on a rather low price basis, I think—I wouldn't be able to say.

Q. Do they compete with you?

A. In a limited way, yes, they do.

Q. In what area would they compete with you? What area?

A. Well, specifically they might compete with us anywhere in the United States.

Q. Generally you consider them competitors, is that right?

A. Well, the fact is their distribution is primarily with the mail order chain stores which we do not sell or we can't sell and so we don't consider them as a very active competitor. We will put it that way.

Trial Examiner Hier: Does that finish that Exhibit?

Mr. Schrup: Yes, that is, for the time being.

Trial Examiner Hier: We will quit now. We can't get through with this witness tonight.

Mr. Sprowl: You want Mr. Niehoff back in the morning, I take it?

Mr. Schrup: Yes.

Trial Examiner Hier: What time will be convenient?

Off the record.

494 (Discussion off the record.)

Trial Examiner Hier: All right, we will adjourn until 10 o'clock tomorrow morning in this room.

(Whereupon, at 4:55 o'clock, p.m., September 4, 1951, the hearing in the above entitled matter was adjourned until Wednesday morning, September 5, 1951, at 10 o'clock, a.m.)

495 Room 1500, 173 West Madison St., Chicago, Illinois, September 5, 1951

Met, pursuant to adjournment at 10:00 a.m.

Before: Frank Hier, Trial Examiner.

Appearances:

Eldon P. Schrup, Attorney for the Federal Trade Commission.

Charles R. Sprowl, Taylor, Miller, Bush & Wagner, 134 South LaSalle Street, Chicago, Illinois, Attorney for the Respondent, C. E. Niehoff & Company, Inc.

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Trial Examiner Hier: Mr. Niehoff resumes the stand for further cross-examination.

C. E. NIEHOFF resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Schrup.

Q. Mr. Niehoff, I hand you copies of Respondent's Exhibits 3 and 4.

Referring to Respondent's Exhibit 3, would it be fair to state that over the years, despite the difference in prices existing between your firm and the various firms listed on Respondent's Exhibit 3, that you have both gained some

business from those firms and lost some business to those firms?

A. Well, our greatest gain is from the growth of the industry, I would say, although we may have gained some from some of the factors in the field.

Q. As a matter of fact, you probably obtained some business from some of those competitors and lost some to some of the competitors?

A. Yes, we have lost some to the competition.

Q. You have also gained some from the competitors, too, sir?

A. I think we have in some instances.

Q. Now, then, turning to Respondent's Exhibit 4,
497 that is the list of hydraulic competitors of the C. E. Niehoff Company?

A. That is correct, sir.

Q. Would you tell us who the first concern is, the Brake Parts Company?

A. Brake Parts is a Chicago concern selling a complete line of hydraulic brake parts.

Q. In what areas do you meet competition with the Brake Parts Company?

A. Well, I think their operation is primarily to such classes of trade where we do not meet with any extreme competition from them.

Q. Would you explain that a little bit more fully?

A. Well, they sell special accounts, and actually I don't know who they sell, but we do not come in contact with the Brakes Parts Company in the resale of our products to the jobber.

Q. In other words, they are not competitors of yours in that field?

A. No, they have an affiliated company, United Parts Manufacturing Company which operates and sells their products to the NAPA set up, and therefore indirectly we do come in competition.

Q. You sell no NAPA outlets, do you, sir?

A. No, not directly.

Q. Do you sell any indirectly?

498 A. Well, we come in competition with them indirectly.

Q. That is, your customers come in competition with NAPA, is that it, sir?

A. That is right.

Q. Will you explain who the Chefford Master Manufacturing Company are?

A. Chefford Master Manufacturing Company is in the brake parts line which is not their principal line, and to my impression they sell mostly to mail order houses and chain stores.

Q. You sell no mail order houses or chain stores, yourself, do you?

A. No, we haven't been selling them.

Q. Will you tell us who E. Edelmann and Company is?

A. Yes, I think E. Edelmann and Company is not a factor in the hydraulic parts line.

Q. They are not a factor?

A. No, sir.

Q. Will you tell us who Eis is?

A. Eis Automotive Corporation is an active competitor of ours nationally and have a complete line of hydraulic parts.

Q. Speaking now of net price, that is, your jobber's cost, the price after the deduction of all discounts, is that net price higher or lower than the net price of Eis Atutomotive Corporation?

499 A. Their prices are somewhat lower than ours, and it is particularly true with the larger customers.

Q. That is, they give a longer discount than you?

A. That is right.

Q. What about SUPCO Products Corporation?

A. SUPCO Products Corporation is also a full line brake parts manufacturer and distribute their products nationally, and we do run into competition with them in various areas.

Q. And speaking again about the net customer price, is your price higher or lower than theirs?

A. I would say that from my limited knowledge of their prices, that it has been reported that their prices are more favorable to the large customer than ours.

Q. Do you not know that as a fact, though?

A. Well, I would say yes, I would say yes, I do.

Q. Who is the Thermoid Company?

A. They are more recent competitors in the brake parts field, and their principal line is brake lining. They are a very aggressive company and they are competitors of ours, nationally, on a national scale.

Q. And the net price, is it higher or lower than yours?

A. Their price is I would say somewhat in line with ours.

Q. Well, would you say it was higher or lower?

A. No, I wouldn't say it is either higher or lower, it would vary, but I think that generally speaking from 500 my knowledge, their price is somewhat in line with ours.

Q. How about Wagner Electric Corporation, who are they?

A. Wagner Electric Corporation has a very complete brake parts line. They are well established and do extensive advertising both to the trade and to the consumer, and are the leading factor in the competition nationally throughout all areas of the country.

Q. And their net customer price, is it higher or lower than yours?

A. Their customer price is slightly higher than ours.

Q. Slightly higher than yours?

A. Yes.

Trial Examiner Hier: Then on Respondent's Exhibit 4 you can disregard the first three names there as being competitive factors?

Mr. Schrup: Yes, I think it comes down to Eis, SUPCO and Wagner as being competitive factors.

The Witness: I would agree, yes.

Trial Examiner Hier: You get your stiffest competition from Wagner?

The Witness: It is like in the case of General Motors and Delco Reamy, they are the original equipment, in some instances, and they carry the prestige of having been established in this field for a long time and do a terrific amount of advertising, and, further than that, they have their 501 own branch warehouses set up throughout the United States. They probably have as many as 20 or 25 established warehouses all over the country and are able to render a service, an extensive service to their customers from these warehouses.

They are also extensively represented by many more salesmen than we have in the field.

By Mr. Schrup:

Q. You are speaking of Wagner now, sir?

A. I am talking of Wagner Electric Corporation.

Q. When you talk about original equipment, you mean

Wagner supplies parts originally installed in the car and also supplies replacement parts?

A. I believe that would be true.

Q. Now, are there any hydraulic competitors of yours that are not on this list?

A. There may be, but I do not know that they would be of any consequence.

Q. I will call your attention to and ask you the further question as I have in the other instances, despite the difference in prices to your customers over the period of years, is it fair to say that you have both gained and lost business to the competitors listed on Exhibit 4?

A. We have gained some business from the E. Edelmann Company and we have gained, I would say, no business from the other three accounts, namely Eis or Supco 502 or Thermoid, that I can recall.

Q. Do you recall losing any business to them?

A. Well, yes, we have lost business.

Q. You can't recall gaining any?

A. We haven't gained any from those accounts. We might have gained some accounts from some of them, but I wouldn't definitely say so because our development in the hydraulic brake parts field is rather limited, and as I think it was reported in the testimony, it amounts to seven or eight per cent of our total volume, and it has been the development of accounts that we have had in the ignition field, and the hydraulic parts line that we have primarily served in this field.

Q. Now, turning your attention to the ignition field, what percentage of the domestic market for the year 1949, for instance, would you say that the Niehoff Company had?

A. Probably one-tenth of one per cent of the entire volume.

Q. In the ignition field alone?

A. In the ignition field alone, yes.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Correction should be noted in the record at page 342. The present witness gave an answer to the effect that the Bureau of Census figures for the year 1949 showed 503 sales of automotive parts, $1,912,000."

This should be $1,912,000,000.

Is that about right, Mr. Niehoff?

The Witness: I believe that is the correct figure.

By Mr. Schrup:

Q. Now, then, referring to page 343—

Trial Examiner Hier: Yes.

Mr. Schrup: The question was asked what percentage of that business,—I take it it is the Niehoff Company,—what percentage of that business did you do, and that figure relates to the entire auto market, as I understand it, and not the ignition field, but my question relates to what percentage of the ignition field did the Niehoff Company do.

Trial Examiner Hier: All right, that is the question.

The Witness: Well, without reviewing the figures, I would say that it would be somewhere around one per cent of the market instead of one-tenth of one per cent.

By Mr. Schrup:

Q. That is, of the ignition field market?

A. Yes.

Q. Now, referring to Exhibit 3 and the competitors listed there, would any one of those competitors have more than one per cent of the market?

A. I don't know what volume these competitors do.

504 Q. From your familiarity, we have discussed them, about meeting their competition, you would have some idea of their size, would you not, sir?

A. It is rather difficult to determine that from my point of view without having the figures of the competitors.

Q. Well, would there be any one competitor on that list that you would say does a more sizeable business than you do?

A. There might be several.

Q. Who would th oe, sir?

A. Well, I wouldn't like to make any statement on that because I don't have the figures to verify it. Anyway, I can't determine it.

Q. Would there be some accordingly that would in your opinion do less business than you did?

A. I believe there is some on the list that do.

Q. That is, referring to Respondent's Exhibit 3?

A. Yes, sir.

Q. Now, Mr. Niehoff, referring to Respondent's Exhibit 4, when I was examining you yesterday I believe I neglected to ask you about the P&D Manufacturing Company.

Will you tell us who they are?

A. The P&D Manufacturing Company are a well estab-

lished firm handling a complete line of ignition parts, also fuel pump parts, and have national distribution.

Q. Then referring again to the net customer price,
505 is it higher or lower than the Niehoff Company's customer price?

A. P&D prices as I recall from having reviewed them the last time are generally, I would say, in line, although I think we are going to present some comparisons which will give you the facts in the matter.

Q. Would you say over the years you have both gained and lost some business to the P&D Company?

A. No, we have lost a great deal more to them than we have gained.

Q. But you both lost and gained business from them?

A. Yes, just the other day we lost an account to P&D due to the better discount they had quoted.

Q. Now, was that a special discount or their general published discount?

A. Well, I would say it was their extreme discount, as I understood it.

Q. That is, their publicly announced discount?

A. I think it is generally known, and whether it is publicly announced, I don't know.

Q. It isn't a specialty where they departed from their normal discount structure?

A. I believe not. I don't know specifically whether they have other discounts beside that.

Q. Then at the very bottom of the list, Respondent's Exhibit No. 3, we have the Wells Manufacturing Corporation.

506 Is that just another name for the American Motor Products at the top of the list?

A. I am not altogether certain, it may be a separate corporation from the American Motor Products Company. They are both in Fond du Lac, and they are, to my knowledge, generally operated by the same personnel, and they approach the jobbing trade more generally than the American Motor Products.

Q. Are your net customer prices higher or lower than the Wells Manufacturing Company?

A. Their prices are generally lower.

Q. Now, if I understand you correctly, Mr. Niehoff, it is your testimony that the new car dealers' ignition replacement business is more or less restricted to the manufac-

turers of the original parts, that is, the parts that are installed in cars?

A. Well, the car dealers are definitely restricted by virtue of his car franchise, and he has to buy the original parts to service that car.

Q. That would be true of all new car dealers, such as Ford, all of the Chrysler line, General Motors line?

A. More or less so, yes.

Q. Now, as I understand it, Niehoff issues a special catalog on Ford parts, ignition parts, we are talking about, does it not, sir?

A. The Niehoff Company did so in '48 or '49, but
507 hasn't published such a catalog since that time.

Q. As I understand it, the purpose of that catalog was to sell authorized Delco-Reamy or Auto Lite official distributors who would not accept any ignition light except on Ford parts, is that correct, sir?

A. That is correct, sir.

Q. These authorized or official distributors of Delco-Reamy and Auto Lite, they were jobbers, were they not?

A. They were generally recognized as jobbers, yes. They also, as a general rule, not in all instances but in many instances render service to the car owner.

Q. They are not new car dealers, though?

A. They are not new car dealers, no.

Q. Now, would it be fair to state that all of the competitors of yours listed on Respondent's Exhibit 3 have the same problem as your concern does in meeting this competition?

A. Meeting the competition of the original parts people?

Q. Yes?

A. I would say to a high degree, yes.

Q. Now, you do not attempt, of course, that Niehoff, sells directly to car dealers direct, do you?

A. No, we do not sell car dealers.

Q. The failure of a Niehoff jobber to sell to a new car dealer is due not to price but to the fact that they have the franchise for the car manufacturer, is that correct, sir?

508 A. I would say it was due to both factors, but probably the predominating factor is that they are tied up under their car franchise arrangement with the factory, with the car factory.

Q. Now, Mr. Niehoff, when did the Niehoff Company first adopt their volume discount schedule?

A. Sometime in the '30's, the late '30's I would say.

Q. That discount schedule has been subject to changes from time to time?

A. Yes, based upon such cost factors as we have been able to establish justifying the price differential that we allow to these larger buyers over the smaller buyers.

Q. Do I understand, then, every time—I mean, before you adopted, before you first adopted a volume discount schedule, and prior to every revision in the discount schedule, you made a cost study?

A. Well, in a sense, we did, yes.

Q. In a sense you did.

What did you do?

A. We tried to determine the factors of selling and merchandising and advertising and manufacture, and handling of the orders as a differential factor to justify fully these various price allowances that we make based on the customer's volume of purchases.

Q. Prior to your most recent change in your volume 509 discount, did you also make a cost study?

A. Well, the most recent change is a matter of some years back, yes.

Q. When was your last change, sir?

A. I think '48 or '49.

Q. Is that cost study available now, sir?

A. No, sir, it is not.

Q. Did you destroy it?

A. Well, I wouldn't say that we destroyed it because I don't know that it is available, because I don't know where it is.

Q. Can you take steps to find it, sir?

A. I would be glad to, but I can't determine the factor because I don't know where it is.

Q. The cost study that you are preparing to present or have presented in part, during this hearing and the past hearing, that has been prepared since your last revision and change?

A. Yes.

Q. And the prior cost study before this hearing is not available for comparison, is it, sir?

A. Well, there are lots of factors entering into the establishment of the cost differential which we feel we are fully justified in the difference in volume of prices that we quote. It is sometimes a difficult problem to give you a figurative analysis of it, but it is definitely there, and I

know in my opinion that these prices which we allowed,
510 the differential based upon volume, are fully justified, in my opinion.

Q. Maybe you misunderstand me, Mr. Niehoff, I am not talking about what your opinion is as to justification, I am talking about the availability of the cost study, the one prior to your recent changes, for comparison with the present cost study which you are undertaking.

A. Well, actually I don't know that is is available. I don't believe we destroyed it because we had no objective to destroy it, but we had no reason to retain it.

Q. You are going to look for it, sir, and you will advise if you do find it?

A. As a matter of fact, I have looked for it, but I don't know,—if it is available, certainly, but I don't know where it is.

Trial Examiner Hier: Mr. Niehoff, if you have a cost study which was made before the discount, it would be of more appropriate value than a cost study made now which has been related back, and if you can find those documents, it seems to me it would settle that issue one way or the other.

If you can locate them, it would be of considerable value.

The Witness: Your Honor, the point I would like to make, in the establishment of this volume discount allowance, it wasn't just an arbitrary allowance, it was based upon the fact of costs, selling, merchandising, adver-
511 tising, the handling of the smaller and larger accounts, to justify the difference. It was based upon good sound reasoning and I know that those factors were very carefully reviewed from time to time and it is one of those factors that, as I said before, cannot be easily established figuratively, but I know the difference exists there, and our price schedules, the way they are established, are attainable to most or the majority of the customers. In other words, they can obtain the five or ten per cent discount, and if they do a substantial business, they can obtain the maximum discount.

By Mr. Schrup:

Q. Mr. Niehoff, while we are on that subject, you state you have 866 accounts?

A. That is right, the record shows that.

Q. How many of your accounts get your distributor with agreement classification?

Mr. Sprowl: Might I interrupt there, your Honor?

We noticed in the record that we have the percentage of accounts—

Mr. Schrup: I am coming to that.

Mr. Sprowl: It is a calculation, but to avoid the calculation, Mr. Niehoff gave me the precise figures for 1949, and I have them here. I don't know as he could recall them from his own memory.

Trial Examiner Hier: They came from him originally?

512 Mr. Sprowl: Yes.

You took these off your yellow sheet last night, Mr. Niehoff, and they are the four figures at the top.

This is for 1949, your Honor.

Trial Examiner Hier: The question is how many distributors with agreements were there in 1949?

The Witness: Distributors, 98, sir.

By Mr. Schrup:

Q. Now, sir, does that figure of 98 include each individual member of the Cotton States?

A. I don't believe so. It includes the Cotton States.

Q. As an entity, but not the individual members of it, does it?

A. I don't believe the original members were included.

Q. That would increase the figure, would it not?

A. It would, by a small amount, five, six or seven.

Q. Would you go to the next lower classification of accounts, that is, the distributor without agreement?

How many are there in that category?

A. Distributors without agreement, it is a total of 241.

Q. Then jobbers with agreements, which is your next lowest category?

A. 228.

Q. And how many jobbers do you sell without agreements, who have no discount whatsoever?

513 A. 299.

Q. 299?

A. Yes, and that represents only about seven or eight per cent of our total volume of sales.

Mr. Sprowl: That is the J accounts?

The Witness: That is the J accounts, yes.

As I recall, the JA's represent the figure of about 18 per cent of our volume.

By Mr. Schrup:

Q. Then, as a matter of fact, as to the discount accorded your customers by the Niehoff Company there are 299 that receive no discount whatsoever?

A. There are 299 accounts that didn't have a JA contract.

Q. That means that when they have no JA contract they have no discount whatever on their purchases?

A. I would assume so, but it doesn't necessarily follow that that situation prevails.

Q. What was the figure you gave for jobbers without agreements?

Trial Examiner Hier: With agreements, 228.

The Witness: 228.

Mr. Schrup: Then that means we have 520 customers of the Niehoff Company that are not getting the top discount?

The Witness: Yes, the figures would show that they are not getting extreme discounts.

514 By Mr. Schrup:

Q. What is the figure you gave for the distributor?

A. 241.

I think that represents about 25 to 28 per cent of the volume for 1949.

Q. They were substantial purchases, then, each one of them?

A. Yes, they were quite substantial purchases.

Q. But still they got less discount than the distributors?

A. Well, the 98 distributor accounts represent about 48 per cent of the total volume, on nearly a million dollars of our business, or 50 per cent of our entire volume.

Q. But in various instances, is it not true, that jobbers with agreements purchasing from Niehoff and Company purchase more from Niehoff and Company than jobbers without agreements purchase from Niehoff and Company?

Trial Examiner Hier: The JA's purchase more than the D's in some instances?

The Witness: That may be true of some, in exceptional cases, yes.

By Mr. Schrup:

Q. Now Mr. Niehoff, do your customers, in their various jobber classifications that we have been talking about compete in the sale of their products from car dealers in the sale of products handled by the car dealers as far as

attempting to sell independent garage men, repair
515 men, and filling stations?

A. Yes, the car manufacturer has his own distributing organization selling these parts, and we have to compete with them.

Q. That is in sales, that is, your jobbers compete with the car dealer in sales to independent repair men, independent garages, filling stations, outlets of that nature?

A. Yes, particularly—well, it applies to all of them, and I know that Ford Motor Company has a very extensive campaign on with warehouse facilities all over the country competing against our jobbers.

Q. I would like to ask you this question, sir;

Referring to Commission's Exhibits 6B and—well, exhibit 6B is the C. E. Niehoff and Company wholesale confidential price list of August 1, 1949 and 6C is the C. E. Niehoff and Company dealer price, August 1, 1949,—now those are your suggested resale prices to that customer classification by your jobbers, are they not, sir?

A. That is correct, sir.

Q. Are those suggested resale prices of the Niehoff Company depicted on Exhibits 6B and 6C, are they higher or lower than the prices offered by car dealers to the outlets to which the jobbers of C. E. Niehoff and Company are attempting to sell?

A. These suggested schedules are generally a bit lower than the car manufacturer prices on their similar prices.

Q. To whom, sir?

516 A. Well, to their trade.

Q. By the trade you mean the type of trade that—

A. That our jobbers would solicit, if they solicit those accounts, or a car manufacturer would solicit.

Trial Examiner Hier: Is that true of the dealer and the wholesaler both? Or just the one?

The Witness: Well, I will clarify that in this way, that both AutoLite and Delco-Reamy have set the price pattern and have differential prices to different classes of their trade, and that establishes the basis, really, for the prices that we have here.

By Mr. Schrup:

Q. In other words, Delco-Reamy and the AutoLite, and, well, say, Ford, wholesalers or jobbers in attempting to sell not car dealers, now, but in attempting to sell retailers such as the independent garagemen, the repair men, the filling stations, and outlets of that nature in

competition with your jobber, their prices are higher than your suggested resale prices as represented by Commission's exhibit 6B and 6C, is that correct, sir?

A. I wouldn't say that is. I would say that it is correct in a sense, although it is not uniformally true.

Auto Lite uses one method and we try to meet their prices by making our suggested schedule slightly lower than theirs, and I would say that that is also true on
.517 the Delco-Reamy line.

Now, Ford's method of distribution is a little bit different, and his price competition is sometimes lower than ours.

We cannot sell the Ford dealer and meet Ford's prices.

Q. I am not talking about sales to Ford dealers now, sir, I am talking about this:

Can your jobbers meet the Ford dealer in selling the independent garagemen and other outlets of that nature? Are your prices as represented by Commission's Exhibits 6B and 6C lower than Ford's prices in that connection?

A. Specifically Ford, I doubt it very much.

Q. You do not know, though?

A. Well, I haven't actually made a comparison in the last few weeks so far as Ford's prices.

Q. You have made?

A. I have not recently.

Q. When was the last comparison you made?

A. Oh, probably a year ago.

Q. At that time were the Ford prices higher?

A. No, the Ford prices were to the trade accounts maybe higher on a few instances, but generally they are quite competitive, I would say.

It is rather difficult with the hundreds of items to
.518 have to check to be specific on that point, especially when it comes from memory.

Q. Now, the same situation as you have related with regard to your competition in this matter with Delco-Reamy and Auto Lite and Ford would be applicable to your competitors as set forth on Respondent's Exhibit 3, would it not?

A. Yes, I believe that would be a correct assumption.

Q. Now, your customers who buy from you under your various jobber classifications are competitive with the customers of your competitors on Respondent's Exhibit 3, are they not, sir?

A. Not in all instances, no.

Q. But in many instances they are, are they not, sir? That is, they are competing to sell the same outlets?

A. Well, I am a little confused on the question, I am sorry.

Q. You have customers in your various jobbing classifications who are competing with the same outlets as customers of your competitors, being the competitors listed on Respondent's Exhibit 3, have you not, sir?

A. Yes, the jobber handling Guaranteed would be competing with the Niehoff jobber in the area.

Q. And for instance a jobber for Standard Motor Products, Inc., in the same trade area as a jobber for C. E. Niehoff and Company would be competing for resales and independent garage sales and filling station sales and so forth?

519 A. Yes, that is correct.

Q. And that would apply also to, well, any of the competitors listed on Respondent's Exhibit 3, would it not, sir?

A. More or less so, if they sell the jobber, yes.

Q. Well, then, that being true, would it not also be true that every jobber of yours located in the same trade area with another jobber of yours would likewise be competing for the same resale outlets such as the independent garagemen, filling stations and repair stations, and outlets of that nature? Is that not so?

A. That would be true.

Q. Now, Mr. Niehoff, is it not a fact that the jobber who gets the lowest price from C. E. Niehoff and Company, disregarding any other factors, not within the control of the C. E. Niehoff Company, has a distinct advantage over a competitive jobber of C. E. Niehoff and Company merchandise who pays a higher price for that same merchandise?

A. No, I don't believe so.

Q. What are your reasons for that, sir?

A. Well, the jobber that—

Q. Now, the question, you must remember, sir, is limited to—

Mr. Sprowl: No, the question is—

Mr. Schrup: I am not discussing any factors not under the control of C. E. Niehoff and Company.

520 Mr. Sprowl: Now, Mr. Examiner—

Mr. Schrup: You have the question.

Mr. Sprowl: The question is what are his reasons.

Trial Examiner Hier: Just a minute, read the question back.

(Record read.)

Mr. Schrup: I want to amend the question.

Trial Examiner Hier: Withdraw it, then.

Mr. Schrup: I will withdraw the question.

Mr. Sprowl: I object to the withdrawal of the question. I think he is entitled to state his reasons, your Honor.

Trial Examiner Hier: He can always withdraw a question the same as you can.

Mr. Schrup: I want to ask the question what are your reasons for stating so having in mind the limitation of the question of disregarding any factors not within the control of C. E. Niehoff and Company.

521 Trial Examiner Hier: Answer that question.

Mr. Sprowl: That question is not answerable.

Mr. Schrup: Now, Mr. Sprowl, let your witness decide that.

Mr. Sprowl: I will still repeat that I don't believe so.

Trial Examiner Hier: He wants to know your reasons for saying so.

The Witness: Well, in the first place the basis for our selling price is fully attainable to any of our accounts and it is a matter of the jobber's cost of operation that enters into that.

524 The Witness: I still don't believe that anyone of the buyers have any advantages over the other in their merchandising of the line. A certain pattern has been set rather definitely by the original parts people in the field as to the level at which competition has to be met and our prices are such that any of our jobbers can meet those prices.

Mr. Schrup: Well, I don't think you are giving me 525 the answer. Let's phrase it this way.

Mr. Schrup: I move the voluntary statement of Mr. Sprowl be stricken.

Trial Examiner Hier: Motion denied. Leave it there. Go ahead.

By Mr. Schrup:

Q. Is it your statement that a jobber buying your merchandise in a given trade area who gets a discount of 10 and 7 per cent from your jobber list price and who

sells that merchandise in competition with another jobber in the same area buying Niehoff merchandise that does not get any discount, does not have an advantage over the jobber that does not get a discount?

A. No, because of the definite competitive pattern that has been set, as I said before, by the original parts people.

Q. I don't see what that has to do with it, sir, and I am trying to find out the competition disadvantages that occur between a jobber getting a discount selling in competition with your own jobber getting a 10 and 7 per cent discount.

We are talking about two jobbers who are of necessity selling these same products in competition in the same area, one who gets no discount on the merchandise and one who gets a discount of 7 and 10.

Mr. Sprowl: I move the argumentative question of Mr. Schrup be stricken and that he put a question to the witness.

527 Trial Examiner Hier: Put it in a question form.

By Mr. Schrup:

Q. Mr. Niehoff, I want you to take the situation in answering this question which I will put to you and after I relate the situation to you you may answer.

You have two jobbers in the same trade area purchasing Niehoff merchandise, the same merchandise, and one of those jobbers who purchases from Niehoff gets a discount of 10 per cent off of the invoice and at the end of the year gets his 7 per cent merchandise credit. In other words, he has obtained your top discount.

The other jobber in that area is a jobber without an agreement who is purchasing we will say a thousand dollars worth, or not quite up to what you said is the twelve hundred dollar minimum for obtaining a discount.

Now, as between the two jobbers, the one who gets your top discount, and the one that gets your lesser discount, is it your opinion that the jobber that gets no dis-
528 count is at a disadvantage or does he have an advantage over the jobber who gets the discount?

A. Well, the small buyer may have an advantage over the bigger buyer.

Q. As a result of the price?

A. As a result of his method of operation.

Q. That is what I—

• • • • •

529 The Witness: The smaller buyer also has the opportunity of obtaining the larger discount through his purchases, and therefore he is placed in a favorable position to compete.

By Mr. Schrup:

Q. You are talking about a completed transaction now, sir, were he has bought certain merchandise from you at a certain price, and the one jobber has merchandise at 10 per cent off the invoice and the merchandi e credit of 7 per cent, at the end of the year, which he obtains at the expiration of his contract. The other jobber on the same merchandise which he is competitively retailing with the favored jobber obtains no discount.

530 Now is it your opinion that as a result of the price alone there is no disadvantage to the smaller jobber?

A. No, I stated that the discount is obtainable to all of our customers and that our price alone is such that even the smallest customer can obtain the highest discount alone.

Q. Now, Mr. Niehoff, is a discount advantageous to your customer?

A. Under certain circumstances, yes, it is.

Q. Under what circumstances would it not be advantageous to your customer?

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531 (Question read.)

The Witness: Well, again I say it depends upon the jobber's type of operation. There may be times when it is an advantage and there may be times when it is a disadvantage.

By Mr. Schrup:

Q. Now, in other words, there are times when it is an advantage, if I understand you correctly, to pay a higher price for the merchandise and there are times when it is advantageous to pay a lower price for the same merchandise, is that correct, sir?

A. That is correct, depending on the type of operation the jobber has, the kind of service he renders in the particular field that he covers.

Q. What type of operation would there be for a jobber

where it was advantageous for him to pay a higer price for the same merchandise that he could obtain from you at a lower price if it was so available to him?

A. We have a lot of jobbers who have grown from a "J" basis to a "JA" or a "D" or even to a "DA" basis by virtue of their operation, and have never been penalized and their program has been such that they have been able to make a profit all along the line.

Trial Examiner Hier: That isn't the question.

By Mr. Schrup:

Q. That isn't the question.

532 What I am trying to find out from you, as I understand it, and I am not trying to argue with the witness, I fully do not comprehend his statements.

As I understand you there is a type of jobber operation where it is advantageous for the jobber in purchasing from you to pay a higher price for the merchandise?

A. That is correct.

Q. What kind of an operation would that be, will you tell me, sir?

A. Well, we have jobbers that are a one-man operation that limit their distribution and it—they make their contacts primarily through the personal acquaintance of their contacts with their trade and they have successfully operated.

Q. Well, do I understand from you then that that jobber in purchasing from you would have an advantage if he bought the merchandise from you without any discount over the situation where if he bought merchandise from you with the discount of 10 and 7 per cent, is that correct?

A. Well, he has the same advantage as he would have buying our parts or Delco-Remy parts at the higher price, which he might be paying.

Q. I am trying to get any answer to the one question. Confine yourself to the Niehoff product and the small jobber you are talking about.

Now if I understand your testimony correctly, this 533 jobber would have an advantage in purchasing from the Niehoff Company the same merchandise,—in two instances, one where he bought with no discount whatsoever, and another where he bought at a discount of 10 and 7, but that the first transaction would be more advantageous to him than the second.

Mr. Sprowl: I think that the question has been answered and answered three times.

Trial Examiner Hier: Twice. It has been answered, he said it did, and you asked what kind of an operation and he said a one-man personal contact, personal acquaintanceship setup. That was his answer.

Mr. Schrup: Maybe I failed to understand the answer. We have a one-man operation and it is more advantageous to him to pay a higher price than a lower price, is that your answer, sir?

The Witness: Yes, and there are many reasons for that.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Schrup:

Q. Mr. Niehoff, you have four customer classifications. Now is it your testimony that price wise it is not advantageous for a customer to be in the jobber agreement category over the jobber without agreement category?

534 A. With these smaller jobbers, we believe that they are really tough competition for the larger jobber.

Q. Mr. Niehoff, the difference between a jobber's overhead and his buying price would be the profit, would it not?

Trial Examiner Hier: What is that?

Mr. Schrup: The difference between all of the selling costs and overhead of a jobber would be his profit, would it not?

The Witness: Yes, that would be the profit and it is shown, generally speaking, that the smaller the account the more profitable the operation in relation to his purchases.

By Mr. Schrup:

Q. The lower his buying price, the more profit he would make, would he not?

A. In some instances that may be true, yes.

Q. Wouldn't it be true in every instance?

A. No, because in some instances—

Q. We are taking a particular jobber, sir, who has a given overhead and he has a given buying power. Now, if that given buying power is lower, he has a greater profit than if that buying price was higher, is that not true, sir?

A. It is true providing you allow for the added sales costs that are represented.

Q. Let's take a constant factor, sir.

We have a given situation of a jobber. Now, everything is in there, his buying, his selling costs have all been
535 computed, all of his overhead is computed, everything, and we will say that it amounts to a thousand dollars. His buying price for the merchandise we will say is twelve hundred dollars. That means his profit would be two hundred dollars, wouldn't it?

A. That is right.

Q. If his buying price was eleven hundred dollars, his profit would be one hundred dollars, wouldn't it?

A. His gross profit would be.

Q. That is right, his profit, so that when he buys at a higher price, his profit is less than when he pays a lower price, is that not true?

A. Well, that may be true in theory, but it is not necessarily true in fact.

Q. How can it be other than that?

A. It has proven otherwise in actual reports and figures that we have obtained many times from these smaller customers that they are not placed to any disadvantage by paying a somewhat higher price.

Q. I am talking about the profit now and we will talk about the disadvantage later.

Mr. Sprowl: Mr. Schrup, may I make a suggestion? I think you and the witness haven't ever had a meeting of the minds. Only—I know what is in your mind and what is in the witness' mind and the witness always thinks
536 that to get the lower discount the man has to buy a greater volume and you are driving at the point that he bought the same volume but at a lower discount.

Now, I think if you state your question that if a man bought five hundred dollars, in that category—

Mr. Schrup: I asked that repeatedly, and he said there was no disadvantage.

Mr. Sprowl: I think I understand it and Mr. Hier understands, but as I listen to Mr. Niehoff, I think he has been wound up in the business so long he thinks that to get the lower price you have to go to the higher volume and he gets the costs problems in his mind, and if he says—if you restate it, I don't think there is any quarrel with the hypothetical question that if a man had a three hundred dollar profit—

Mr. Schrup: Let's take it this way.

On any given article of Niehoff merchandise let's say

the article is sold by the Niehoff Company, the jobbers' base price of one dollar, that is the jobbers' cost, or the list price, as you term it.

Do I understand your testimony that it is not an advantage to buy that article at 90 cents?

The Witness: It may be an advantage to him to buy it at ninety cents if all of the factors were equal.

537 By Mr. Schrup:

Q. If all of the factors are equal and he pays ninety cents, or he pays a dollar, which would be the most advantageous to him?

A. Well, I would agree that the ninety cent price,—he might have some advantage.

Q. That is what I have been trying to get for the last half hour.

Mr. Sprowl: I would have stipulated that.

Mr. Schrup: I don't know from all of your objections that you would have.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Schrup:

Q. I direct your attention, Mr. Niehoff, to Commission's Exhibit 47 A and you will note in Tampa, Florida you have a jobber with an agreement purchasing $4,573 who received a 10 per cent rebate $457.30, and you also have a jobber in Tampa, the same city, purchasing your merchandise who bought $2,107 during the same period of time who received no discount.

Now as I understand your testimony this jobber with an agreement and this jobber without an agreement are competing with others in selling or attempting to sell,
538 we will say, independent garages, filling stations, repairmen, or any customer of that type, is that correct, sir?

A. Yes, they compete with each other, undoubtedly, although each jobber has its clientele or customers.

Mr. Sprowl: What two accounts were you speaking of, Mr. Schrup?

Mr. Schrup: I was speaking of the two in Tampa, Florida, Gulf and Piscon.

By Mr. Schrup:

Q. Now, turn to Commission's Exhibit 47 B and I will

refer you to Shreveport, Louisiana. There you have a distributor purchasing $4,464.44 getting a 10 per cent rebate of $446.44, and you have a distributor purchasing $95.56 and getting a rebate of $9.56, that is the 10 per cent rebate.

Then there is another distributor purchasing $1,612 and getting a rebate of $161 and you have a jobber without an agreement purchasing $204 and getting no rebate or discount whatsoever.

Now is it my understanding from your testimony that these distributors and jobbers in Shreveport were competing in the resale of your products to various outlets such as independent garages, filling stations, repairmen and customers of that nature?

A. Yes, they compete.

539 Of course here in the case of Chain Battery, they apparently are a loss account to us, because any account that buys less than a thousand dollars would be an actual loss to the company to even handle it.

Q. But column three on Exhibit 47-B represents the total sales at jobber prices for the year 1949 to all those accounts?

A. That is right.

Q. Now, turning to Commission's Exhibit 47-C, there you have a distributor purchasing $312.22 getting a rebate of ten per cent, or $31.22.

You also have a jobber with agreement who purchased $1,973, considerably in excess of the distributor, and he gets no ten per cent rebate, but he gets his customary allowance under his jobber with agreement.

Now what about these two accounts, are they in competition also in the resale of your products to independent garage men, retailers, and so forth?

A. Well, the Auto Parts and Equipment went out of business and apparently the other company,—I don't know specifically, but it is my impression that they took over and their business is represented here on a six-month basis with us.

Q. They were in competition during the year 1949?

A. They actually weren't in competition because I think one succeeded, in a sense, the other.

Q. But column three on Exhibit 47-C discloses, as
540 I understand it, all the purchases during the year, or for six months, I guess it is, by the JA account and for the entire year by the D account?

Mr. Sprowl: I don't think it shows that.

The Witness: They went out of business probably in the spring of the year, maybe April or May, as I recall it, so it doesn't represent their potential buying power, and I wouldn't think that this other account—

By Mr. Schrup:

Q. Well, go on to the account which has been in business all of the year, and we can find plenty of them here, let's take another example on Commission Exhibit 47, that did business for the entire year.

Take Chattanooga, Tennessee, you have a jobber there purchasing $1,533, and that is a jobber without agreement, and he receives no discount, or rebate, whatsoever, and you have—

Mr. Sprowl: What town, Mr. Schrup?

Mr. Schrup: Chattanooga, Tennessee.

You have another distributor in Chattanooga without agreement who purchased $1,355.56, or less than the jobber I have just mentioned, and he receives a ten per cent rebate of $135.56.

Now you have a jobber in Chattanooga that purchased $627, that is a jobber on agreement, or without agree-
541 ment, and he received no rebate.

Now as regards—

The Witness: These differentials here would automatically be adjusted when the reclassification of these accounts would be made. Some would go up and maybe some would go down.

By Mr. Schrup:

Q. Yes, but for the year 1949—

Mr. Sprowl: Mr. Schrup, I don't think you have in mind the record.

Mr. Niehoff, as to the first account you mentioned, you testified in clarification of that exhibit at the last session that that should have never been on there, it was rebuilt or repair items and not the electrical line.

Trial Examiner Hier: Yes, I remember that.

Mr. Schrup: Which, the Auto Parts?

The Witness: Auto Parts Warehouse Company purchased only rebuilt items. They didn't—it was rebuilt distributors, they sent in their distributors to have them rebuilt.

Mr. Schrup: That is considered part of your ignition business, isn't it?

The Witness: It may be in a sense, but it is a completely different kind of an operation.

Trial Examiner Hier: It is a sale of service rather than a sale of materials?

The Witness: That is right.

Examiner Hier: That appears on page 350.

Mr. Schrup: We can eliminate the first jobber, but we still have the Auto Parts Warehouse Company,—well, we can eliminate that from consideration but we will still have the distributor without agreement and the jobber without agreement in Chattanooga, Tennessee, the first one purchasing $1,355.56 with a ten per cent rebate of $135.56, and the other jobber without agreement purchasing $627 and receiving no rebate whatsoever, or discount.

Now, those two jobbing accounts in Tennessee are competing with each other, are they not, for the resale of Niehoff products?

The Witness: They would compete to some degree in the area, yes, sir.

Trial Examiner Hier: He said that as to all of his accounts, that not all of the accounts resell in the same area, and why go into detail.

Mr. Schrup: I want to point out specific instances where there is a variation in classification but that will be sufficient if the Examiner thinks so.

By Mr. Schrup:

Q. There is one other city here that I would like to call specific attention to on Commission's Exhibit 543 47-D, Dallas, Texas.

In Dallas, Texas you have a jobber with agreement purchasing $2,463 and receiving a rebate of $172.31, and a distributor with agreement purchasing $5,277.78 receiving a distributor's rebate of $527.78, and an additional rebate of $227.65.

You also have a distributor who purchased $550 and received a ten per cent rebate of $55.

You have a jobber without agreement who purchased $795 who received no discount whatsoever.

A. I would judge that that jobber would probably be reclassified, but Mr. Geyer would undoubtedly be able to give you more specific detail on the account.

Q. Those jobbers are all in competition, of course, in the resale of your products?

A. Yes, sir.

Q. Mr. Niehoff, your original volume discount plan adopted in the early 30's, was that preceded by other discount plans?

A. Well, there are modifications and changes that have been made, but it wasn't adopted in the early 30's, it was rather adopted in either the middle or latter part of 1930's.

Trial Examiner Hier: Was the company coincidentally starting in manufacture? As I recall you testified that you started to manufacture in 1936.

544 The Witness: Well, I would say it was after that, yes.

By Mr. Schrup:

Q. That original discount was based on the number of items of purchase, is that it, the number of items of the same item?

A. I made the statement that the original pricing method differed in this respect, that we had a quantity on a given number of items and that we didn't feel after studying the cost factors and the picture that it would be equitable because the larger jobber could buy the quantities where the smaller jobber would not be able to obtain his turnover wouldn't be sufficient for that, and in this manner in adopting the sales allowance plan was giving him a discount on their annual volume of business, and it would be obtainable to the majority of the accounts, and more equitable to them. That was our reasoning in the matter.

Q. In other words, there was a difference in price to the large jobber and the small jobber for these items because one bought more than the other, is that it?

A. That was generally the case.

Q. You didn't consider that difference in price was equitable?

A. From the customer's point of view it was equitable; from a cost point of view.

545 Q. But not from the customer's point of view?

A. Yes.

Q. Now that was superseded by the volume discount which depended upon the number of items purchased but they could be varying items, is that right, sir?

A. It was predicated upon their entire annual volume of purchases.

Q. But with relation to your second discount plan,

your larger customer still gets the better price, does he not?

A. The larger customer based upon his volume gets a longer discount, yes.

Q. Do I understand your testimony that in the first instance, on the first discount plan, you didn't consider it equitable for the larger customer to get a better price from the customer's viewpoint, and in the second plan you do consider it equitable from the customer's viewpoint?

A. I believe the second plan was more equitable, that was our conclusion, because it made it possible for the smaller customer to grow into a larger customer if he so desired.

Q. What would make it possible for him to grow into a larger customer?

A. Through his own activity and by getting the advantage that might accrue to him as a result of added purchases.

Q. You mean a better price?

A. Yes, a better discount.

546 Q. Mr. Niehoff, I think if I recall your testimony correctly on direct examination you stated that your operating costs would prevent you from meeting the lower net price of certain of your competitors.

A. Well, I think that that isn't the paramount reason because in our earlier studies of the cost factors in justifying the price differential, based upon volume, we have certain limitations, and we have to keep well within those limitations.

Q. What would those limitations be?

A. Well, the limitations that we have set up in our contracts, which we feel and have always felt are justifiable discount allowances based upon the difference of cost factors that enter into the merchandising of the line.

Q. You misunderstood me.

Do I understand from you that your operating costs are such that you cannot meet the lower net prices of some of your competitors?

A. Well, it actually costs us money to handle accounts that don't do a volume of $1,300, or in other words, you might say that that may prove a loss account to us.

Q. I understand what you are talking about, but what I mean is this: As I get the purport of your testimony, certain of your competitors have lower net prices to their

customers than you can reach because of your higher operating costs, is that true?

547 A. I can't say that.

Q. That is what I understood your testimony to be.

Trial Examiner Hier: Discussion off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

The Witness: I don't think we would be justified based upon the cost factors, to stay within those cost factors, to extend a longer discount, that is the point.

By Mr. Schrup:

Q. In other words, you mean it wouldn't result in sufficient profit to you, is that it?

A. Well, we try to maintain a profit in the operation of our business.

Q. That would be the basis that you couldn't reach down to the lower level we are talking about?

A. Well, that is a factor, too, yes.

Q. In Respondent's Exhibit 6, which I will hand you, I note that two accounts listed on that exhibit are located in Memphis, Tennessee.

A. That is correct.

Q. Now, one account at the top of the page is a distributor with an agreement account and the account below is a jobber with agreement account.

A. That is correct.

Q. Now, Commission's Exhibit 47-D for the same
548 City, lists a distributor in Memphis, Tennessee and another distributor with agreement in Tennessee, this distributor with agreement purchasing more than the distributor with agreement appearing on Respondent's Exhibit 6, and the other distributor purchasing more than the jobber with agreement in Memphis, Tennessee.

Why was not that exhibit compiled on the basis of all four customers in Memphis, Tennessee?

A. I don't know why it wasn't compiled on all four customers. There was no—

Q. Who compiled this list, sir? That is, Respondent's Exhibit 6?

A. Well, that was compiled in our office, I believe under the direction of Mr. Sprowl, the attorney, and probably Mr. Kirchschlager had the details.

Q. Now as I understand it, all of the invoices repre-

sented by the sales to the customers on Exhibit 6 will be made available to us?

A. I see no objection to it.

Q. You will also make available to us all of the invoices with relation to the two other customers in Memphis, Tennessee with relation to the same purpose as Commission's Exhibit—

A. Yes, there is no reason why not.

Trial Examiner Hier: Aren't the basic or underlying data for Respondent's Exhibits 5 and 6,—do they not also underly Commission's Exhibit 47-A, B, C, and D?

549 The Witness: No, sir.

552 Mr. Sprowl: I would like to have this marked as Respondent's Exhibit 7.

(The paper referred to was marked Respondent's Exhibit No. 7 for identification.)

Trial Examiner Hier: This is the advertising expenditure breakdown for 1949.

The record may show that Respondent's Exhibit 7, which is an advertising expense analysis for 1949 is received without objection to the record in further elucidation of the figure of $100,437.11 which appears on page 304.

553 (The paper referred to, heretofore marked for identification RESPONDENT'S EXHIBIT NO. 7, was received in evidence.)

Mr. Schrup: Can Mr. Niehoff explain it?

Mr. Sprowl: Yes.

By Mr. Schrup:

Q. Mr. Niehoff, with reference to Respondent's Exhibit 7—

Trial Examiner Hier: This is further cross-examination limited to Respondent's Exhibit 7.

By Mr. Schrup:

Q. This is entitled "1949 advertising expense analysis." What does the term "executive salaries" cover? Who are the executives that those salaries cover?

A. The advertising manager, who is vice president of the company.

Q. And what is the term "advertising office?" What is that?

A. That is the cost of the office, clerical help in the office.

Q. That is in the Niehoff office?

A. In the advertising department of the Niehoff office.

Q. Well, "advertising trade paper," that is self-explanatory.

Now this item "advertising, catalog." Those are the catalogs that you furnish the jobber customers, is that right, sir?

A. That is correct.

Q. Both present and potential customers?

A. That is right.

554 Q. Now, what is "advertising, printed matter?"

A. Well, it involves all types of printed matter, sales literature, instructions, technical data.

Q. That also goes to present jobber customers and potential jobber customers, is that right, sir?

A. That is right.

Q. And what is "advertising, miscellaneous?"

A. Miscellaneous is always a hard one.

Well, it is just what it says, advertising, miscellaneous.

Q. It is a small amount.

Coming back to "advertising, printed matter," does that include price lists?

A. I assume it does.

It does not, I am wrong.

Q. Where would the price list be incorporated?

A. In the catalogs.

Q. The price lists would be incorporated—

A. With the catalogs, yes.

Q. What is the item "show expense?"

A. National and regional shows that are held by the industry. It covers the exhibits, the transportation of the exhibits, the maintenance of them, and so forth.

Q. What is display?

A. Well, display is the actual creation of the dis-

555 play itself.

Q. That is at the show?

A. At the shows around the country.

Q. And photo expense?

A. Photo expense is photographs for advertising purposes, and it may involve the photographing of certain parts that have to be presented in the catalog, the actual catalog.

Q. And samples?

A. Samples are miscellaneous salesman's samples.

Q. With relation to Respondent's Exhibit 1, you have the number 866, which is your total customers?

A. That is right.

Q. And that figure of 866 related to Respondent's Exhibit 7, does that cover the customers serviced by the House of Peaslee or the customers serviced by Paul Niehoff on the west coast, or any other customers?

A. Well, this does not cover their expenditures, but it does cover the cost of the catalogs and price lists and so forth, that is mailed into that territory.

Mr. Schrup: That is all.

Redirect Examination by Mr. Sprowl.

Q. Mr. Niehoff, you were shown the wholesaler's confidential price list and the dealer price list, which I believe are Commission's Exhibits 6-D and 6-C.

What is the fact as to whether or not a jobber is
556 required by Niehoff Company to follow the prices set out in those sheets?

A. Well, it is entirely at the discretion of the jobber to use these sheets.

Q. They are merely suggested prices?

A. They are suggested prices, yes.

Q. I notice that these particular exhibits have been printed on a particular type of paper with several types of holes punched along the lefthand margain. Why is that?

A. Well, each jobber maintains a binder, a rather large binder with catalogs and price lists on the discounts, and the salesmen, if he has salesmen covering the territory, usually carry the binder and carry in this binder the price lists, and the punch is a standard accepted practice in the industry, and the colors have been more or less adopted as standard means of identifying the price lists throughout the trade.

Q. Now, you state this is a rather large binder. Would you tell me precisely how large they are in the average jobber's set up?

A. Well, precisely, some of them I have seen are as large as this table when they are on the counter.

Q. That long?

A. That long, yes.

Q. With a sufficient number of sheets in to extend five or six feet?

557 A. I would say at least three or four feet.

Q. Now, those aren't just Niehoff price sheets in that binder, are they?

A. No, they are price sheets on all of the lines the jobber handles.

Q. How many would be Niehoff's price sheets?

A. Well, he would have one set of our price sheets in there.

Q. One of 6-B and 6-C?

A. Yes.

Q. I would assume from having these price sheets before them that the dealer, or if a jobber wanted to follow them, that they are keyed by your number of each item to the product, am I correct?

A. Well, each product has a code number, yes.

Q. And that appears on the box that the product is contained in?

A. The box has the number as listed on the price sheet, for instance if it is an A177—

Q. And from the box you could go to A177 on the price sheet?

A. Correct.

Q. And that makes it unnecessary, I would take it, so that if the jobber wishes to follow this price sheet, to go to the expense of putting an individual pricing mark on each box? Am I correct?

558 A. That is right.

Mr. Schrup: That is conjectural.

Trial Examiner Hier: Why is it objected to?

Mr. Schrup: I think it is conjectural. I don't see the materiality of it.

Trial Examiner Hier: Overruled.

Go ahead.

The Witness: Well, the price sheets are issued for the convenience of the jobber to give him a guide by which he can price his merchandise.

Trial Examiner Hier: Do you know whether or not your jobbers follow those suggested resale prices? Do you know?

The Witness: Well, I think yes, that they follow them, but as to the choice of the prices, that is entirely—

Trial Examiner Hier: I understand it is up to them as to whether they follow them or not, but I just wondered if you knew what they do for the most part, whether they follow them or exercise their prerogative?

The Witness: I believe they follow them.

Trial Examiner Hier: All right, go ahead.

By Mr. Sprowl:

Q. And they do so that if they do choose to follow one

or the other list, then the individual pricing on each box, I assume, is unnecessary?

559 A. Well, there is no need of putting the price on each individual part because the price list gives them the guide by which they can sell the merchandise.

I might add that it also gives the dealer the convenience of determining his selling price if he wishes to follow it.

Q. I would like to call your attention to Respondent's Exhibit 3, the third company on that list, on that exhibit, F & B Manufacturing Company. Do they have a trade name for its product?

A. Yes, it has a trade name called Filco.

Q. What company handles the product that is sold under the trade name Ampco?

A. American Motor Products.

Q. That is the first company listed on Respondent's Exhibit 3?

A. That is the first company on the list, yes.

Q. Does the P. Sorenson Manufacturing Company commonly refer to its ignition line as just Sorenson?

A. I think it is referred to as Somco.

Q. And what company produces a line under the trade name of Valley Forge?

A. Well, that is not represented on this list here.

Q. Do you know the name of the company?

A. The Valley Forge trade name is by Paragon

560 Manufacturing Company of Brooklyn, New York.

Q. Now does that company compete with the Niehoff Company in the ignition field?

A. Yes, they do.

Q. And in what areas do they compete with the Niehoff Company?

A. Well, they have national distribution.

Mr. Schrup: Which one is this?

Examiner Hier: It is not on there.

The Witness: They have national distribution.

By Mr. Sprowl:

Q. Speaking now of the Niehoff Company base price, that is the jobber price, how does the base price of the Valley Forge line compare?

A. Their prices are substantially lower.

Q. Does Valley Forge also have a volume discount plan?

A. Well, I am not able to say it is a fact. They have a—

Q. I will put it another way.

Referring now to their ultimate net price, to any class of customer, how does that ultimate net price compare with the Niehoff Company, the ultimate net prices?

A. Their net prices are substantially lower than our very best prices to our volume buyers.

Q. Now, I wish you would, if you know, after looking at Exhibit 3, how many of the competitors listed on that
561 exhibit have a volume discount plan substantially similar to the one used by the Niehoff Company, and for the purpose of keeping the record consistent, I suggest that we confine that to the year 1949.

A. Do you want me to name the companies, or just the number of them on the list?

Q. Whichever is most convenient, Mr. Niehoff.

A. I have knowledge that at least ten firms on this list have a volume discount allowance.

Mr. Schrup: That is on Respondent's Exhibit 3.

Mr. Sprowl: And that was true in the year 1949?

The Witness: Yes, that would be true in 1949.

Mr. Sprowl: And there are 16 companies listed, and as to the other six, are you just without knowledge as to their method?

The Witness: Well, I am not entirely without knowledge as to their method, some of those firms have a net price and they have different net prices based upon the types of customers that they sell.

Mr. Sprowl: In other words, they have one net price for a customer of a volume of a small amount and a different set of net prices for a customer with a larger volume?

The Witness: That would be true, yes.

Mr. Sprowl: So then the net effect would be a
562 substantially similar price structure?

The Witness: Somewhat similar, I would say, yes.

Trial Examiner Hier: We will adjourn now until a quarter of two.

(Whereupon, at 12:00 noon, a recess was taken until 1:45 p. m., this day.)

563 Afternoon Session.

2:00 p. m.

Trial Examiner Hier: Come to order. You may proceed.

C. E. NIEHOFF resumed the stand and testified further as follows:

Redirect Examination by Mr. Sprowl.

Q. Mr. Niehoff, you made some references in your testimony to N. A. P. A. outlets. What do those initials indicate?

A. National Automotive Parts Association.

Q. In what ways does it operate in the field?

A. The National Automotive Parts Association maintains warehouse distributors throughout the United States in all areas and sells manufacturers' lines; warehouse them and redistributes them to the jobber.

Trial Examiner Hier: It is a private merchandising outfit; it is not a trade association?

The Witness: I do not think it is a trade association.

Mr. Schrup: Similar to a buying group.

By Mr. Sprowl:

Q. Does it compete with the Niehoff Company for the jobbers' business?

564 A. It competes with our jobbers.

Q. In other words, at your jobber's customers' level?

A. That is right; no, that is not right.

Mr. Schrup: That is not correct.

The Witness: It competes at the jobber level but not the jobber's customer's level.

By Mr. Sprowl:

Q. Would it be possible for the Niehoff Company to lose a jobber account to the N. A. P. A.?

A. Yes, it would be.

Q. It is at that level that the competition exists?

A. We could lose a jobber to the N. A. P. A. distributor.

Q. N. A. P. A. does not handle the Niehoff line?

A. It does not handle the Niehoff line.

Trial Examiner Hier: Is it tied up in any way with original equipment manufacturers or does it buy its materials and products from independent manufacturers such as yourself?

The Witness: To my knowledge, it buys its products from independent manufacturers; there may be exceptions to that rule, however. It is true in ignition. However, they handle independent manufacturers' lines.

By Mr. Sprowl:

Q. At one time in your cross-examination, you were referring to Respondent's Exhibit No. 4, and, as I
565 understood it, you said that the Edelmann Company, which is the third company listed on that exhibit, was not a factor in your competition. Later on you said that the Niehoff Company gained some business from Edelmann or took some business from them. What is the fact? Is it competitive or is it not competitive?

A. We were talking about the hydraulic parts line.

Q. Right.

A. The Edelmann Company has been in the process of eliminating the hydraulic parts line and that obviously left open, certain of their accounts from whom we have acquired some business.

Trial Examiner Hier: The Edelmann Company did manufacture various hydraulic parts up until 1949, but since that time has gradually been getting out of that business, is that substantially correct?

The Witness: That is substantially correct.

By Mr. Sprowl:

Q. You testified on cross-examination, of an early discount plan, as I recall it, based on the unit volume of any single item. Did you give such testimony?

A. Yes, I did.

Q. Then you said that that system was changed to your volume purchase discount plan now generally in effect, is that right?

A. Yes, that is right.

566 Q. I didn't understand clearly your differentiation in the equitable method that you spoke of. Will you tell me again?

Mr. Schrup: That has already been asked and answered.

Trial Examiner Hier: Let him finish the question.

By Mr. Sprowl:

Q. Will you tell me in what way—I'll call it unit volume discount—would be more difficult for the small account to attain than the annual volume discount plan?

Trial Examiner Hier: Do you have an objection?

Mr. Schrup: That has already been asked and answered.

Trial Examiner Hier: No, I don't think so. You went into it and he has a right to go into it. Go ahead.

The Witness: What I referred to, was, there was a quantity price on many items of the line, as for instance, a better price on five hundred sets or a thousand sets, than on the purchase of one or ten or twenty sets.

Q. By Mr. Sprowl: Sets of what?

A. Points, or it might apply likewise on one hundred coils or five hundred coils—the price was better than on buying a lesser quantity of points.

Q. And to attain that type of a volume purchase discount, did you have to buy the required quantity all at once?

A. That is correct, yes.

Q. There was no accumulation of purchases to 567 attain a quantity under that plan?

A. A quantity applied specifically to a definite number that they had to purchase in order to get that price.

Q. At a single time?

A. At a single time.

Trial Examiner Hier: Single order, quantity order unit discount?

The Witness: It was a net price, no discount.

By Mr. Sprowl:

Q. And then, as I understood the point you wished to make was—

Mr. Schrup: Let the witness answer as to the point he wished to make.

By Mr. Sprowl:

Q. How would that work out for the smaller jobber?

A. We felt definitely it worked out to their disadvantage.

Q. Why?

A. Because they could not attain those quantities in their normal purchase or get the benefit of the quantity price.

Trial Examiner Hier: Is that because it was confined to

a particular unit or was it because it was confined to a single order at one time or both?

The Witness: It was confined to the quantity involved, not only one item, but it involved numerous items of the line on which the quantity prices varied and he
568 wouldn't have the ability or the financial means to purchase those quantities.

By Mr. Sprowl:

Q. In what way does that differ in its effect on the smaller jobber with your present volume discount method?

A. Under the present method, the discount is more readily available to him on the over-all line than it was when he had to purchase on the definite quantity basis.

Q. Under your present plan, you take into consideration all purchases made by a given customer of any item in the line irrespective of how many of each item he may purchase?

A. That is correct.

Q. Then, you accumulate those for how long a period?

A. For a period of one year, making up the total volume of purchases during that time.

Trial Examiner Hier: Mr. Niehoff, can you give me an approximate estimate of what the company spends in time or money for this annual review which you make of your accounts? I mean, do you have any idea how many man hours are spent by those officials who do that once each year?

The Witness: Well, it is rather difficult. It probably takes several days or maybe a little longer.

Trial Examiner Hier: For one man?

The Witness: It might involve two men.

By Mr. Sprowl:

569 Q. Referring to Respondent's Exhibit No. 3, are there any other companies, other than Delco-Remy and Auto-Lite, not listed on that exhibit, who competed in the year 1949 with the Niehoff Company in the ignition field?

A. Yes, there are quite a few in addition to this list.

Q. How many such companies were there in business in the United States in the year 1949?

A. I believe that in some phase of the manufacture of automotive electrical parts there are close to one hundred such concerns.

Q. Can you name some of the other companies? Can

you name one of them, say, that is not listed on there that is rather prominent in that field?

A. Well, the American Bosch Company is one. They manufacture ignition coils; a complete line of coils. They also manufacture voltage regulators which they sell to the trade, to the jobbing trade, I mean. They are a very strong factor in competition on those particular items.

Q. Any other companies?

A. There is the Holly Carburetor Company in Detroit who manufacture not only carburetors but also ignition parts, principally for the application to the Ford line of replacements. They specialize in selling Ford parts to many of the original service stations or jobbers that handle Auto-Lite and Delco-Remy.

570 Q. Is Valley Forge on there?

A. Valley Forge is not on this list—Paragon Manufacturing Company use that brand name.

Q. Mr. Niehoff, will you tell me your reasons why a jobber customer of the Niehoff Company buying at the base jobber's price is not at any competitive disadvantage with other jobber customers of the Niehoff Company in the same area buying at a more favorable price within the range of the Niehoff Company's discount?

A. The small jobber has a definite economic advantage in selling and servicing his trade in a locality—in a rather limited locality. He is, in all probability, a one man operation with several assistants and has full control of all items of expense and does not have to go to the extent of having selling expense, advertising expense and delivery expense that many of the larger jobbers have to contend with. His capital investment is less in his plant, equipment and inventory. He also has the advantage of knowing his customers personally and servicing them within the radius of his place of business; rather limited radius of a few miles, relatively speaking.

Fact of the matter is, the smaller jobber is becoming a very tense competition for the larger jobber in many of the areas throughout the states, by virtue of his advantage he can give to the dealer in that community quicker

571 service and closer contact and immediate delivery and factors of that sort that the jobber that has to carry on distribution over considerable area can't provide.

I believe, therefore, that this smaller jobber has a definite advantage at his buying level over the larger—medium and larger jobber in the territory.

Q. From the viewpoint of the Niehoff Company, of what value to the Niehoff Company is the small jobber as a customer?

A. Well, actually—

Mr. Schrup: I think that is rather immaterial and I probably object to that question. I think we are getting a little farther afield here. We are interested here in price discrimination and not value of a customer to Niehoff.

Trial Examiner Hier: I assume he means economic value. The objection is overruled. You may answer.

The Witness: Adding of the business to the "J" accounts is rather an expensive venture but it has this aspect that out of those accounts, we develop larger accounts. Not all of them grow into large accounts, but quite a few have developed into substantial profitable accounts to the company.

By Mr. Sprowl:

Q. Have they increased their volume of Niehoff purchases?

A. There are some accounts that would resist the theory of increasing their volume beyond a certain point but there are others who develop into substantially
572 larger accounts and that is proven true with a good many of our present accounts that are on a "D" or "DA" basis.

Q. You say that some of these jobbers resist growth. Why is that?

Mr. Schrup: Just a minute. We are getting into a lot of hearsay testimony here. If Mr. Niehoff is purporting to tell us what jobbers tell him, that is all hearsay. I think we should have these jobbers come in and tell us themselves if they don't want to buy at a better price.

Trial Examiner Hier: Mr. Niehoff, we only want your knowledge unless your opinion is asked for which this question does not do. If you don't know, say so. In other words, we do not want anything here that you know by reason of the fact that somebody else told you. You have been in this business now, nearly thirty years and you certainly have the means of knowledge. Whether you have the knowledge or not, only you can tell but if you have the knowledge, give us your knowledge; if you do not have the knowledge, say so.

The Witness: It is verified by the development of some of our own jobbing trade.

Trial Examiner Hier: I have to leave it up to you whether you know or not.

By Mr. Sprowl:

Q. The question is specifically, why do some of the jobbers resist growth?

Mr. Schrup: That is the question I objected to.

573 Trial Examiner Hier: If he knows, he may answer the question. If he does not know or if his knowledge is based upon hearsay, then I do not want the answer. I have to leave it up to him. He is the only one that can determine that question.

Mr. Schrup: The state of mind of a jobber as to why he does something is something that Mr. Niehoff couldn't possibly know.

Trial Examiner Hier: There may be an economic reason for it; we'll see when he answers. This is not a jury case; you can always have the answer stricken. You may find out the basis for it too.

The Witness: I know there are jobbers who do not want to expand their business beyond their present size. Why, I can not state specifically but I assume it is economic.

By Mr. Sprowl:

Q. Mr. Niehoff, in your cross-examination by Mr. Schrup as concerning Respondent's Exhibit No. 1, you stated that the direct selling expense figure shown on the first line of that exhibit included commissions paid to the Biglow organization, Paul G. Niehoff organization and the Peaslee organization; and you also stated that by the same token, the number of accounts, 866, shown in that exhibit included the customers of Biglow, Paul G. Niehoff, and Peaslee.

At my request, did you have prepared from the
574 books and of the C. E. Niehoff Company, a further exhibit showing the breakdown of the direct selling expense for the year 1949 excluding therefrom commissions paid to Biglow, Paul G. Niehoff and Peaslee?

A. That was your request as of yesterday, yes.

Q. Was it prepared and I show you what has been marked for identification as Responsent's Exhibit 8 and ask you if that is the document that you had prepared at my request?

A. Yes, it is the document.

Q. I notice the figure of 781 accounts used in that ex-

hibit as opposed to 866 in Respondent's Exhibit No. 1. Is that the number of the total accounts reduced by the Biglow, Paul G. Niehoff and Peaslee acounts?

A. Yes, that is right.

Mr. Sprowl: I offer in evidence as Respondent's Exhibit No. 8, this breakdown—

Trial Examiner Hier: I would like to ask the witness one or two questions here. I notice that after the second item which is entitled "Salesmen's Commissions" the exhibit shows definitely that that figure does not include Biglow, Paul G. Niehoff or Peaslee. I ask you whether or not the following three figures or summations are likewise exclusive of Biglow, Paul G. Niehoff and Peaslee.

The Witness: Yes, they would be.

Trial Examiner Hier: Then, that should be ditto 575 marked. Do you have any objection?

Mr. Schrup: We have the same objections as heretofore made. It calls to my mind that when we get through cross-examination on exhibits, they immediately go out and revise them. It is a never-ending process. I am objecting for the same reason as the other exhibits—connect them up and show their relevancy.

Trial Examiner Hier: You can not do it all at once.

Mr. Schrup: I know. That is why it is difficult on this cross-examination—we start some place—they see their error and go back and correct it again—come in with the exhibit revised; we get through cross-examining and then they go out and correct it again—I don't know where we are going to end up.

Trial Examiner Hier: Are you objecting to them making the corrections that you insist should be made?

Mr. Schrup: No: I think we should be entitled to cross-examine at one time and get all the exhibits in the record.

Trial Examiner Hier: You are going to cross-examine on this exhibit in just a few minutes

Mr. Schrup: Then they will bring in a revised exhibit —Exhibit No. 9.

Trial Examiner Hier: Your objection is overruled.

576 Mr. Schrup: I would like to have the correct exhibit in the first place.

Trial Examiner Hier: No use talking about that now. The record may show that Respondent's Exhibit 8 is received in evidence. The record may also show that the Trial Examiner is putting ditto marks underneath the parenthetical statement "Not Biglow, PGN or Peaslee"

three times; in other words, to follow the items of travel expense, entertainment and sales conferences.

(The paper referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 8, was received in evidence.)

By Mr. Sprowl:

Q. Mr. Niehoff, referring to the first item appearing on Exhibit 8, Salesmen's Salaries, does that also exclude any salaries paid to Biglow, Paul G. Niehoff or Peaslee salesmen?

A. Those individuals or companies do not receive any salary.

Q. This salesmen's salaries are just the C. E. Niehoff Company salaries?

A. Cover the fifteen salesmen that are connected with the C. E. Niehoff.

Trial Examiner Hier: Who do not call on the other accounts you mentioned previously?

The Witness: Yes.

Mr. Sprowl: It is probably just a matter of mathematical computation to take the cost per call shown 577 on Exhibit 8 and applying that to Exhibit 2 as already put in evidence, is that correct?

The Witness: Yes. The average number of calls are—

Mr. Sprowl: I don't think you understand. You will recall, if you look at Exhibit 2, we used as the cost per call, $35.83 off of old Respondent's Exhibit 1 and if we now wish to use this average figure shown on Exhibit 8 of $34.02, it would just be a mathematical computation to read Exhibit 2.

The Witness: That is correct.

Mr. Sprowl: That concludes my redirect.

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579 *Recross Examination by Mr. Schrup.*

Q. Mr. Niehoff, in response to Mr. Sprowl's question, you stated that you know that there are jobbing accounts that would not want to expand their business beyond present size. Are they customers of yours?

A. Yes; they are some of our customers.

Q. What classification are they?

A. Well, they may be classification "J" or in the classification of "JA."

Q. Would you name those customers to us, please?

A. I do not know that I can name them right off.

Q. I would be very interested in knowing the customers right now, that you testify to, would not be interested in expanding their business beyond their present size that are customers of yours.

A. I think I talked to customers at various times
580 that have indicated their desire to remain small in their operations.

Q. The question is, Mr. Niehoff, I would like to know the names.

A. That is quite impossible for me to give you any names just from memory.

Q. Mr. Niehoff, with regard to discount schedules, is that similar in all respects to the discount schedules of your competitors on Exhibit 3?

Trial Examiner Hier: Let him see it.

Mr. Schrup: That is merely a list of his competitors.

Trial Examiner Hier: He may want to look at it. The question being, whether or not their discount schedules are similar to yours in all respects.

The Witness: There are ten accounts on this list that use a similar pattern of discounts based upon their volume of purchases that I know of specifically. There may be others that I do not know of.

By Mr. Schrup:

Q. Some of them give a longer discount and some give a shorter discount than Niehoff?

A. Most of them give a longer.

Q. Some give a shorter?

A. I don't know of any. I might add, some don't give any discount.

Q. They sell on a different type of basis?

581 A. They sell on a net price schedule or they have several net price schedules that they apply to the classification of their accounts.

Q. What companies would those be? Would you name the companies appearing on that list that do that?

A. Yes, one of them is Tungsten Manufacturing Company.

Q. Any others?

A. I am under the impression that Automotive Specialty Company has a net price base. The F & B Manufacturing Company have a different base or use a net price schedule.

The Echlin Manufacturing Company sells through their I. A. P. A.

Q. Is that all?

A. That is all, yes.

Q. Do you recall whether there are any cities where you have customers where any of the competitors listed in Exhibit 3 do not sell your customers?

A. I would not know as to whether there were any cities in the United States where some of these manufacturers are not represented but I assume there are some. I have no specific information on that point.

Q. When you make up your discount schedules or make any changes in your discount schedules, you are not acquainted with that fact?

A. When you talk about discount schedules and distribution in an area, that is something different. I don't
582 know what to answer you on that.

Q. In preparing your discount schedules, as I understand your discount schedules, they apply nation wide?

A. That is correct.

Q. And your different customer classifications are applied on a nation wide basis?

A. May I get that question?

Q. And your different customer classifications—your jobber without an agreement, your jobber with an agreement, your distributor without an agreement and your distributor with an agreement—they are also applied on a nation wide basis?

A. That is correct, yes.

Q. In making that application to customers and giving that discount—that corresponding discount to customers, what investigation do you make of your competitors' discount system in any particular area?

A. On the basis of these competitors having national distribution, we make our check up based upon their price schedules that are issued from time to time and I assume they are applied uniformly throughout the territory.

Q. You do not know, do you?

A. We do know that they have the same price in California or in Texas as they have in Florida. I know that to be true, yes.

583 Q. Do you have any occasion to depart from your pricing system to meet a departure from the normal pricing system of a competitor?

A. We maintain our pricing system as is, under the volume discounts that we have established.

Q. You never depart, then, from your established pricing system and the volume discount under the different classifications?

A. No, we do not.

Q. Do you ever change a customer's classification?

A. Yes.

Q. What is the basis of that?

A. As previously stated, we check them annually to determine their status based upon their volume of business.

Q. That would be the only reason for a customer's classification change—his volume of business?

A. There might be some other reason—it might be credit.

Q. Any other reason?

A. I don't believe so.

Trial Examiner Hier: Let me have Respondent's Exhibit 3. Mr. Niehoff, on Respondent's Exhibit 3, are any additions which your testimony has made thereto and including Delco-Remy and Electric Auto-Lite, are there any of these competitors who have engaged in local price cutting or special deal price cutting as opposed to an
584 across the board system such as you have? In other words, what I want to know, is there a single company there whom you have heard was cutting the price on a particular line of ignition products in say, for instance, Atlanta, Georgia—in that area but not nationally? Do you know of any such instances?

The Witness: Well, it is my impression that such things have happened, yes.

Trial Examiner Hier: Do you know whether any of them happened in 1949?

The Witness: It could have, but I am not certain about it.

Trial Examiner Hier: What I am interested in, gentlemen—I'll tell both of you, is whether or not this picture is confined to meeting competition on a national basis—both sides—on his part and on the other part—or whether or not it also includes localized price cutting and if it does, whether he meant that by a national price cut, by a local price cut, or how the situation was handled. This meeting competition picture is confusing enough and we would like to clean that up.

I'll put this other question to you. If there have been

instances of localized price cutting during 1949, did you attempt to meet that situation by a similar local price cut in that particular area but confined to that area? You just stated a minute ago you adhere to your volume discount
585 schedule and make no deviations therefrom.

The Witness: Going back to 1949, it is rather difficult for me to say. We have maintained consistently, our pricing policy on a national basis regardless of specific price cutting. If there is such price cutting which may have occurred, that I can not point my finger on specifically.

Trial Examiner Hier: Tell me this, does Electric Auto-Lite or Delco-Remy ever, to your knowledge, engage in local price cutting?

The Witness: I think their prices are consistent on a national basis.

Trial Examiner Hier: Go ahead.

By Mr. Schrup:

Q. Mr. Niehoff, in your talking about overhead of a jobber and deciding what classification to put a jobber in, which of course determines the price which he will pay for your products, do you consider his overhead?

A. No.

Q. On redirect examination, you mentioned American Bosch Company and Holley Carburetor as additions to Respondent Exhibit 3, and I believe you mentioned there were one hundred such concerns.

Will you tell us why, in compiling Exhibit 3, they were not listed on that exhibit in the first place?

A. Those listed on Exhibit 3, I believe, have, what
586 is termed, a complete line of ignition parts rather than a partial line and also the fact, that they sell the same class of trade generally that we do.

Of course, the Bosch Company do sell to jobbers and mail order houses and chain stores and they have a somewhat restricted line because they have both coils and voltage regulators in their line.

Q. But Exhibit 3 is a list of concerns that you consider your real competition?

A. There are others like Mallory Electric; they are also in the field and very active on coils and condensers.

There are many manufacturers that make parts specifically for electrical purposes that do not sell directly to the jobbers and others sell but a limited number of items to the jobber.

Q. What I am trying to get from you, Mr. Niehoff, is this, that Respondent's Exhibit 3, as originally compiled, represents the competition you meet with in selling the jobber trade on the Niehoff ignition line, is that correct?

A. There are others, though, besides that list.

Q. Why weren't they placed on there originally?

A. Well, you asked me that question—they probably should have been placed on that list but they weren't, so I do not know.

Trial Examiner Hier: He answered. He said they
587 did not make a full line and that is the reason he did not put them on the list.

By Mr. Schrup:

Q. Concerning Commission Exhibit 6B and 6C which are respectively your wholesale confidential prices and your dealer prices, I ask you whether it would be just as convenient if you had one sheet that would list the list price, dealer price and wholesale confidential price and the jobber price?

A. It would be very difficult for the dealer who has to use a list price to sell the parts in order to service your car or determine the price on the part that goes on your car as a replacement, to disclose his cost or to disclose the jobber's cost and likewise it would be impractical for the jobber to disclose his cost to the dealer; I don't think it is being done.

Q. In other words, it is possible that if the jobber was not furnished with your suggested resale price list, he might sell the product at a cheaper price than suggested by you?

A. It is his privilege to sell the part at any price.

Q. I say, it is possible, is it not, if you did not furnish those suggested prices to him, that a cheaper price would result down the line because the jobber might sell it at a cheaper price than your suggested prices?

Mr. Sprowl: I object to the question; anything is possible.

Mr. Schrup: I am asking this man.

588 Trial Examiner Hier: He may answer; I do not think it means much. Go ahead and answer.

The Witness: He may sell it cheaper. He may sell it cheaper even though he has the price schedule before him.

By Mr. Schrup:

Q. But he isn't doing that, sir, as I understand your testimony.

A. I think he wants to stay in business and continue servicing his customers.

Q. You say he wants to stay in business. Do you mean that he is not likely to sell at a lesser price than is depicted on Commission Exhibit 6B and 6C, is that correct?

A. I think I testified to the fact that he has to compete with such large concerns as Delco-Remy and Auto-Lite and Ford who set the pattern for the price schedules as a whole, you might say.

Q. I don't know whether you are trying to evade the answer or didn't understand the question.

Mr. Sprowl: I object.

Mr. Schrup: We have gone off into a different pattern—will you read the question back to Mr. Niehoff?

(The reporter read the question as follows:

"Q. You say he wants to stay in business. Do you mean that he is not likely to sell at a lesser price than is de-
589 picted on Commission Exhibit 6B and 6C, is that correct?")

The Witness: I said he wants to stay in business and so he sells it at a reasonable margin of profit to himself on the basis of his cost and I don't know what other answer I can give.

By Mr. Schrup:

Q. The difference then, between the buying price and the selling price after deduction of all overhead, is the margin of profit, is it not?

A. Gross margin of profit; yes.

Q. And the lower the buying price, the higher the gross margin of profit?

Mr. Sprowl: I object to that as a conclusion of the interrogator.

Trial Examiner Hier: I think the question is proper on cross-examination. Objection is overruled.

The Witness: It is not necessarily true, if that is the answer you want.

Trial Examiner Hier: Never mind the answer that you think he wants. I want to know the facts.

The Witness: I say it is not necessarily true.

By Mr. Schrup:

Q. If the overhead is the same to jobbers and the buying price is higher for one jobber than it is for another, isn't there a greater margin of profit for that jobber buying
590 at the lesser price?

A. I think I stated that.

Mr. Schrup: Same selling price.

Mr. Sprowl: And same overhead.

Trial Examiner Hier: That's agreed to.

By Mr. Schrup:

Q. It is considered advantageous, is it not, for jobber without an agreement to become a jobber with an agreement from the jobber's standpoint?

A. Generally speaking, yes.

Q. What is the reason for that, sir?

A. Well, as he develops his business, he develops the cost of doing business by virtue of added costs and he must get lower costs based upon that fact.

Q. And he also gets a better buying price, does he not?

A. He does get a better buying price based upon his volume of purchases.

Q. That is an inducement for becoming a jobber with an agreement on the basis of a jobber without an agreement?

A. That is an incentive for him.

Trial Examiner Hier: The particular thing is to keep the increase in overhead less than the extra differential on the price?

The Witness: I think that is basically sound, yes.

Trial Examiner Hier: Would you say that was in
591 addition to his managerial skill?

The Witness: That applies to anybody. You can't just be reckless and increase your volume of business unless all other factors are kept under control and the basic factor is the capital investment.

By Mr. Schrup:

Q. If a jobber wants to grow, he has to make a profit, does he not?

A. The records show—the surveys show the smaller jobber is doing a better job in making profits than the bigger jobber.

Q. You testified, Mr. Niehoff, that in connection with the Greiner Company, New Orleans, that if you had not

given them an additional 7 per cent discount in the year 1949 that you would not have been able to keep that company as a customer, is that correct?

A. I doubt that but I think Mr. Greiner can answer that better than I can.

Q. That was your statement. I refer you to page 259 of the testimony.

A. Not only Greiner, but a number of other accounts.

Q. I am asking you specifically as to Greiner.

Trial Examiner Hier: The answer is yes.

By Mr. Schrup:

Q. Who was the company that you would have lost Greiner to?

592 A. I do not know.

Q. Prior to 1949, what discount was Mr. Greiner getting from your company?

A. I think our sales manager can answer. I think we acquired the account either in 1947 or 1948; maybe it was even later than that and he received the same discount that the cotton states received.

Q. In other words, as I understand your testimony, it is this, that when you made your arrangement with the cotton states group, that you then acquired Greiner as a customer of C. E. Niehoff?

A. Actually, we acquired him at some date later.

Q. After your arrangements with—

A. It might have been a year or two later.

Q. When did you first make your arrangement with the cotton states group?

A. That goes back quite a while. I am trying to recollect, but it is at least—might be five, six, seven or eight years, maybe ten years.

Q. Before you made your arrangement with the cotton state group, how many of those members were you selling as customers of C. E. Niehoff & Company?

A. We were selling quite a number of them.

Q. What were they, sir? I would like to know the number and know the discount at which you were selling

593 them. Perhaps that could be prepared. Apparently your memory is not good.

A. It is very hard for me to remember.

Q. Would you oblige us with another exhibit in which you show the date of the origination of your arrangement with the cotton states group, the number of members of

the cotton states group that you had been selling previous to that arrangement and the discount afforded them, and then, the names of the members following the arrangement with the cotton states group which you acquired as customers and the discount afforded them?

A. I do not know if our records would be available that far back but I think Mr. Post testified to it and his testimony is in the record.

Mr. Schrup: I would prefer it from the records of the respondent here.

Mr. Sprowl: If we have it, we will certainly prepare it.

The Witness: I don't think we have it.

Mr. Sprowl: If we don't have it, we may be able to get it some place else.

Mr. Schrup: I think that is all we have for the present.

Trial Examiner Hier: Do you have anything further?

Mr. Sprowl: No.

Trial Examiner Hier: I have a few questions. Pass 594 me that transcript, if you will, please.

Mr. Niehoff, on page 344 of the transcript, you were asked by Mr. Sprowl, "Does your cost of manufacture enter into this pricing" and you answered, "Well, the cost of manufacture does enter into it but it is secondary so far as the establishing of our prices to the trade and jobber is concerned."

I would get the implication from that that if the competitive price—any particular competitive price is lower than your cost of manufacture, you nevertheless meet that. That is not what you intended to convey.

The Witness: The point I tried to state there, and I think I have said it many times, that the pattern of the pricing is set by the original parts manufacture such as Delco-Remy and Auto-Lite and that regardless of costs on any specific item or number of items, we have to be in line or meet that competition because, otherwise, we just couldn't remain in business competing against these organizations.

Trial Examiner Hier: But you never sell below your cost of manufacture, do you, regardless of what competition does?

The Witness: Well, I would hope not. I would say that generally we do not, but there are specific items where it is difficult for us to meet competition.

Trial Examiner Hier: You made the statement yester-

day morning which I noted down that you believe that
595 your present pricing methods are the best methods of meeting price competition. The word "best" intrigues me; are there other ways? I expected you to say that it is the only way but you said "best." I am interested in why you used that term. It is rather late to recall it to you, I know.

The Witness: Undoubtedly, there are other ways but from my point of view I think it is the best way and gives the jobber the best opportunity of meeting what we call the original parts competition which, after all, is a big factor with us.

Trial Examiner Hier: Then, I have been interested in something that apparently counsel on both sides have assumed all through this case.

These parts which you manufacture, Mr. Niehoff, for various cars—they are manufactured to the same specifications as Delco-Remy or Electric Auto-Lite or anything of that sort?

What I am trying to get at, is there any quality competition or manufacturing competition there or are they substantially or exactly the same part?

The Witness: Quality is an important factor, yes, and we pride ourselves in the fact that we are producing a very high quality unit.

When you ask about specific specifications, we have to go down the line covering hundreds of items. If Delco-
596 Remy sets up specifications of a diameter, say of a contact which might be .1550, we would have our contact the same size. If they set up a thickness of tungsten of .040, we would meet that thickness or improve upon it. You can go through the line and take coils, condensors or bakelite materials—we are constantly striving to improve them.

While General Motors and larger companies have a great opportunity for research work, we also try to maintain an engineering department—laboratory and check on the products so we know they are up to specifications, as we speak of it.

Trial Examiner Hier: Your parts and Electric Auto-Lite or Delco-Remy are interchangeable?

The Witness: That is correct.

Mr. Schrup: I would like to ask a few questions.

Recross Examination by Mr. Schrup.

Q. We have compared the quality between Niehoff, Delco-Remy, Electric Auto-Lite and Ford. Now does the quality of the Niehoff line compare to the competitors listed on Respondent's Exhibit 3?

A. I have no answer for that because I would have to go into—unless you want to keep me for another two or three hours.

Q. In your opinion, do you consider it better quality?

A. Yes.

Q. That is one of your selling points that you impress upon a jobber that it is of a better quality?

597 A. It certainly is one of our selling points.

Trial Examiner Hier: Anything else?

Mr. Sprowl: Yes, I have a question.

Redirect Examination by Mr. Sprowl.

Q. Mr. Niehoff, you expressed to Mr. Hier, the hope that your prices were always within your cost. At what level of discount do you consider that your prices are lower than your cost? I am speaking now of the jobber level with no discount,—the jobber with an agreement with the applicable discounts, the distributor without an agreement, and the distributor with an agreement—those four classifications, which ones, if any, do you service at below cost?

Trial Examiner Hier: You are speaking of over-all cost?

Mr. Sprowl: Yes.

The Witness: We were talking about manufacturing cost but when you involve all the cost factors and you had a scientific way of really setting up a breakdown, that would show that the cost to the smaller customers would unquestionably be higher than it would be to the larger customers.

By Mr. Sprowl:

Q. Higher than the Niehoff Company?

A. Higher to us. I am talking about our products in servicing a jobber or a "JA" account or "DA" ac-

598 count because, the factors of cost as we have already demonstrated, are greater in the sale of a small account than it is to a large account.

Trial Examiner Hier: Do you have anything further from this witness?

Mr. Schrup: I think that is all.

Trial Examiner Hier: Thank you, very much, Mr. Niehoff. You are excused.

(Witness excused.)

Trial Examiner Hier: We will take a short recess.

(A short recess was taken.)

Trial Examiner Hier: Come to order. Proceed.

Mr. Sprowl: Your honor, what we should like to do—I am having Respondent's Exhibit 2 recomputed with the figure that is produced by Respondent's Exhibit 8, and I would like to reserve our number nine for that recomputation so it will follow eight, if I may. We will have that tomorrow morning.

Trial Examiner Hier: The record may show that Respondent's Exhibit 9 for identification is a recap, or shall I say, revision of Respondent's Exhibit 2.

Mr. Sprowl: Just as Exhibit 2 except using the $34.02 figure instead of the $35.83 figure. I should like to have this marked for identification, as Respondent's Exhibit 10A and 10B.

Trial Examiner Hier: It may be so marked Respondent's Exhibit 10A and 10B, which is headed "Price
599 Comparison Niehoff vs. Competitor, One Through Competitor Ten."

FRED H. GEYER was thereupon called as a witness for the Respondent and, having been duly sworn, testified as follows:

Direct Examination by Mr. Sprowl.

Q. Mr. Geyer, I show you Respondent's Exhibit 10A and 10B for identification, and I wish you would explain to me what that compilation is.

A. These prices shown are the jobber's price, that is, Niehoff jobbers in comparison to the same jobber prices of competition. I believe there are ten here. We have taken the most popular items of our line comparable to competition such as points, condensors, bakelite material such as rollers and caps; also, the coils, regulators, switches and relays.

Q. What volume of your ignition line in dollar sales do those items represent?

A These particular items would represent approximately 80 per cent of our volume.

Q. And you have many other items which make up the other 20 per cent?

A. Yes, sir. These are all what we classify on our price sheet as "AB" items, or the fastest moving items and there may be one or two "C" items among them. These are the items that we do the greatest majority of our 600 volume on and that the jobber in turn, gets his greatest sale on.

Q. I observe that across the top of this Exhibit 10A and 10B, you have competitor No. 1, competitor No. 2, etc.

A. Yes, sir.

Q. I show you Respondent's Exhibit 3 and ask you, if the competitor numbers appearing opposite certain of the names on Respondent Exhibit 3, refer to the same competitor who bears the identical number on Respondent's Exhibit 10.

A. They do.

Q. I call your attention to our Respondent's Exhibit 3. You will notice that opposite the name F & B Manufacturing Company, is competitor number four. Who, in fact is competitor number four on Respondent's Exhibit 10?

A. Guaranteed Parts Company.

Q. So, on our Respondent's Exhibit 3, to make the key accurate, it should have competitor number four dropped down a line to be opposite Guaranteed Parts Company?

Mr. Sprowl: Do we do that by a physical correction?

Trial Examiner Hier: Yes, I suppose it can be done. Let the record show that the Examiner has, on Respondent's Exhibit 3, drawn a line in ink across "Competitor #4" and dropped it down a line to Guaranteed Parts Company, to indicate that it is competitor number four.

By Mr. Sprowl:

Q. Referring again to Respondent's Exhibit 10, 601 what do the dates appearing at the head of each column under each competitor indicate?

A. 7/18/49 and 9/26/49.

Q. What do they indicate?

A. The month, date, and the year of the price sheets.

Q. Of that particular competitor?

A. Yes, sir.

Q. In the first column on the left, the column headed "Niehoff", is that the Niehoff jobber base price?

A. Yes, sir.

Q. In the column to the left, even of that column, there are symbols "AL-7793" and so forth.

A. Those are the numbers of our parts.

Q. Are those same numbers used by your various competitors?

A. No, sir, but we do have a comparative number of each competitor in comparison to our number and in that way, we use their comparative number to check our price against that price.

Q. So, in fact, prices shown in the first column, across this sheet for each competitor, are for the same item of merchandise as the Niehoff price applies to in that line?

A. Yes, sir.

Q. What do these plus and minus symbols indicate?

A. The plus symbols indicate that in this particular case where our price comparable to competitor number one is one cent lower, that is, he is one cent higher, and on 602 the minus it shows that we are higher and they are lower.

Q. Turning now to the end of page 10B, the last, the last three lines, do they represent a recapitulation of the plus and minuses and of the comparable prices?

A. Yes, sir.

Q. This exhibit, in no way, indicates the volume discount plan, if any, of any competitor shown on that exhibit, is that correct?

A. That is right.

Q. Taking Exhibit 3, if you wish to key the number of the competitor to his actual name, starting with the first column, competitor number one, can you tell me what that competitor's actual volume discount plan was in the year 1949?

A. To the best of my knowledge—

Mr. Schrup: Just a minute. I have an objection here. I think that we should bring in as the best evidence, the actual discount plan of the competitor rather than relying on the statement of the witness here. We would like to check that ourselves and see it.

Mr. Sprowl: If Mr. Geyer doesn't know, nobody in the world does.

Trial Examiner Hier: As pointed out to you in the Edelmann case, and I think you agree with me, respondent,

in this case has the right to show why he believed he was meeting prices; he may be right or wrong. I mean, if
603 he thinks that that competitor number one there is selling part X-520 or whatever the number may be at 26 cents and he meets that, he has a perfect right to testify as to what he thought it was and then you have a right on cross-examination to bring out that the basis of that belief is faulty or inadequate or incomplete.

There is no burden on him to show, as I see it, that competitor number one's price was actually such and such or that competitor's discount plan was actually such and such.

Mr. Schrup: This is a showing as to what he believes and what caused his actions—that is one thing but if it is put in here for the truth of the matter, what the competitor was actually doing, that is not the best evidence and we would like to see the schedules.

Trial Examiner Hier: I am going to let it in on the first basis. He has the right to show the prices he believes he was having to meet out in the field. It is up to you to show that those prices are not correct; that the basis that he had was inadequate and he went off half-cocked without adequate information.

Mr. Schrup: I think it is the part of the Respondent to show that the competitors actually made these prices.

Trial Examiner Hier: I don't know about that. I am not certain about that at all. I am not sure the statute requires to show what the fact was; merely requires
604 him to exercise reasonable diligence of an ordinary prudent man in similar circumstances to find out whether or not he succeeds in getting the absolute truth—it is a question of good faith. I am going to let it in on that basis.

Mr. Sprowl: I would suggest, as I recall, Mr. Niehoff, on this Exhibit 3, did not want to embarrass his competition. In asking their prices, if you can, in discussing these columns use the competitive number, we will know the names we are talking about.

By Mr. Sprowl:

Q. Going back to that first competitor, number one—

A. Yes, sir.

Q. Do you know the volume discounts employed by that competitor from his jobber's base price in the year 1949?

A. Yes, sir.

Q. Tell me what they were.

A. On a volume going up to $12,000, fifteen per cent. On a volume greater than that and to concerns that do a group buying, 20 per cent.

Q. Is that volume related to any given period of time?

A. I believe for one year's purchases.

Q. You believe?

A. I am sure it is.

Q. Is there any further discount given by that competitor for prompt payment or any other factor?

A. There is a 2 per cent cash discount.

605 Q. These percentages, it is the first percentage you just spoke of, the 15 percent that is first deducted from that competitor's base jobber's price?

A. You mean the 15 per cent?

Q. That is right.

A. It has been in some cases and in others, it goes according to their volume varying from a 3 per cent plus 2 deduction on the face of the invoice, to 15 per cent on the total volume for the year's purchases.

Q. This competitor has two volume discount plans?

A. Right.

Q. Tell us about the second one.

A. The second one is offered to large purchasers of this particular line; in some cases, a certain purchase over a period of a year and in other cases, given to a group to any number of jobbers who belong to this group.

Q. You have lost me. Now—

Mr. Schrup: You certainly have lost me.

By Mr. Sprowl:

Q. Let's get back to the first discount plan. You said that went up to $12,000?

A. That is right.

Q. From one dollar up to $12,000? A 15 per cent discount?

A. I didn't say that.

Q. Tell me what you mean.

606 I said that on the face of the invoice, off of their jobber's price, they quote 3 and 2 per cent and according to the volume that the purchaser makes over the period of a year, the discounts will run from 3 to 15 per cent, with a top discount earned of 15 per. cent. Now, to another group, they sell at a 20 per cent discount.

Q. What group is that?

A. That is to a group of jobbers who get together as

a buying group. Besides that, and I am pretty sure that in 1949 certain jobbers, individually, were sold at 20 per cent.

Q. As I understand it, there is a discount off the invoice price at the outset from this customer's method of doing business.

A. Yes, sir.

Q. How much is it?

A. Three per cent.

Q. At what volume level?

A. At any volume level on a particular contract which they have and that discount will go through to the end of the year and if their purchases are $12,000, they will receive 15 per cent.

Q. In addition to the 3 per cent they have already received?

A. No, sir, an additional 12. That is what the contract reads.

Q. What if they obtain $6,000?

607 A. Their discount would run possibly 8 per cent.

Q. Can you give me these volume levels at which these discounts apply?

A. I have a copy of the contract; if you want to let me have it. I don't remember them.

Q. If it will refresh your memory, you may refer to the contract.

A. At $1,800 it is 3 per cent plus 2; at $2,400—

Mr. Schrup: May I suggest, rather than read from the contract, why don't you offer that as an exhibit so we will have some basis of cross-examination?

Mr. Sprowl: It is agreeable with me. This will be Respondent's Exhibit 11, and that addendum should be 12.

Trial Examiner Hier: We'll mark it "B".

Mr. Schrup: Where did you get this? That is a photostat. Where did you get the original?

The Witness: I don't really remember.

Mr. Schrup: No question of it being authentic. I am trying to place it.

The Witness: I am sure it is authentic.

Mr. Schrup: Did you pick it up from a jobber?

The Witness: Yes, sir.

Mr. Schrup: Would you mind telling us the name of the jobber you picked it up from?

The Witness: I don't honestly remember.

608 Mr. Schrup: Did you pick it up personally?

The Witness: No.

Mr. Schrup: How did it come to you?

The Witness: Through one of our salesmen.

Trial Examiner Hier: Let the record show that there has been marked for identification as Respondent's Exhibit 11A, a photostatic copy of competitor number one on Respondent's Exhibit 3, what is headed, "Master Distributor's Rebate Contract" and, as Respondent's Exhibit 11B for identification, what is entitled "An Endorsement Thereto." Now, go ahead.

(The documents referred to were marked Respondent's Exhibits 11A and 11B for identification.)

By Mr. Sprowl:

Q. I show you Respondent's Exhibit 11A and 11B and ask you if that is a copy of the contract of competitor number one and attached to it is Respondent's Exhibit 11B, a document, whereby the terms of that contract were extended for another year—that is, the following year.

A. Yes, sir.

Q. And that contract sets up the volume discounts to the jobbers of competitor number one that you were endeavoring to describe a few minutes ago?

A. That is correct.

Q. How did that particular document come into your hands?

A. Through one of our salesmen who received it 609 from one of our jobbers.

Mr. Sprowl: I offer those in evidence.

Mr. Schrup: I don't think that this is a bit material until we ascertain the fact that competitor number one has approached a customer of Niehoff Company, and, that as a result of that approach and attempt to sell on the basis of Respondents Exhibit 11A for identification, that the Niehoff Company then met that price on their part to retain this customer of theirs who had been offered, purportedly, terms appearing on Respondent's Exhibit 11A for identification.

The Witness: It would be impossible, Mr. Schrup, for us to get this unless it was given to a jobber and then in turn, given to us.

Mr. Schrup: I have an objection pending to that, on the basis not of its authenticity, but as a fact whether or not competitor number one came to one of your customers and attempted to sell them on the basis of that contract

which is Respondent's Exhibit A for identification, and, that resulting from an offer thereto or therefrom, then made the offer to your customer that you did to hold him.

The Witness: I didn't say that we made them an offer after he received this contract. We might have lost the customer due to him getting this contract.

Mr. Schrup: I think we have to have that customer's name.

610 Trial Examiner Hier: I don't think he has to make any such showing. I think he has a right to show what competition is selling at. So far as he can ascertain that fact, this is obviously a printed document; it is not gotten up for one isolated instance. It is gotten up apparently to be used quite widespread.

Mr. Schrup: May I ask the witness—

Trial Examiner Hier: I have no doubts about the authenticity of it and I think it is admissible for purposes as indicated.

Mr. Schrup: May I ask the witness if competitor number one, which this purports to be one of their contracts, has other contracts?

The Witness: If they have, I have never seen one.

By Mr. Sprowl:

Q. Do they have other arrangements?

A. They have other arrangements.

Q. Will you explain those other arrangements?

A. The other arrangement is, as I mentioned before, where they sell to a group of jobbers or an extremely larger jobber and in that case, he obtains a 20 per cent discount.

Q. How large is extremely large?

A. Well—

Q. Are you speaking of annual volume?

A. They say—

611 Q. I want your knowledge.

A. To the best of my knowledge, they are supposed to be $50,000 and $100,000. On the $50,000 it is a straight 15 and on the $100,000 it is 20 per cent.

Mr. Schrup: I suggest, your honor, that it is going to be very difficult to cross-examine this man on the truth of this without these documents.

The Witness: It is the truth.

Mr. Schrup: I am not questioning that you are speaking the truth but I would like to see the documents.

Trial Examiner Hier: He has the documents.

The Witness: There is no such document available as far as this 20 per cent discount is concerned.

Mr. Schrup: I say there is another document.

Mr. Sprowl: I'll do this, Mr. Schrup., I am perfectly willing to go to the standard record and you and I will write a stipulation and I think it will cover every factor. We have a copy of the transcript and we will write out a stipulation that will end it., If you want to make it difficult to prove a fact, that is one thing. If you are genuinely objecting, that is another.

Mr. Schrup: I do not see the materiality of it and I am objecting.

Trial Examiner Hier: I am satisfied about the materiality as part of his defense and before anybody else
612 prevents me from doing so, I am going to admit in the record, Respondent's Exhibit 11A and 11B. The objection is accordingly overruled. It is admitted on the basis as before; not as proof of the fact, but as to what this respondent acted on.

(The documents referred to, heretofore marked for identification as RESPONDENT'S EXHIBIT 11A and 11B, were received in evidence.)

By Mr. Sprowl:

Q. Turning to competitor number two, what do you know about the volume discount plan, if any, offered by competitor number two in the year 1949 from the jobber's base price shown in that column?

A. Here again we have a similar contract showing the prices quoted, plus, that again to the group buyers there is a 20 per cent discount offered to them at all times.

Q. I show your Respondent's Exhibit 12 for identification, and ask you if this is the contract that was in effect in the year 1949 by competitor number two?

A. Yes, sir.

Q. Does it show on the face of it, the volume discounts that you mentioned were in their printed form of contract?

A. Yes, sir.

Q. Do they have any other discounts that they extend that do not appear on that contract?

A. Yes, they do.

613 Q. Will you tell me about them?

A. They have a group discount which amounts to 20 per cent which is offered to any large group who accepts this line or who sells the line.

Trial Examiner Hier: How large, if you know.

The Witness: In this case, I would say, any group where the volume would consist of, anywhere from $20,000 to $25,000.

By Mr. Sprowl:

Q. Annually?

A. Yes.

Mr. Sprowl: We offer then, as Respondents Exhibit 12—

Mr. Schrup: Same objection.

Trial Examiner Hier: Same ruling. Respondent's Exhibit 12 is admitted in evidence.

(The document referred to, heretofore marked for identification as RESPONDENT'S EXHIBIT 12, was received in evidence.)

By Mr. Sprowl:

Q. Turning now to competitor number 3, tell me what you know of that competitor's volume discounts in force in the year 1949.

A. This company also uses a similar agreement and I believe we have a copy of that.

Q. I show you Respondent's Exhibit 13 for identi-
614 cation, and ask you if that is the printed form of contract to which you just referred.

A. Yes, it is.

Q. Was that in use in the year 1949 by competitor number three?

A. Yes, sir.

Q. Are there any other discount plans extended by competitor number three in addition to those shown on the contract that you know of?

A. Yes, there is.

Q. Tell me about it.

A. They also have a 20 per cent group buying deal and have a 20 per cent deal to large accounts, such as may purchase anywhere from $10,000 to $15,000.

Q. Annually?

A. Yes.

Q. Going to competitor nuinber four—

Trial Examiner Hier: Do you wish to offer that in evidence?

Mr. Sprowl: Yes.

Trial Examiner Hier: Same objection?

Mr. Schrup: Yes.

Trial Examiner Hier: Same ruling. Respondent's Exhibit 13 is admitted in evidence.

(The document referred to, heretofore marked for identification as RESPONDENT'S EXHIBIT 13, was
615 received in evidence.)

By Mr. Sprowl:

Q. Referring to competitor number four, do you know what that competitor's volume discount plan was in the year 1949?

A. Yes, sir.

Q. Tell me about it.

A. As far as I know, we do not have a copy of the contract but their discounts from 10 per cent, 15 per cent and 20 per cent.

Q. Do you know at what volume level of annual purchases those discounts applied?

A. The ten per cent applied on the face of the invoice; as to the 15 per cent, while we were never able to get an exact contract on this, any account that did $5,000 or better, say, up to $10,000 would get this discount and over that, the 20 per cent.

Q. What were those annual volume levels again, to which these applied?

A. Five thousand, 15 per cent and over that the 20 per cent—over ten thousand, 20 per cent.

Q. Is that anything from zero on up?

A. From zero to five thousand was ten per cent.

Trial Examiner Hier: Off the face of the invoice?

The Witness: That is right, and over $5,000, 15 per cent and ten or better, 20 per cent.

616 By Mr. Sprowl:

Q. Were there any further discounts or rebates given on those prices?

A. None that I know of, except 2 per cent cash discount.

Q. So, under that plan, every purchaser got 10 per cent and 2 per cent?

A. Right.

Q. Turning to Respondent's Exhibit 10, the fifth competitor shown thereon, tell me what you know about that competitor's volume discount plan in effect during the year 1949 as it related to the jobber's base price shown on Exhibit 10.

A. Their discounts were 5 per cent on $1,800.00.

Q. Is that zero to $1,800.00?

A. Yes; 10 per cent on $1,800 to $3,600; 15 per cent on $3,600 to $5,000 and then, they had a 20 per cent discount which I don't know where it started or where it ended, plus 2 per cent cash discount.

Q. That 2 per cent applied to all levels of purchase?

A. Yes, sir.

Q. Do you have any sample form of contract on that competitor?

A. I don't think we have.

Q. Competitor number six shown on Exhibit 10; tell me what you know of that competitor's annual volume discount in force in the year 1949 as it applied to the jobber's prices shown on Exhibit 10.

617 A. I believe we have a contract on that.

Mr. Sprowl: I would like to have this marked as Respondent's Exhibit 14 for identification.

(The document referred to was marked Respondent's Exhibit 14 for identification.)

By Mr. Sprowl:

Q. I show you Respondent's Exhibit 14 and ask you if that is the contract used by competitor number six in the year 1949.

A. Yes, sir.

Q. Does it reflect the volume discount plan of that competitor?

A. Yes, sir.

Q. And, is it complete?

A. Yes, sir.

Q. Were there any further discounts in addition to those shown on that contract, to your knowledge, were used by that competitor in the year 1949?

A. Not that I know of, no, sir.

Mr. Sprowl: I should like to offer as Respondent's Exhibit 14, the document that has been so marked.

Trial Examiner Hier: Have you had a chance to look at it?

Mr. Schrup: I was going to ask—I note the date "March 22, 1949" stamped on the top. What does that mean?

618 The Witness: Well, I presume that that is the date that it was received by us in the mailing department. When our mail comes in, it is stamped.

Cross Examination by Mr. Schrup.

Q. What about the underlining in red ink?

A. The underlining was put on there by our salesman so that I would certainly notice what else this particular competitor has in his agreement.

Q. When was the last revision in the discount schedule of the C. E. Niehoff Company?

A. You mean discounts on our contract—on our agreement to the jobber?

Q. Naturally your contract agreement to the jobber in the sale of ignition equipment and your other equipment, of course.

A. I believe in 1948. I would like to ask Mr. Niehoff—

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Schrup:

Q. What I am interested in, is the last revision of your volume discount and your various contracts with jobbers.

Trial Examiner Hier: His best recollection is in 1948.

The Witness: Yes.

619 By Mr. Schrup:

Q. Those are the contracts that were in effect in 1949?

A. Yes, sir, and still are in effect.

Mr. Schrup: I have an objection, of course, to the materiality of this.

Trial Examiner Hier: Same objections?

Mr. Schrup: No, if it is introduced on the element of good faith—revisions to meet these contracts were made in 1948, prior, as I see it, to the contracts, these competitors' contracts of '49.

Mr. Sprowl: I think if you want me to go back—I have to cover all that, Mr. Schrup. If you want me to do it now—I was going to do it as to all of them in a bundle at the end. I didn't want to take each one singularly.

Mr. Schrup: Let me reserve my general objection until you complete your examination on them.

Trial Examiner Hier: Respondent's Exhibit 14 is admitted in evidence.

(The document referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 14, was received in evidence.)

Redirect Examination by Mr. Sprowl.

Q. As to competitor number seven, shown on Respondent's Exhibit 10, can you tell me from your knowledge
620 what volume discount plan was used by that competitor in the year 1949 with respect to the jobber's base prices shown in that exhibit?

A. On that particular company, I can't give you the exact figures that were used starting with the lowest amount, up to the highest. To the best of my knowledge, there was a 15 per cent proposition to the jobber and that was on a volume of $3,600 or over. Under that, I am not sure. We had a contract of that but —

Q. You have no sample contract?

A. No, sir. I don't know what happened to it. I lost it.

Q. But you have seen it?

A. Definitely.

Q. All right, competitor number eight on Respondent's Exhibit 10; tell me with respect to that competitor what volume discount plan was in force in the year 1949 with respect to the jobber's base prices shown on that exhibit.

A. This particular company sells their product through a distributor or what is called a "central", in having one of these distributors in each state to whom they quote a discount of 23 per cent from the jobber's price and he in turn sells these items at a 10 per cent discount from the jobber's price. This particular firm specializes mostly in Ford replacement ignition parts.

Q. They sell to their central at 23 per cent from the prices shown under column eight?

621 A. Right.

Trial Examiner Hier: Regardless of volume?

The Witness: Regardless of volume because usually those are quite large accounts and buy in substantial amounts and act as their distributor.

By Mr. Sprowl:

Q. Is there a further discount for cash?

A. Two per cent, cash, yes.

Q. Then, that central, in turn, sells to jobbers?

A. Sells to jobbers and mostly to the larger electrical so-called companies such as Delco-Remy and Auto-Lite; accounts who do not have a Ford line.

Q. This is primarily confined to the Ford line?

A. Right.
Q. That is at 10 per cent off of the jobber's base price?
A. Right.
Q. Is there a further 2 per cent discount?
A. Two per cent discount in all cases.
Q. Is that last transaction, irrespective of annual volume?
A. Yes, that is on the face of the invoice.
Q. To any jobber?
A. Any jobber.
Q. From zero on up?
A. To one hundred or five hundred.
Q. Do you have a copy of the type of contract used
622 by that organization?
A. I don't think we have.
Q. Referring to competitor number nine on Respondent's Exhibit 10, tell me what you know of that competitor's volume discount plan in force in the year 1949 with respect to the jobber's base prices shown on that exhibit.
A. I believe we have a copy of the contract.
Trial Examiner Hier: Off the record.
(Discussion off the record.)
Trial Examiner Hier: On the record.

By Mr. Sprowl:

Q. I show you Exhibit 15 and ask you if that is the contract to which you just referred?
A. Yes, sir, it is.
Q. Does it reflect the discounts used by that competitor in the year 1949?
A. Yes, sir.
Q. Were there any other discount plans used by that competitor not reflected on that contract?
A. None that I know of.
Mr. Sprowl: I offer that document as Respondent's Exhibit 15.
Trial Examiner Hier: Same objection?
Mr. Schrup: Yes, and I think I may have a further objection at the close of the examination. I presume
623 they are all going to be connected up.
Trial Examiner Hier: Let the record show that Respondent's Exhibit 15 is admitted in evidence.
(The paper referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 15, was received in evidence.)

By Mr. Sprowl:

Q. With respect to competitor number ten, shown on Respondent's Exhibit 10, tell me what you know of that competitor's volume discount plan in force in the year 1949 with respect to the jobber's base price shown for that competitor on Exhibit 10.

A. The only price that I know about, as far as this particular competitor is concerned, is a 10 per cent off the face of the invoice on all purchases, plus 2 per cent for cash.

Q. Does that have any relationship to annual volume?

A. As far as I know, none at all. In fact, it is given on the face of the invoice no matter what the purchases might be.

Q. Zero on up?

A. Yes.

Trial Examiner Hier: Actually, Mr. Geyer, the last column, horizontal, across Respondent's Exhibit 10A and 10B, is 10 per cent too high. That is the jobber's price but you said they get 10 per cent off their price regardless of volume.

The Witness: That is right, 10 per cent off this 624 price to the jobber regardless of what volume.

Trial Examiner Hier: As far as actual sales go, that column on Exhibit 10A and 10B is really 10 per cent lower than what appears. Some of these discounts have been quantity discounts, with respect to competitor number ten; and, I think number eight, there was a discount granted off the face of the invoice regardless of quantity.

The Witness: But basically, the price was still jobber's price.

Trial Examiner Hier: I understand that. Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Sprowl:

Q. Now, Mr. Geyer, with respect to any one of these ten competitors, in the year 1948, did they have any substantially different discount method than the one you have described in your testimony?

A. You said 1948?

Q. Yes.

A. As far as I know, no.

Q. This method, and amounts and quantity of discounts that you have described for each competitor was the fact in 1948 as well as 1949?

A. Yes, sir.

625 Q. Was that fact known to you in 1948? In other words, did you know what your competitors' prices were—prevailing prices were and discounts were in the year 1948 as well as you did in the year 1949?

A. There may be one or two of those contracts that were never received by us and that we actually had in our possession until early in 1949, but we knew and had heard some of these prices were in effect.

Q. You knew the price levels?

A. That is right.

Q. How long have you been in charge of sales in the C. E. Niehoff Company?

A. Since 1941.

Q. What is the fact as to how well you kept yourself informed in each of those years as to your prevailing competitors' prices?

A. Yes, sir.

Q. What is the fact?

A. Naturally I had to be in a position to have the knowledge of the competitors' situation; first of all, to be able to instruct our salesmen in regards to what price situations prevail. Also, I had to make contact through our salesmen to many types of jobbers and in trying to sell these concerns, naturally we had to know what our competition was doing.

Q. Did you know or did you not know?

626 A. We definitely did know on that basis and the only way we were able to occasionally get a new account.

Q. Mr. Geyer, I show you Commission Exhibit 47A, sheet one and I call your attention to Piston Ring & Supply Company, "J" account of Tampa, Florida; total sales for the year 1949, $2,107.00. I also call your attention to Gulf Auto Supply of Tampa; annual volume of the year 1949, $4,573.00. What do you know of those two customers and their volume situation?

Mr. Schrup: I think that question should be more specific. We have the volume down here. The exhibit speaks for itself.

Mr. Sprowls: You asked Mr. Niehoff specifically about

those two accounts and I am entitled to clarify any information that you tried to put in on them.

Trial Examiner Hier: I don't see anything wrong with the question. Do you understand it?

The Witness: Yes, sir.

Trial Examiner Hier: Go ahead and answer it.

The Witness: Gulf Supply Company has a "JA" agreement with us; the volume is $4,573.00. Piston Ring Supply Company is a new account to us and we put them on a "J" basis. And, after we had sold the account for—I don't remember exactly whether it was then or eleven months or what it was, we lost the account.

By Mr. Sprowl:

627 Q. Is this in the year 1949?

A. Yes, sir.

Q. To whom did you lose that account?

A. Competitor number one.

Q. That all happened in the year 1949?

A. Yes, sir.

Q. The acquisition and loss?

A. I believe the account was started in 1948.

Q. Did you ever have, with respect to that account, a full year's experience upon which you could grade it as to classification prior to the year 1949?

A. No, sir.

Q. With respect to this same exhibit, sheet two, I call your attention to three accounts in Shreveport, Louisiana, Central Auto Parts, Chain Battery and Interstate Electric, all recorded as "D" accounts. The annual purchase volume of the first one at jobber price being $4,464.44; second one, $95.56, and the third one, $1,612.22.

Mr. Schrup: There is an additional one there.

Mr. Sprowl: Did you interrogate Mr. Niehoff concerning United Service, Incorporated?

Mr. Schrup: I do not recall.

Mr. Sprowl: All right, I'll include the fourth one, United Service, Incorporated, "J" account, same town, annual jobber volume, $304.00. Can you give me any

628 explanation with respect to those four accounts?

The Witness: The first account, of course, is an account that has done a volume of business which obviously warrants them to the "D" price.

The second account, during the previous years, have done

a very nice business with us and have bought our Ford line only, and, we lost the business.

Trial Examiner Hier: When?

The Witness: In 1949. I don't know what month. I think it was very early.

By Mr. Sprowl:

Q. You are speaking of Chain Battery?

A. Yes.

Q. Who did the $1,612?

A. No, $95.56.

Q. What volume had you enjoyed with that customer in the previous year?

A. I am not sure. I do not know.

Q. In relation to the $95 volume shown there.

A. I really couldn't tell you. I do not know. To the best of my knowledge, they were a good account for us on the particular line that they were buying.

Q. You lost them in what year?

A. 1949.

Q. Do you know to what competitor—if you can do it by name?

629 A. I don't know. The next account, this company also the previous year and years before that had done a very fine or a very good job and in 1949 they had some changes in their sales organization, and we took back quite a bit of merchandise from them and their sales dropped considerably.

Q. This "D" classification, for that particular account, was made at the beginning of 1949?

A. No, sir. I don't know when it was made but we had had them for quite a number of years previously.

Q. What was the fact with respect to their 1948 volume?

A. I couldn't say definitely, but I presume it was $3,600 or better.

Q. Which would have entitled them to what classification?

A. To the "D" classification.

Q. These classifications are made prospectively or retroactively?

A. They are retroactive.

Q. What does retroactive mean, in your mind?

A. Well, we give them—pardon me—excuse that. the "D" classification we give them a billing on the face of the invoice.

Q. I understand that. I want to know this: When you classify any customer, is that a classification that pertains for the coming year or goes back through the past year?

A. We classify customers according to the volume of business they have done the previous year.

Q. To what year then, does the classification relate?

A. In regards to these three accounts?

630 Q. Any account.

A. To the previous year, 1948.

Trial Examiner Hier: It is based on the previous year, but it is operative in the coming year, is it not?

The Witness: Yes, sir.

By Mr. Sprowl:

Q. Is there one other account in that column?

A. Yes, United Service.

Q. Explain that.

A. This account, after losing the Chain Battery account, our salesmen sold this company our Ford line only, at the regular "J" basis, or jobber's price.

Mr. Schrup: United Service?

The Witness: Yes.

By Mr. Sprowl:

Q. Does United Service have more than one outlet that you sell to?

A. I believe we sold them in Baton Rouge and St. Charles. I think they did have, at that time, two or three branch stores.

Q. I call your attention to sheet three, Duncan, Oklahoma. This is still Commission Exhibit 47, Auto Parts & Equipment Company and the F & H Parts Company. The first company has a "D" classification with a volume of $312.00 at jobber price. The second company, a "JA" classification, has a volume of $1,973 at jobber price. Is
631 there any explanation that you have with respect to those two accounts?

A. Auto Parts and Equipment Company had gone out of business sometime in the early part of 1949, I believe, and F & H Parts Company was one of the partners of Auto Parts Company, and they opened up a new place of business and we sold them on a "JA" agreement.

The Auto Parts Equipment Company, in 1948, had done a fairly good volume of business on our line and when the new company was organized, and naturally, one of the

partners being acquainted with our line, wanted the line, so we sold them and placed them on a "JA" agreement. It was a new account.

Q. That is F & H Parts Company?

A. Right.

Q. Did Auto Parts & Equipment Company go out of business before you acquired F & H Parts as a customer?

A. I could not say for sure on that, Mr. Sprowl.

Q. Calling your attention to sheet 4 of Commission's Exhibit 47, Motor Supply Company, of Dallas, "D" account, with a $550.00 volume at jobber's price; Wholesale Parts Company, "J" account, $795.00 volume at jobber's price. Is there any explanation with respect to those two accounts?

A. Yes, sir.

Q. Will you give it to us?

A. Motor Supply Company of Dallas, we lost to one of our competitors.

632 Q. What year?

A. 1949 and we then sold Wholesale Parts Company, which was a small account in this particular neighborhood of Dallas at the "J" price.

Q. Was that a new customer in that year?

A. Yes.

Trial Examiner Hier: Do you remember how many months in 1949 you sold the account you say you lost? Does that chart show three months' business, five months' business—

The Witness: No, it does not. This particular account had done a volume with us in the previous line of $4,122, joined a group, and we sold them. Then we lost them to competitor number one.

Trial Examiner Hier: Do you care to offer Exhibit 10A and 10B in evidence?

Mr. Sprowl: Yes, I do.

Trial Examiner Hier: Mr. Schrup, he offers Exhibit 10A and 10B in evidence. Outside of the objections—

Mr. Schrup: I want to examine the witness in general on cross-examination. I make the same objection on the basis of materiality and I want to go into this other matter on cross-examination.

Trial Examiner Hier: I know, but your objection to Exhibit 10A and 10B is, it is immaterial.

Mr. Schrup: It is not the best evidence, of course,

633 I mean, as I understand it, your honor, even if it is admissible it will not be admissible for the truth of the

matter stated thereon, but merely for the basis of the action upon which the respondent acted.

Trial Examiner Hier: Admitted to show what the respondent learned and the basis on which the respondent acted with reference to that knowledge that he acquired.

Mr. Schrup: That is true. It is not admitted for showing the facts stated on there are true.

Trial Examiner Hier: They are not necessarily true. He stated, that in some instance, he did not know it as a fact and he makes that assertion under oath. Unless you destroy it on cross-examination, it stands. If you have no other objection, then we will overrule it and Respondent's Exhibit 10A and 10B is admitted in evidence.

(The paper referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 10A and 10B, was received in evidence.)

By Mr. Sprowl:

Q. I would like to again, show you Respondent's Exhibit 3. I want you to look at the competitors' names thereon who don't have a key number following their names, and ask you if any of those competitors had a different kind of pricing method to the jobber trade in 1949, than the volume discount method used by the Niehoff Company.

634 A. The first one on here is the same company as number three, under another name, and has the same arrangement for selling or use the same discounts with the exception of lower jobber prices.

Q. You mean they have a lower base price to start from?

A. Than number three, although it is manufactured by the same company.

Q. It is fundamentally, a volume discount plan?

A. Yes, sir.

Q. I want to know if there are any on there that have some plan other than a volume discount plan.

A. Well, the third one, which has no number here—

Trial Examiner Hier: You better use the name.

The Witness: Echlin—this company does their entire volume through the N. A. P. A. They have a volume discount that they sell N. A. P. A. to and N. A. P. A. in turn sells the jobbers at a regular jobber's price.

By Mr. Sprowl:

Q. They have, in effect, one customer?

A. Yes. You might say one customer with different branches throughout the country.

Q. Was that true in 1949?

A. Yes, sir.

Q. What about any other competitor that has no number?

A. Another one is Philco—no number on it.

635 Q. What type of pricing method did it use?

A. This company has what they call a distributor's price. These prices are figured on a base of about 20 per cent from our jobber's price sheet. That may vary slightly on coils and regulators but basically, it is a 20 per cent lower price.

Q. Than the Niehoff jobber base price?

A. Right.

Q. To everybody in the trade?

A. To everybody in the trade, whoever they sell to.

Q. Do they have a different discount plan for a different classification of customer?

A. No, sir, they do not. They have a price sheet for the dealer, and the wholesaler, and the list price for their jobber, or distributor as they call them.

Q. What about any other competitor that you haven't already discussed?

A. Preferred Electric. I don't know of any discount that these people quote from their distributor's price but their distributor's price is approximately 15 per cent lower than our jobber's price.

Q. Going back to P & D—does it ever deviate?

A. That was Preferred.

Q. Going back to P & D, do they ever use a different price than the one you have described?

A. I don't think so.

636 Q. What about anyone else on there?

A. The Automotive Specialty Corporation, Brooklyn, New York. I don't know very much about this company. Their business is mostly in New York and New England. They have a 10 per cent discount from the jobber's price sheet, and if they have anything beyond that, I have no definite knowledge of it.

Q. Is that at all levels?

A. Yes, sir.

Q. Is there another one there?

A. Yes, Tungsten. This company has a jobber's base price which is about 20 per cent lower than our price.

Q. Is that available at all levels?
A. Yes, sir.
Mr. Sprowl: That is all.
Trial Examiner Hier: The hearing in this case will now stand adjourned until 9:30 a. m., tomorrow morning.

637 Room 1500, 173 West Madison Street, Chicago, Illinois, September 6, 1951.

Met, pursuant to adjournment at 9:30 o'clock a.m.

Before: Frank Hier, Trial Examiner.

Appearances:

Edson P. Schrup, Attorney for the Federal Trade Commission.

Charles R. Sprowl, Taylor, Miller, Bush & Wagner, 134 South LaSalle Street, Chicago, Illinois, Attorney for the Respondent, C. E. Niehoff & Company, Inc.

638 Proceedings.

Trial Examiner Hier: On the record.
It appears that what we numbered Respondent's Exhibit 10-A, B, C, and D should be 10-A and -B because C and D were duplicates. So, the record should show that Respondent's Exhibit 10-A through -D should be renumbered 10-A and -B, and the transcript corrected in accordance there with.
I have telephoned the young lady who took the transcript yesterday afternoon. She wasn't in the office, but the office told me they would tell her.

FRED H. GEYER having been previously duly sworn, resumed the stand and continued testifying as follows:

Direct Examination (Continued) by Mr. Sprowl.

Q. Mr. Geyer, how frequently does the Niehoff Company review its cost prices to its customers?
A. We always review our prices at least twice a year. Some years we have got out one new price sheet and in other years we got out two new price sheets.

Q. How frequently do you review your volume discount plans?

A. We haven't changed our volume discount plans since 1948, I believe.

Q. And I will ask you how frequently you reviewed them?

A. We naturally check, we review them every year
639 when we discuss new prices but we have made no changes in the steps in any one of the agreements which we have issued.

Q. Now, in adjusting your prices from time to time, and in setting your prices from time to time, what factors do you consider?

A. Well, first of all, we consider our costs. We maintain a cost department, both in the plant and production department, and in the office. We review costs of all of the items, and after we get through reviewing and checking our costs we check all competitive prices to see that our prices are in line, and of course at all times we try to be competitive and in some cases due to our costs our prices may not meet certain competition. It is impossible for us to meet this competition due to costs which we have. But, we make every effort to try to get competitive because it is necessary for particularly we in the sales department.

Q. Are these cost departments something that you have had in the Niehoff Company for some time?

A. I believe we have had a cost department for, well, all of the time I have been with the company, and that is 18 years. I, myself, have been active in it since 1941.

Q. Active in what?

A. In the checking of costs and establishing or helping to make up the prices.

Q. All right. What relationship is there, if any,
640 between your volume discounts that you establish from time to time and your costs?

A. We have always maintained a price in relation to our cost, and have never sold any merchandise below cost but have always regulated our prices according to the different steps which we have in our agreements, and in no case do we sell any merchandise at a price that isn't warranted according to our cost and competitive prices.

Trial Examiner Hier: Now, I wish you would keep straight in your testimony the difference between cost to manufacturer and total cost.

The Witness: Our total cost, I am talking about selling cost, not manufacturing cost. Pardon me if I did not make myself clear on it.

Trial Examiner Hier: All right. Go ahead. If you haven't finished, go ahead.

By Mr. Sprowl:

Q. Now, from the price that is charged the jobber without agreement, which as I understand it is your jobber base price—

A. Right.

Q. —the next classification is jobber with agreement, is that correct?

A. Yes, sir.

Q. And at that level, there is a volume discount, is that correct?

641 A. Yes.

Q. Now, why is it that you don't grant any discount to the jobbers without an agreement, whom I understand purchase less than a hundred dollars a month on the average, and you do accord a discount to the next higher groups progressively?

A. Well—

Mr. Schrup: Wait a minute. There is no testimony in this record what the average jobber purchases.

Mr. Sprowl: I will rephrase the question. I think the testimony is that it is $1,200 a month, under $1,200 a month.

The Witness: $1,200 or over.

By Mr. Sprowl:

Q. Is the jobber with agreement?

A. That is right, $1,200 or over is the first step.

Trial Examiner Hier: All right. Go ahead and answer the question. What is it?

The Witness: If we are positive that the account does not do a hundred dollars worth of business with the company, it is really an unprofitable account for us.

By Mr. Sprowl:

Q. In what period of time, a hundred when?

A. A hundred a month or twelve hundred dollars a year. The time which we devote to that type of an account, if we can't step up that business and get it into
642 the next bracket, then we have an account on our hands that is unprofitable to us. That is the reason

Q. By unprofitable do you mean that the amount you receive does not equal your costs in handling it?

A. That is right, that is the most costly account for us for the simple reason that our selling or expense, that is the salesman's time that he devotes to that account, if he cannot bring that account up above $1,200, then we do not believe, our records show us and prove to us that that account is not profitable to us.

Q. All right. Now, go on to the next step.

A. The account that will go over $1,200, we find that that type of an account we are in a position to build up to get into the next step of say $2,400 because it is an account that is trying to grow, and we try to help the small account particularly so as to make a better customer out of him. We never know when we take on an account just where this account is going to go. We do not know whether he is going to become a $3,600 account or a $2,400 account, but our efforts are—

Q. Getting back to this proposition, does the five per cent discount that you give that jobber with agreement have any relationship to your cost savings?

A. Well, in all cases whatever discount we give to the customer, as his volume increases, we know that in no way is our cost affected. In other words, we know that
643 as the volume increases the amount of business which we get warrants us to give the man additional discount which we supply—

Q. Are you trying to tell me there is cost savings of some kind?

A. There is a cost savings in this way, that as the account increases our salesman will naturally do more business and the amount of volume which we receive out of that account naturally is a saving to us, the handling of small orders, the same procedure goes through with the handling of a $20 order practically as it is with the $100 order. So that when we get an account to function at a more volume or a greater volume, naturally it is a saving to us.

Q. Now, you have been with the Niehoff Company, you say, for 18 years?

A. That is right.

Q. Prior to that time, what was your business?

A. I was in the jobbing business for 20 years.

Q. What type of jobbing?

A. Automotive company, with the Andrea Company

at Milwaukee. We were the largest jobber in Milwaukee. We had 18 salesmen, and for the last 10 years I was with the company, I was sales manager for the company.

Q. All right. Now, when you first went with the Niehoff Company, what was your capacity?

A. I was a salesman for them, travelled in the
644 territory of Michigan, Indiana, Wisconsin and Illinois.

Q. And you did actual direct selling of that nature for the Niehoff Company for how many years?

A. Up until—from 1933 up to 1941, which was eight years.

Q. And since that time, what has your position been?

A. Since that time I have been sales manager for the Niehoff Company.

Q. And as sales manager, are you responsible for the direction of the salesmen of the Niehoff Company?

A. Yes.

Q. All right. I would like you to tell me how long it takes a salesman to call on a small "J" account as compared to the time he would spend in calling on a, say, one of the large distributors with agreement accounts of the Niehoff Company?

A. Do you mean after the account has been sold, Mr. Sprowl?

Q. That is right, just a regular routine call on the very smallest account as compared to the very largest account?

A. Well, that is one of our big problems, having had the experience myself for many years, and since being sales manager, going out with our salesmen, that in contacting the small account you have very many obstacles to overcome in that first of all it is a very small business. The man either operates on the counter himself and does
all of the work himself, in running the small business,
645 and he is not in a position to take care of his, let us say, perpetual inventory or inventory and his stock, so that our salesman has to go in and spend more time with the small account in straightening out his own—putting his own house in order, and writing up the order, if it is possible, or waiting for him to go over the stock with him and make up an order. This is done in a hit and miss sort of a way because the customer comes in, the fellow is with you, he goes to the counter, and the time that is spent in the small account is, I would

say, 50 per cent greater than it is in a large account. You go into a large account, he has a bar, he has a perpetual inventory system, his stock is in good order, and your problems are just that much less.

Q. What does your salesman do with relation to straightening stock?

A. I didn't get the word.

Q. You said he straightened stock. Is that the Niehoff stock?

A. Our stock. In our line, we have a very long, a long line of merchandise. We have hundreds of items. These are put up in individual boxes. Each box has its own particular number. All of Auto-Lite parts are marked "A.L."; all Ford's, "F". There is a minimum of 600 items. At all times we try to render a service to the jobber by keeping that stock in numerical order by placing it
646 that way originally and keeping it in numerical order.

Q. Do you have specially designed shelves to carry these?

A. No, we don't. We have a system that is designed for the jobber to run everything in numerical order. In the small jobbers you find this: first of all he is crowded for room. We are trying to put a line of what consists of four bins, three foot wide, with eight shelves and seven foot high, where it should be in four cabinets like that, which are the jobbers'. In a lot of cases, we have to sandwich into two. You have stuff piled on each other, on top of the shelves, and it is a very hard thing for both the jobber and our salesmen to check that stock.

Q. Is it necessary to check the stock and straighten it before the salesman can obtain an order?

A. Right. This small fellow is very reluctant, and you can't blame him. He has financial difficulties, let us say, or he doesn't have too much money, so he isn't going to make any investment in merchandise that he has on the shelves. He buys according to the way he sells.

Q. He wants to know what he has?

A. He has to know. He has no perpetual inventory. We have to show him that he has two of this, three of this, none of this, before we can get an order from him. That is our reason for trying in all cases to develop this fellow into a better account. We are trying to impress on
647 him that our line is a major line with him, and that it will pay him to merchandise this line and sell it.

Q. Now, does your salesman spend any additional time

with the small account trying to teach him how to make more distribution of the Niehoff line?

A. Yes, sir.

Q. What does he do along that line?

A. We, of course, we have our catalog which we have spent 20 years in trying to perfect to make it as simple and easy as possible for him to use on our line, and the system of his stock should conform with our catalog price sheet.

Q. You do not understand what I mean. As I understand your earlier testimony, you said you wanted the little men to become bigger men. What does your salesman do to show him how to get more business and become a bigger Niehoff customer?

A. He goes over our catalog with him and our advertising, and he tries to sell this man on the idea that to increase his volume of business, not only on our line but other lines, he should have a salesman at least working the small territory or get a man to work on the counter and he himself go out so as to increase the volume of business which he is justified in getting from the territory that he covers. Our salesman is always trying to help and educate the man to develop his business.

Q. I think this might be a good place, Mr. Geyer, 648 I have heard the word "service stocks"—

A. Yes, sir.

Q. —from Mr. Niehoff a good many times. Would you explain what a service stock is and how it is used by any jobber of the Niehoff Company?

A. Well, you asked the question before about whether we furnished the bins. We don't [illegible] the jobber. Our service stock is made up in different sizes, mainly from $54 up to $180. They run $54, $99, $125, $180, and so on. These service stocks are set up in cabinets so that the jobber can go out and place the dealer, the garage man, and the super-service station in a position by selling them one of the service stocks so that the stock of Niehoff parts is available to him and the customer comes in. The real backbone of the jobbing business in our line and in many others is whether the jobber can have a certain number of service stocks out in his given territory so that those dealers who have these service stocks can take care of their trade, whether it be during the hours when the jobber may be closed, like in the evening, Saturday afternoons, Sundays, and some of these fellows are open—

Q. I want to ask you this. You mentioned a cabinet, and you have a nice picture of it in your mind I am sure.

A. Yes, sir.

Q. We sit here and we don't know whether it is a
649 kitchen cabinet, a bathroom cabinet, or what it is. Can you describe it?

A. I can show you in our catalog if you wish. It is a steel cabinet. The smallest one has four shelves on it. Here again the merchandise is in the cabinet similar to what we put in the jobber's stock, in numerical and alphabetical order so that the dealer has a system whereby he can check and the jobber's salesman, when he contacts the dealer, can check the cabinet so that he can write up an order with the greatest amount of ease.

Q. And is the cabinet at all sold in the first instance by the jobber to the dealer?

A. You mean on the first call?

Q. Well, when you first get a service stock in some dealer's hands.

A. Usually, our salesman may contact this account with the dealer. In some cases the dealer may sell this cabinet to this accounts by himself.

Q. All I want to know is—

Mr. Schrup: You are getting the word "dealer" mixed up with the word "jobber." I am getting confused.

By Mr. Sprowl:

Q. All I want to know is this. I take it that you have these cabinets available?

A. Right.

650 Q. Your jobber can get them from you?

A. Right.

Q. Stocked with some inventory?

A. All complete.

Q. And he sells the cabinet and all to the dealer, is that right?

A. Right. He sells it as a unit package, for $54, cabinet and stock.

Q. That was easy. Is this the—

A. Those are the small cabinets. These are the large.

Q. This is Commission's Exhibit No. 1. You are referring to Commission's Exhibit No. 1?

A. Yes, sir.

Q. And on pages 10 and 11 it portrays various types of service stocks?

A. Yes, sir.

Q. And the following two pages portray additional service stocks?

A. Yes, sir.

Q. And they show the cabinets which you have been talking about?

A. Yes, sir, complete with the merchandise.

Q. Now, after that service stock is once placed by the jobber in the dealer's place of business, I assume that it is unnecessary to again place a cabinet in the dealer's
651 hands, that part is accomplished, it is a matter of keeping the cabinet filled with merchandise, is that right?

A. That is correct. As the dealer grows or expands in this line, he may purchase another cabinet with an additional stock.

Q. I see. In other words, he could start with a small service stock portrayed on, say, pages 10 and 11, and increase it in size to service stock of the size portrayed on pages 12 and 13?

A. That is correct.

Q. And I see that those cabinets on the flange of each shelf seem to have some parts numbers. Is that to assist the dealer in keeping his inventory?

A. That is right. Each one of the strips on the shelf, underneath the merchandise, shows the number of the merchandise, the amount of items that were in the service stock originally, so that if the dealer runs out or sells them he can replace them without even referring to the catalog because the numbers and the amount that was there is marked on the strip, printed on the strip.

Trial Examiner Hier: I think perhaps that it should be mentioned at this time that these cabinets are more fully described on pages 4 and 5 of Commission's Exhibit No. 1 also.

All right; go ahead.

By Mr. Sprowl:

652 Q. Then, getting back now to where I had you digress to explain these service stocks, I take it from what you say your salesman endeavors to encourage this jobber to get as many of these service stocks out into his customer's hands as is feasible?

A. Right.

Q. Now, does your salesman ever spend any time with

the small jobbers in going along with them and making calls to help him place these?

A. Yes.

Q. And how does that time spent with the small jobber for that purpose relate proportionately to the time spent by the salesman with the very large jobber?

A. If the small jobber has one salesman out, in trying to make every effort to develop this account into a larger account, we spend a given time, maybe a day, maybe two, whichever is available to us by the jobber in going out and contacting his particular, let us say, better accounts to sell them a service stock because the jobber does realize particularly as to the time our salesman has spent instructing him and informing him and showing him that by having service stocks out that he can enjoy a greater volume of business from that particular dealer. It is a true statement that when a dealer once has one of our service stocks he will continue to buy this line from this particular jobber.

653 Q. And the cabinet is designed to give that dealer a sort of perpetual inventory?

A. The same as we would offer to the jobber, yes, sir.

Q. Now, you say you endeavor to make the small jobber into a bigger jobber. In your experience with the Niehoff Company, what is the fact as to whether any small jobber ever moved up in your classification of accounts to jobber with agreement or higher?

A. Yes, very many of them. That is the reason we do spend as much time with the small man to bring him up into the bigger or into the bracket where his volume will increase, and we have many jobbers that have gone from, say, less than $1,200 to $2,000, from $2,000 and greater, and so on.

Q. Can you think of any that have attained the highest classification, DA, distributor with agreement, that started as your very smallest jobber?

A. Yes. We have. Over a period of say, four or five years, this jobber has developed into a good sized jobber, and is today—

Q. Can you give me a concrete example or a schedule? Can you name any?

A. Yes. I can name Bergstrom Automotive at Rockford.

Q. Tell me about their development.

A. Well, this account was sold, I would say, ten years ago. I do not know exactly.

654 Q. Within your memory and time with the company?

A. That is right. In fact, I sold them myself. Today they are enjoying a volume of over $6,000.

Battle Creek Auto Supply is a case where they developed into the $6,000—

Q. Where did they start?

A. They started from scratch. They started as a jobber on our "J" prices.

Q. Without an agreement?

A. Without an agreement.

Q. Where are they today?

A. They are in the $6,000 bracket.

Q. You mean they enjoy an annual volume in excess of $6,000?

A. In excess of $6,000. I cannot tell you exactly.

Q. How many years did that take?

A. Oh,—

Q. I mean, approximately?

A. I would say about six years.

Q. Name another one.

A. I think if I named some in the southwest, the south and southwest, would you like to have some just developed in through, well, here is one right here in Chicago, Cermack Auto Parts. They started at $1,800, and in the last couple of years they have grown from, well, they have increased their volume so that they are in the seven per cent bracket.

655 Q. That would be in the jobber with agreement with the volume of where?

A. Where? The $1,200 or better agreement, the "JA" agreement.

Q. Well now, to get the seven per cent, what volume does he have?

A. $2,400.

Q. That is what I mean.

A. Nylon Supply Company of Milwaukee, from $1,128 to $2,076.

Q. Is that in one year?

A. Yes, sir.

Q. Well, I do not want to belabor this type of examination. We can go on here all day long. You have named some that come to your mind now?

A. Yes.

Q. And there are others?

A. Well, there are many others, yes. I could—

Q. If Mr. Schrup wanted you to make a study—

A. I could give him in each territory 15 men, a certain number of those that, in some territories it might be 10, in others it might be 15, but in all territories—

Q. There is a progression upward in the volume of your account?

A. That is right.

Q. Now, getting back now to the time spent by your
656 salesmen, you have pretty well told me what he does when he calls on the small jobber. What is the situation your salesman finds in calling on the large jobber that cuts down the time he is required to spend?

A. Well, in contacting the larger account, I believe I mentioned this before, the contact with the large jobber is entirely different because the large jobber has a purchasing agent, a bar. He invariably has a perpetual inventory system. His stock is kept up by the stock men in the store or in the warehouse. Our contacts, our salesmen's contacts with them are not so much as to write up an order at that particular time. Of course, all salesmen like to write an order, and it is a lot easier in that the jobber works from his perpetual inventory and has a much better system of giving the manufacturer, salesman, an order. Our time is mostly spent in the large accounts in that they request sales conferences with their men, or meetings with—supposing they have two or three men, a lot of times our men will meet their men on a Saturday morning or any given morning, or later in the afternoon, and have a meeting with them in going over the catalog, and if there is a new item that comes up, to give them that information, which of course is also given to the small account. But, the time spent with the large account is more along those lines.

Q. With the large account is it pretty well confined
657 to advising the salesman employed by that account of the items in your line and the prices?

A. Right, and in a lot of cases they have a sales manager so that there is some time spent with the sales manager in giving him information.

Q. But there is no stock straightening that is involved in any degree?

A. No, sir.

Q. All right.

Trial Examiner Hier: Would you say that is 50 per cent less than the "J" account or did I understand you to say that?

The Witness: Yes, I would say so. It is a lot less work.

By Mr. Sprowl:

Q. I want to show you Respondent's Exhibit No. 3, Mr. Geyer, and could you tell me on there, those are the electrical, the ignition line manufacturers who are in general competition with the Niehoff Company throughout the United States, other than Delco-Remy, Auto-Lite, and Ford, on that list whom would you name as the principal competition? You would know. I would not know how to express it.

A. Well, outside of Auto-Lite, Delco-Remy, and Ford, our most active competitor I would say probably is—do you want me to give these?

658 Trial Examiner Hier: I imagine so.

Mr. Schrup: I was going to raise that point: I do not see any necessity, seeing the names on these exhibits, these exhibits, Exhibits 3 and 2, these are on other charts, anybody that looks at that—

Trial Examiner Hier: Is there any reason?

Mr. Sprowl: I want him to name the competitors by name.

Mr. Schrup: We can simplify the procedure.

Trial Examiner Hier: Call them by name.

The Witness: I would say Standard Motor Products.

Trial Examiner Hier: Is that price-wise, quality wise, service-wise, or what?

The Witness: In every way, price-wise particularly.

By Mr. Sprowl:

Q. Name them in order.

A. P & D; Guaranteed Parts Company; Sorenson Manufacturing Company; Shurhit Products, Incorporated; American Motor Products, which means Wells. They have two active lines.

Q. I just want the ones that you consider—

A. That is about it. Those are the most active.

Q. Are there any more that you would consider

A. F & B, and Kem Manufacturing Company.

By Mr. Sprowl:

Q. But competition exists from all of these others

659 that are on that list?

A. Oh, yes.

Q. Now, Mr. Geyer, how many jobber customers, potential jobber customers were there available to the Niehoff Company in the United States in the year 1949?

Mr. Schrup: If he knows. Get the basis.

Trial Examiner Hier: If he knows, yes.

The Witness: I do know.

Trial Examiner Hier: All right. Tell us.

The Witness: In 1949, about 7500.

By Mr. Sprowl:

Q. How many were there in 1950?

A. About, I believe, 8200. That is in round figures.

Q. And in 1951?

A. 8676, something like that.

Q. All right. Now, you have already testified, or there is evidence in the record, that you had 866 accounts in 1949.

A. Correct.

Q. How many accounts did you have in 1950? Do you need any figures to refresh your memory?

A. I am not sure. I never checked that, Mr. Sprowl.

Q. Could you tell me at a recess, could you call your office and get me the—

A. I can give you 1951.

660 Q. All right, 1951.

A. 806.

Q. All right. Now, directing your attention to the year 1949, did the Niehoff Company lose any jobber accounts in that year?

A. Yes, we did.

Q. And did you gain any jobber accounts?

A. Yes, we did.

Q. Do you have with you any information as to that year that would tell me how many accounts your company lost and how many you gained?

A. We added 76. You asked how many we gained?

Q. How many.

Trial Examiner Hier: In 1949.

The Witness: In 1949, 76.

By Mr. Sprowl:

Q. And how much dollar volume did these 76 accounts produce?

A. $102,630.

Q. And how many accounts did you lose?

A. 42.

Q. And what was the dollar volume of, say, 1948 of those 42 accounts?

A. $89,924.

Q. Is that dollars?

661 A. Dollars.

Q. Now, do you have a record there of how many accounts you lost and gained in 1950?

A. I have, Mr. Sprowl, but I haven't had a chance, I just picked these up. I haven't had a chance to add them up.

Q. Would it be better to add those up at a short recess when we come to one, and then go back to the question?

A. Yes.

Mr. Schrup: We can take some time now.

Trial Examiner Hier: We will take a short recess.

(Short recess had.)

Trial Examiner Hier: On the record.

Mr. Sprowl: Mr. Geyer doesn't have the complete list of losses and gains.

By Mr. Sprowl:

Q. You can get those for 1950 and 1951?

A. Well, I do not know whether we can get them back here today, Mr. Sprowl. I can call the office.

Q. I do not think it is that important, but are you sure of the total of your present number of accounts?

A. Yes.

Q. That is how many, 807?

A. That is 806—805, pardon me.

Q. Let me ask you this. Is the 8066 figure we used for the year 1949, is that the year end figure?

662 A. Yes.

Q. So it would incorporate the gains and losses you have already testified about for the year 1949?

A. Right.

Q. And then so that the difference between 866 at the end of 1949 and the 805 figure as of the present moment, that would be how many accounts?

A. It would be 61.

Q. That is the accounts that you have lost in that interval of time?

A. That is right.

Trial Examiner Hier: On that point, has the gross volume gone down?

The Witness: Our gross volume has increased.

Trial Examiner Hier: It has increased even though the accounts went down, the volume went up?

The Witness: Yes, sir.

Trial Examiner Hier: All right.

Mr. Sprowl: Do you want me to follow that up with the question of whether the whole industry has increased or whether that is a trend?

Trial Examiner Hier: That is up to you. I thought I would nail the point at the moment. I did not know what he was going to say. You probably did.

Mr. Sprowl: It was a slight increase. I think Mr.
663 Eldridge will know those figures better.

By Mr. Sprowl:

Q. Referring again to Exhibit 3 and your testimony of yesterday, will you tell me whether or not there are any competitors on Respondent's Exhibit 3 who give more favorable jobber prices and more favorable discount allowances than the Niehoff Company gives?

A. On this list here, I would say that there are four whose prices are considerably lower than our jobbers prices.

Q. What about their volume discounts?

A. Those four do not have volume discounts.

Q. Talk about some of them that—

A. The other ten, their volume discount is greater than our volume discount.

Q. What about their base prices?

A. Their base prices, as the record will show, are approximately in line with ours. In some we are higher and in some we are about the same, or are the same, and on a few we may be lower.

Q. All right. Is there any reason why the Niehoff Company hasn't granted as liberal a discount plan as these competitors that you say have a more favorable discount plan?

A. We have never sold any merchandise at below cost. On each level which we have, we feel, we know that our savings in proportion to the cost which we give to the
664 jobber, that the saving in all instances warrants the discounts which we quote to the jobber.

Q. Well, and I take it you don't want to go below that?

A. Definitely not. We are trying and have always tried to give the jobber the very best price which was possible at any volume of business which we received from them.

Q. But you still have to make a profit?

A. Definitely. We know that in each one of these brackets that we must make a profit.

Trial Examiner Hier: On these 15 accounts on Respondent's Exhibit 3, there are 16, two of them are the same outfit, I understand, is there a single one on there whose net price to the jobber, figuring all the discounts and allowances and everything else, is higher than your price for the same line of merchandise, on the average I am talking about?

The Witness: I do not think so.

Trial Examiner Hier: All right.

The Witness: We talk about the net jobber's price?

Trial Examiner Hier: Yes.

The Witness: That is right. I am sure.

By Mr. Sprowl:

Q. Now, Mr. Geyer, from your experience as sales manager of the Niehoff Company, and as a salesman prior to that for the Niehoff Company, and as a jobber in
665 the years before that, in your opinion would it be feasible for the Niehoff Company to eliminate all volume discounts?

Mr. Schrup: I have an objection, of course, to that, the same way—

Mr. Sprowl: Let me finish the question.

Trial Examiner Hier: Let him finish the question.

Mr. Schrup: I am sorry.

By Mr. Sprowl:

Q. In your opinion, Mr. Geyer, would it be feasible in the sale and distribution of the Niehoff products to eliminate all volume discounts and to have your salesman sell only at your jobber's price except where at the actual point of sale found it necessary to reduce that price to meet the equally low price of a competitor?

Mr. Schrup: I have my objection, of course, as being entirely speculative, not material to the issues in this case.

Trial Examiner Hier: As I recall the same question was put to Mr. Niehoff.

Mr. Sprowl: It is purely an opinion.

Trial Examiner Hier: What it is worth is another

story. I thought it was proper then, and I do not see any reason to change my viewpoint. The objection is overruled.

The Witness: In my opinion, having sold this line for many years, and at the present time and for the past
666 nine years having been in charge of the sales force, I think it is impossible for us to go out and sell a line on that basis.

By Mr. Sprowl:

Q. Why is that?

A. First of all, the base price would be very far out of line and we just would not be close to competition. Secondly, due to it being a long line the way it is, and the items being small, the orders in turn also being small, even from our largest jobbers our orders would run four or five hundred dollars, and it would be impossible for us to hold any accounts on that basis. Our salesmen, to start with, certainly could not sell any new accounts. If they went and contacted an account, and try to sell them, and the customer naturally would say, "Your price is way out of line here," and they would want to come back to us to see whether we could give them a better price on a certain sized order. That would be impossible because, first of all, our salesmen have, they have nothing to do with the cost of merchandise. We submit to them a price sheet with an agreement and on that basis they must go out and get business, and we have never allowed our salesmen to ever sell any customer at any other price except those prices which we have submitted to the trade.

Trial Examiner Hier: I think the record should show that in my opinion, at any rate, the contentions of counsel in support of the complaint that Section 2(B) is con-
667 fined to the point of sale, meeting competition price-wise, is not a settled issue. I am sure he thinks it. So far as I can see, I do not think it is a settled issue. Counsel for the respondent claims that the statute does not mean that; that competition might be met by across the board or nation-wide or industry-wide price differences. If the issue were settled, I would not permit this type of testimony. I do not think the issue is settled. That is the reason it is being permitted. Go ahead.

By Mr. Sprowl:

Q. Would it have any effect on the personnel you would

need in the way of salesmen and people back at the plant to check each price adjustment request?

A. Well, first of all, if you try to attempt to do a thing like that, you would, I believe, first of all you would have to increase your sales force considerably, probably tremendously, triple it, to try to cover a territory in contacting more accounts out of desperation to try to get business, and I just cannot see how it would be feasible at all. I do not see how we could get a jobber on that basis, no matter even if we increased our sales force to triple its size. We might catch an unusual account or somebody just going into business that does not know any better, but you take the bulk of the jobbers today that are in business, they are contacted not only by us but by everyone of our competitors. The
668 prices are presented to them. The salesmen for the other manufacturers, they are out trying to sell their line. The salesman presents the picture in the best light that he possibly can. How could we attempt to compete with a situation like that? I do not see how it is possible.

Q. Does the number of items which you have in the line sway you in your opinion in any way? Does the number of items which the Niehoff Company carries in its line affect your opinion? In any way?

A. Well, due to it being a long line, and many small parts, some of the items sell through the jobber as low as two cents, four cents, six cents, and the highest priced item in our ignition line runs about three dollars. It is not like if you were selling a carload of brick, coal, or something, where you sell a large amount of one item. There may be some discrepancy about the price that due to the large purchases you could go back to your factory and ask for a longer price or that you would have to have a longer price to get that particular order. This is a long line with many items in it, many small items, with the prices varying, and it would be impossible to operate on that kind of a base.

Q. Do you know how many items there are in the Niehoff line approximately?

A. I would say approximately in our ignition line probably 2000 items.

669 Q. How many are in your hydraulic line?

A. I am going to have to guess on that pretty much.

Q. That is all right.

A. I would say maybe 1200.

Q. Are they all listed in the catalogs that are in evidence?

A. Yes.

Q. If anybody was really statistically minded they could sit down and count them?

A. Yes, I think we could count them. I would say probably we have that figure; I don't know. We have to have many items in the line, too, that are—

Q. Do you think—excuse me.

A. We have many items in the line that were for older cars, too, and the turnover is very small on those items. The jobbers do not even stock those items, but we do and they are in the book.

Q. What would be the customer impact if your salesman had a price that was always subject to change at point of sale to meet competition?

Mr. Schrup: Same objection, we have the same objection.

Trial Examiner Hier: The record may show he has an objection continuing to all of this line of testimony.

By Mr. Sprowl:

Q. Understand, I am speaking of the customer reaction.

A. Right, I think the customer—

670 Mr. Schrup: That is another matter further about the customer reaction. As to what was in the mind of the customer—

The Witness: Well, in contacting—

Trial Examiner Hier: Just a moment. I do not know. This gentleman says he has had considerable contact with customers.

Mr. Schrup: That may be true, but if he is going to repeat to us what the customer told us, I think we have to have the customer here to find that out.

Trial Examiner Hier: He is asking for a distillation of what he has learned, found out, in talking with customers.

Read the question.

(The question was read as follows:

"What would be the customer impact if your salesman had a price that was always subject to change at point of sale to meet competition?")

By Mr. Sprowl:

Q. I will rephrase it to ask the witness' opinion of that because that is what I am entitled to get. I want his opinion as sales manager of considerable experience.

Mr. Geyer, what is your opinion as to what the customer reaction would be to a method of selling your merchandise

which had one price quoted but with the authority of the salesman or somebody in the company to change that price at the point of sale in order to meet competitive
671 situations that you might confront?

Trial Examiner Hier: The same objection?

Mr. Schrup: Same objection.

Trial Examiner Hier: Go ahead and answer.

The Witness: My experience of many years in contacting the jobbers, and plus the handling of the salesmen, I know that the reputation of our company or any other company would be rated to a point where the jobber would not want to do business with anybody like that because in all cases, no matter what kind of line it is, in the automotive business there have been prices established which have been submitted to him. When you go in to sell a jobber, you have to have a basic price, and you cannot go in and sell him on the idea that, well, this is a price, and possibly we can do a little better. He does not want to do business with anybody that does business that way.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

By Mr. Sprowl:

Q. Mr. Geyer, I want to ask you about the preparation of your catalog. What type of work and effort goes into the preparation of your catalogue, either on your ignition line or your hydraulic line?

A. For many years we have always tried to make avail-
able to the jobber and to the dealer, the jobber's cus-
672 tomer, a catalog that was very easy and accessible for information to all cars that are in the field. We have always tried to give him the most complete information that is physically possible. Everytime we have come out with a new catalog, we try to improve over the catalog which we had the previous year. In doing so it requires the keeping of this catalog up to the current specifications on all cars.

Q. What work do you do?

A. I was coming to that. When you realize the number of items we have in the line, which have to be checked against all original parts, in fact we just completed a catalog, our hydraulic catalog, on which we spent about three months. Two men worked on that. They were doing nothing but bringing this information up to date, which is very costly to us. Each and every item has to be checked and double checked. We must be sure that specifications are

absolutely correct because if a man out in Montana asks for a set of points, the jobber or dealer had better give him the right set.

The art work, besides all of this other information, the making up of the service stocks, and the keeping of those up to date, and changing the service stocks to keep them up to date—

Q. The catalog description of the service stock?

A. That is right. Everytime we get out a new book, the specifications change. Chrysler comes out with a new
673 set of cars, Dodge, Chrysler, the points, the rotors, the brushes, we have to change the specifications. We have a specification for each year. All of the setting up of this catalog and the changing of the cuts—

Q. How do you make those pictures?

A. We photograph all of our own cuts, and here again, as the set of points, the coil, as they change new photographs have to be made. The procedure as to each catalog, whether it be hydraulic or ignition, is very costly and takes a tremendous amount of time.

Q. What I am getting at, after you take the photographs, you have a cut made?

A. We have a cut made.

Q. For each picture in the catalog?

A. Right.

Q. And then I assume you arrive at some point where you have the copy in the form you want it for the catalog?

A. Make up a proof, and it is proof read.

Q. You have some art work done for the cover?

A. We have art work done, not only for the cover but for the setting up of the pages. There is individual art work on each page, and on the cover itself, on the front, and the back, so that is also very costly and takes a lot of time.

Q. Then, you turn all of that material over to the
674 printer and he finally sends you a proof of some kind?

A. Yes, and we spend weeks proof-reading that thing.

Q. You do that yourself?

A. No, sir, I do not.

Q. At the Niehoff Company?

A. The proof-reading of it, no, I don't.

Q. Does somebody at the Niehoff Company do the proof reading?

A. Yes, we have two men that proof read.

Q. The printer does not do that, you do it?

A. We have to do it. We have to be sure. We cannot take the chance on not having it proof read.

Q. And then when you have read the first proof, and have some changes made, what do you do? Do you send it back for another proof?

A. To be corrected.

Q. Until you get down to the final copy and you are ready to print?

A. Correct.

Q. After all of that has been done, you can run off one catalog or ten thousand catalogs, is that it?

A. It would not be feasible to run off one catalog because it would cost you as much to run off one as it would 10,000.

Q. That is the point. In other words, this stayed work all goes ahead of ever printing a catalog?

675 A. That is correct, and that is the most expensive part of the book, that is for sure.

Q. And the difference between one book and 10,000 books is the press time and the paper, is that correct?

A. Very true; very true.

Trial Examiner Hier: Where did you get your specifications from when new parts appear for cars?

The Witness: Whenever a new car comes out, we have a man in the engineering department who checks the cars. We also use and we do try, for instance, our biggest problem is with the truck companies. They cooperate pretty good in giving us the specifications. It takes us sometimes months to get the specifications compiled. It is a terrific job. We have gone so far, when a car comes out, a group of cars, we have to send somebody to Detroit to check on it as quickly as we possibly can.

By Mr. Sprowl:

Q. You get it from the factory or do you have to take the car apart?

A. We have to take the hood up and check on it, and when these fellows change once in a while without our knowing it, it throws our catalog off and we have to issue a special bulletin saying to our jobbers that for the first six months, they changed the cap on the ignition part, we send them a bulletin and say that those hold true for the
676 first six months and these will hold true for the next six months. So, you have that problem to contend with. That requires a bulletin, not only to the jobber but to all of the service outlets.

Q. That sort of thing is an addendum to your existing catalog, is that it?

A. That is right.

Q. And at the year's end, you go through all that again and recompile a new catalog?

A. Right now we are working on a new ignition catalog. We hope that we can check the 1952 specifications before we get the book out. In some cases we do not. We have to issue a special bulletin after 1952, if our book comes out in December.

Mr. Sprowl: That is all. You may cross-examine.

Cross-Examination by Mr. Schrup.

Q. About how many catalogs do you print a year?

A. I believe this number 28, that is the last catalog in the ignition line that we printed, I believe that we printed about 50,000.

Q. 50,000?

A. Yes, sir.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

677 Trial Examiner Hier: On the record.

By Mr. Schrup:

Q. And you also print other catalogs in addition to the ignition catalog?

A. Hydraulic.

Q. And how many catalogs annually would you print on that?

A. I think on the hydraulic, our run this year was 10,000.

Q. Now, calling your attention to Respondent's Exhibit No. 7, and the advertising catalog listed there, would that be the approximate number as printed during the year 1949 or 1950?

A. I would not know, Mr. Schrup.

Q. You do not know how many were printed in 1949?

A. I do not know. I might guess 30,000. I would not want to say for sure.

Q. How are these catalogs distributed? How do you usually send them to a jobber without agreement?

A. We submit to all jobbers on the original mailing a catalog for all their binders which their salesmen carry.

and counter catalogs, plus a catalog for the buyer, and for the sales manager. When taking on a new account, we ask the jobber how many catalogs he requires. A small jobber might require two or three. Another jobber might require six. Another jobber might require eight. Some jobbers may have 18 men out, and six counters—six
678 counter binders, and then the purchasing department wants one.

Q. What kind of jobber would that be, the last description?

A. Any large jobber like possibly the Cook organization.

Q. Under the classification of the Niehoff Company, would that be a jobber with agreement?

A. In most cases, yes, sir.

Q. Would that also apply to a distributor?

A. Yes.

Q. And then as you get to the jobber with agreement, or distributor without agreement, and a distributor with agreement, that would apply, but when you get to the jobber without agreement, the number would go down a little bit, wouldn't it?

A. It might in some cases where they have less salesmen or less countermen. You may find a jobber that does a fairly good job that only has two salesmen, and another jobber that may have four salesmen.

Q. Do you class your accounts large or small by the basis of the number of salesmen employed by a jobber?

A. On the distribution of the catalog you mean?

Q. No, just generally.

A. No. They are classed according to the volume of business that they do over all.

Q. Not necessarily the amount they purchase from the Niehoff Company?

679 A. That is right.

Q. That is when you are talking about a large or a small jobber?

A. That is right.

Q. Coming back to the catalogs, those are distributed on the basis of more or less the volume of business that that jobber does with you, is that right?

A. Not necessarily, Mr. Schrup. You may have a jobber whose requirements for catalogs are less than some of the smaller accounts. On the other hand, we find that

many of the small jobbers require, like to get from us, and from all manufacturers, as many catalogs as they possibly can because in their small given territory they like to present this account with a catalog figuring that it will help them to increase the business. Where the large jobber, the salesmen are out, they have the catalog in their binder, and they really go out and work for business.

Q. Well, what I am trying to get from you, Mr. Geyer, is this: The large jobber with the large number of salesmen would require more catalogs than the small jobber with a one-man organization?

A. Sure. A man who had two would get two, and so forth. That is true.

Q. Now, Mr. Geyer, would you give us the name, the territory in which he works, and the salary and com-
680 mission basis upon which he operates, on each of your salesmen, please?

A. Well, I could not give you that offhand, Mr. Schrup. I do not have those figures here. What each salesman's salary is, as far as the bonus that they make, I can give you that because it is the same as to each salesman.

Q. What is the bonus? How does that operate?

A. It operates according to the volume in the territory. Each man has a quota varying from 90 to 100,000 dollars, from 90 to 125,000 and after he reaches the 125,000 and his business is 200,000, for example, he would receive a two per cent bonus on that volume over the 125,000 dollars.

Q. Is that rather substantial in some instances?

A. Yes, it is.

Q. Now, all of your salesmen work on a salary plus a bonus?

A. Right.

Mr. Sprowl: That was two per cent on volume over $125,000?

The Witness: It varies, Mr. Sprowl. Some territories are smaller, so we set up the quota on a smaller basis.

By Mr. Schrup:

Q. Will you be kind enough to tabulate that for us so that we can have that, too?

A. I will be very happy to.

Mr. Sprowl: What year?

681 Mr. Schrup: I think for the year 1949 would be all right. That is the sample here.

The Witness: Do you want the salaries of all of the salesmen—

By Mr. Schrup:

Q. Salaries and bonuses plus the quota set up for them in the respective territories.

Trial Examiner Hier: Salaries and bonus received, in 1949 of each of the 15 salesmen?

Mr. Schrup: The territory they cover and the quota set up for them in that territory.

The Witness: And you want the quotations and the territory they cover?

Mr. Schrup: That is right.

Trial Examiner Hier: When do you want this information?

Mr. Schrup: Whenever it is available. We won't need it today, of course. Before the next hearing will be satisfactory.

The Witness: I could not get it today.

Trial Examiner Hier: By October 10, put it that way.

By Mr. Schrup:

Q. Mr. Geyer, how often do you visit each Niehoff account?

682 A. I?

Q. Yes?

A. I have never visited all of the Niehoff accounts.

Q. Well, on the basis of a year, how many visits would you make normally?

A. My personal contact with these accounts is mostly during the show periods which are held in different parts of the country. For instance, this year we had one in Oklahoma City. We had one in Atlanta. In each group we advise those salesmen whose customers we feel are coming in for the show. We set up a booth there, display booth, and the customers come in and I meet them through our salesmen. The same holds true when we have in this business what they call the big show here in Chicago. We see our accounts here, and we do have them come out to the factory whenever it is possible. Whenever I am in one of those localities, I contact, if we have an account, like we had in Oklahoma City, one or two accounts, or Atlanta, I would contact those accounts. That is about it.

Q. How do you receive your information as to prospective accounts?

Do you have salesmen's reports?

A. Every day. Our salesmen in each given territory makes his contacts, like today, and if he makes five contacts today, or seven, whatever it may be, maybe three
683 on a certain particular day, where he has probably checked stock and then called on a couple of prospective accounts, tomorrow or the day after we have the report.

Q. And how do you get your information on the Niehoff accounts? How do you get your information on the actual customer?

A. The same way.

Q. By salesmen's reports?

A. Plus, whenever he takes an order, it is submitted with the daily report and the report shows that he has taken that order, shows the order number on the report that he makes.

Q. You are talking about the actual accounts?

A. Actual. That is what you asked?

Q. Yes.

Now, do these reports disclose how much time a salesman spends with either a potential account or actual account?

A. No, sir.

Q. You have no way of knowing that from your salesmen's reports?

A. No, sir.

Q. I take it then, the reports on either prospective accounts or actual accounts by your salesmen will merely disclose the number of calls made during that particular day?

684 A. That is right, not how much time he spends with him. He may have spent a couple of hours with a prospective account. I did contact an account just last week on which I spent three and one-half hours with this account myself. Our salesmen may do the same thing. He may spend 20 minutes with another account.

Q. The report would not disclose either the time he spends with the salesman or the account?

A. Yes, when our man works with a salesman, then we have another report which we will be very happy to turn over to you which shows the number of contacts that he made with whatever jobber it may be, giving the jobber's salesman and the number of calls, and if any merchandise was sold and how much in dollars and cents.

Q. Those reports then, as I stated, for the year 1949 are available for our inspection?

A. I do not know.

Trial Examiner Hier: You do not know whether you still have them or not?

The Witness: That is right. I think, Mr. Schrup, I know definitely the reports for 1949, we never save those. We kept them for a certain length of time. The reason we do that is when we get a prospect, the report shows us the prospect. We then write the prospect a letter, and we keep that prospect alive for a certain length of time
685 until we are sure that we can sell him.

Q. I presume if you have destroyed your 1949 reports, your reports of like character of 1950 would be available, would they not?

A. Not on the salesman's report.

Trial Examiner Hier: How long do you keep those?

The Witness: We have kept them about, probably, six months. We have no use for them after that. The prospect, he had either bought another line or he has bought our line, and we have—

By Mr. Schrup:

Q. You are talking about prospective accounts?

A. And for our own accounts, it does not make any difference. We could destroy those the next day. It is just a report to us telling us what the man on this report, we show that the man has to check the stock or something, go over the inventory. He writes on this report if he receives an order, in what shape the stock was, who he talked to, if he talked with the sales manager and the buyer or the president of the company, and then there is a spot on the bottom for comments. After we get through with that, we can destroy the report. We have no further use for it. It is just a piece of paper.

Q. Would there be any reports for 1951 available of that character?

686 A. I think so.

Q. And the actual account reports, too?

A. Yes, sir.

Q. Some of those, what you have, would be available to us for inspection?

A. Yes, sir. In fact, I have a whole pile of them on my desk right now that I haven't checked.

Mr. Sprowl: You have not been to the office as much as you would be otherwise?

The Witness: That is right.

Trial Examiner Hier: Did you say a salesman makes a report every day?

The Witness: Yes, sir.

Trial Examiner Hier: You have 15 reports a day?

The Witness: We get from one man maybe four, five or six. For each jobber that he calls on he will make an individual and separate report. Now, it may be possible, Mr. Examiner, that if a salesman did not get an order today he would hold his report until the next day. In fact, we try to save, if we can, on postage, so that they send them in, if there is no rush or he has no order, he will send them in the day after. We would get them at a minimum of twice a week.

Trial Examiner Hier: You would have a pretty healthy stack at the end of the month?

687 The Witness: You bet your life.

Trial Examiner Hier: Go ahead.

By Mr. Schrup:

Q. I believe you stated that in 1949 you gained 76 customers?

A. Yes, that is correct.

Q. Could you name some of the competitors from whom you got those customers?

A. No, I could not, Mr. Schrup. I really do not know. We have always kept, let me say this, we have kept a record of who we lose our accounts to, but in 1949, I have no record.

Q. Well, in toto then, or as a group, would you say they are the competitors listed on Respondent's Exhibit No. 3?

A. I would say some of them were, yes.

Trial Examiner Hier: Some of them were?

The Witness: Yes. There are many accounts that we get either that are new accounts or that started business. Some accounts have never had ignitions. We have sold them on going into the ignition business. They have had a certain number of lines, and particularly those include also some of our hydraulic accounts. The hydraulic business being a little younger with us, many of the jobbers have gone into the hydraulic business, too.

By Mr. Schrup:

Q. Then, those that are just going into business and those that are new accounts and that you have sold them on the ignition, and the hydraulic line, the balance I take it would be those that you obtained from competitors listed on Respondent's Exhibit 3 and Respondent's Exhibit 4?

A. Correct.

Q. Mr. Geyer, in the case of the Niehoff jobber who is selling Niehoff ignition line over a period of time, sort of becoming established, doesn't it entail some expense for him to switch to a competitive line?

A. Actually, as far as expense in making the switch, no. As far as the time of working with our men on a new line, yes. We in turn do the switching of the line. Our men do the work of remarking the numbers and straightening out the stock because the competitor's numbers are different than ours, and if he is going to use our box he has to have our numbers.

Trial Examiner Hier: If he has, for instance, a Standard auto part, all your man does is go in and remark Standard's box with your number until it is sold out of stock, and the new sales, of course, come with your stock, is that right?

The Witness: That is right, and the boxes are marked —this is not necessarily our merchandise that has been reboxed. That holds true whether Standard takes them away from us.

Trial Examiner Hier: Standard does not have to take what goods are on hand as obsolete stock?

The Witness: No, I do not think anybody does that.

By Mr. Schrup:

Q. If the Niehoff line was established in a particular jobber's community and he spent a lot of time establishing it, it would be a considerable effort for him to switch over to Standard, would it not?

A. Yes. It is a job that Standard has to do or it is a job that we have to do when that change takes place, with the help, obviously of the jobber's salesman.

Q. But then, again, in addition to that, outside of the physical work, there is the idea that he has to resell his customers on the Standard line?

A. That is invariably done through sales meetings that we hold with the jobber, or the competitor holds, and

the salesman for the manufacturer working with the jobber's salesmen. First of all, the jobber's salesmen have to be instructed and sold on this new line obviously.

Q. Who classified your new accounts, Mr. Geyer, for the Niehoff Company?

A. Whom?

Q. You have four classifications. How do you decide to put an account in any one of the four classifications?

Trial Examiner Hier: Who does it, you say?

690 Mr. Schrup: I asked who and how.

The Witness: We, of course, have sales meetings with our own men and have always had them, and we instruct them according to the policy of the company on what a jobber should be classified at according to the volume that in our estimation and from the figures which we get from him, according to that information we classify the account. Of course, the jobber will always try to amplify his previous sales or what he has been doing, and he knows pretty well what our agreement is. He knows pretty well what competition is. Our salesmen in contacting the account, due to the printed information which we give to him, the volume of business that the jobber does, his appearance of his place of business, the number of salesmen, all of those things through the years of experience that I as a salesman or any one of our salesmen have, that they can judge pretty well approximately what this account might do. They might miss once in a while.

Q. You are speaking of the volume of business in the Niehoff line?

A. I am talking about the volume of business he might have done with any other line, if we are trying to sell him.

Q. Is that the sole determining factor, the volume?

A. Yes, sure.

Q. And would it make any difference as to whether you are approaching a prospective customer, a small job-
691 ber in a small city or a very large jobber with many salesmen, as to whether you would insist on the same volume from each jobber?

A. You would know that a man who has no salesmen out, you could not possibly obtain the volume of business that would be required. An agreement like that wouldn't fit into this picture. Our own set up at the present time, I might say, Mr. Schrup, we feel this way.

We have instructed our salesmen thoroughly and

definitely that unless they can see that an account would at least warrant our DA, which is the old JA—

Q. The old J without agreement?

A. The old JA.

Q. The old JA?

A. We do not want our salesmen to spend the time trying to sell that type of an account.

Q. What is the account?

A. I am talking about the JA account which today we call the DA.

Trial Examiner Hier: Let's take the 1949 designations.

The Witness: In other words, we have instructed our men that we do not even want them to solicit the business from an account who would not warrant a JA agreement.

Trial Examiner Hier: Under the 1949 classification?

The Witness: That is right.

692 By Mr. Schrup:

Q. Well, now, is it possible, Mr. Geyer, that certain of the large jobbers would handle several competitive ignition lines?

A. Yes, only of the original, not ours, and any one of those shown on that list.

Trial Examiner Hier: Respondent's Exhibit No. 3.

The Witness: They would show, they might handle Auto-Lite or might even have both and still have our line.

By Mr. Schrup:

Q. And when you approach a jobber like that, what type of an agreement would you give him?

A. We place him on a JA agreement unless his volume due to the number of salesmen and possibly branch houses that he might have, we would then submit to him one of our DA agreements. If he does not make it—

Q. You are speaking about a jobber that is handling the Delco-Remy or Auto-Lite line, and now he wants to take on a third line?

A. That is right. He is invariably—let me say this. First of all, Delco-Remy and Auto-Lite do not sell any account unless it is quite a substantial account.

Q. And when you approach them, as I understand it, to place the Niehoff account with them, you would place him in the DA category from the start?

693 A. That is right, his volume of business would warrant that.

Trial Examiner Hier: They only voluntarily leave you what you classify as the J business?

The Witness: They leave use the crumbs. When Delco-Remy and Auto-Lite and Ford get through with you, of course Ford does not go through the jobber, but they have all of these distributors running all over the country.

By Mr. Schrup:

Q. The classification of new accounts is under your direction, is that right, sir?

A. Yes, sir.

Q. And the reclassification of accounts is under your direction?

A. Yes, sir.

Q. And how often did you state that you reclassified accounts?

A. At the end of each given term. That is one year, 1949, we reclassified the accounts in 1949, according to the 1948 volume. I might say that in 1949 we reclassified 92 accounts who were on a D basis, and put them on a JA basis. That is quite a trick to do that. That is a problem.

Trial Examiner Hier: Let me ask you this. Do you do that for all of your 800 odd accounts in one month or is this matter of reclassification and revision coming up each month because you signed the man on, we
694 will say, for instance, in February, then the following February his business is renewed, or is it renewed in the month of December that same year along with the rest of them?

The Witness: In 1949 we reclassified them by the year. In 1950, and previous to that, in 1950 and 1951, we, due to the problem that I have about accounts coming in in February, June, July, and so on, we have placed the accounts on a JA basis, and then if their volume, say, for four months equalled whatever the contract or agreement showed, they would get from, and from the first of the year we would start them over.

By Mr. Schrup:

Q. Referring to the year 1949, as I understand it, each account that did not meet the required volume of its classification during that year was declassified in 1950?

A. Not every one, Mr. Schrup. We did miss some of them due to such circumstances which came up. Some of them were due to credits, some of them due to a man prob-

ably changing a business. Others strenuously objected to it.

Q. When they objected, you did not declassify him, is that it?

A. We tried to take that account and work with him to get him up into the proper classification.

Q. Why would they object to being declassified?

A. Well, because you have billed him on the basis
695 of the base price less 10 per cent, and then when you bill him on the new reclassification of the JA agreement, he does not get the 10 per cent on the face of the invoice. He has to earn it.

Q. Now, in those accounts which you stated had not reached the volume requirement for their classification during the year, nevertheless during the year 1949 they did get the discount that that classification called for, did they not?

A. Yes, there was a few of those, as shown on the books.

Q. Well, now, in 1950 were they charged back for their underpayments or was that forgotten?

A. There is always a lapse there during the period in which you reclassify the accounts, too, but I wish we could charge that back.

Q. Now, take for instance in the case of the jobber whose volume met the next highest classification, for example, a jobber without agreement, would he automatically be reclassified when he hit the volume required for the next higher classification?

A. We would submit an agreement—

Mr. Sprowl: For the following year, what?

The Witness: The next year. If he made his quota or his volume came up to let's say $6,000, see, after he had done that volume of business then for the following year we would place him on the DA agreement.

696 By Mr. Sehrup:

Q. That is on the next year he would be placed on the—

A. Right the following year.

Q. Under the classification that his volume earned for him the past year?

A. That is right.

Q. But during the past year, while he had earned the volume, he did not get the discount that the volume called for because he was not so classified?

A. No.

Q. In the year 1950 when he was reclassified, was he credited for over-payments he had made in the previous year?

A. I cannot tell you. I cannot answer that on any particular case. I do not know.

Q. It was the usual practice that he was not, isn't that right?

A. That is right.

Q. Now, have you the list, Respondent's Exhibit 3, before you, Mr. Geyer?

I think in conjunction with that you will probably want to look at Respondent's Exhibit 1.

Now, calling your attention, I think we might as well take these by name, because it will simplify it, competitor number one on Respondent's Exhibit 3 and Respondent's Exhibit 10, is Standard Motor Products, Incorporated 697 of New York City?

A. That is correct.

Q. Now, how and when did you first obtain your information as to the jobber prices and the discount from jobber prices of Standard Motor Products for the year 1949?

A. Well, I could not answer that. You say how and when. These price sheets are submitted to us by our salesmen, and just when we got the 1949 prices I do not know. I presume right after they were issued because invariably any one of the competitors send price sheets to prospective accounts plus their catalog, and in some, and in most cases, these are received by us from our salesmen through a jobber.

Q. And you cannot tell us now or ascertain definitely when you first received them?

A. I could not say when we got those in 1949. I could not tell you when we got them in 1951. The different manufacturers get out price sheets at different times. I just received a short time ago a new price sheet that was submitted by one of our competitors that just came out.

Q. Would the same answer that you have given with respect to Standard Motor Products apply to all of the rest of those on Respondent's Exhibit 3 and Respondent's Exhibit 10?

A. Yes, I would say yes.

Q. Now, Mr. Geyer, when was the last revision of Niehoff jobber prices in the ignition line?

698 A. The last revision?

Q. Yes?

A. December, 1950.

Q. And previous to that when was the last revision?

A. I believe in January or February, 1950.

Q. And were the revisions in 1949, previous to that?

A. I am not sure, Mr. Schrup. There might have been. We have the price sheets and can check on those dates if you would like to have them.

Q. And when was the last revision of the hydraulic line, jobber prices?

A. We just revised that as of September 1st.

Q. This year?

A. That is correct.

Q. And then there have been previous revisions of that?

A. Previous to that, I think it was August, 1950.

Q. Were there revisions in 1949, also?

A. There might have been.

Q. Well, have the revisions been upwards or downwards in the ignition line?

A. There has been some increase in prices. There has been some reduction.

Q. Would this apply to every revision in the jobber prices that you have carried on for the years?

A. I think so. That is both from a list standpoint
699 right down to the jobber's price.

Q. Every revision would be characterized by some upward move in prices and downward?

A. That is right.

Q. And that would also apply to the hydraulic line?

A. That would.

Q. And you sell certain net items, do you not?

A. Yes, our equipment such as our—

Q. And that is sold without any discount?

A. Those prices are net on the jobber's sheet. They go into making up the volume on which the jobber receives the five per cent. It works the same as the other items.

Trial Examiner Hier: The equipment on what?

The Witness: Equipment such as vacuum gages, compression gages, and timing lights, small equipment that the garage men use.

By Mr. Schrup:

Q. When was your last revision in the discount from jobber prices in the ignition line?

Trial Examiner Hier: You mean quantity discount?

Mr. Schrup: I am talking about the regular discount that Niehoff gives on its jobber prices to its purchasers.

The Witness: I believe the distributors, the jobber's agreement and the distributor's agreement have not
700 changed since, I think, 1948.

By Mr. Schrup:

Q. And what were they prior to that, the same?

A. I believe.

Q. Using the present terminology of 1949, when was the last change or revision of the discount schedule of the Niehoff Company on all of Niehoff products? Let's limit it to the ignition line.

A. I believe it was 1947.

Q. That was the last revision?

A. That is right.

Q. And what contracts did that apply to?

A. To the JA and the DA.

Q. And that appeared in the 1947 contracts?

A. I think so. I could check on the copies of the contract and show you.

Q. Then, following the revision of 1947 in the JA agreement, and the distributor, that is the distributor without agreement, is that what you are speaking of?

A. The distributor with agreement, the DA.

Q. The DA and the JA?

A. That is the only change made.

Q. When was the next change following the 1947 change?

A. There wasn't any.

Q. Since 1947 until today—

701 A. I would rather say 1948, Mr. Schrup.

Q. What part of 1948?

A. I do not know. I think it was the early part of 1948 or the last part of 1947.

Q. The change was decided, your discount structure was decided to be changed in 1947 and then applied in 1948, is that it?

A. It wasn't the discount. It was the volumes in the agreements.

Trial Examiner Hier: That only applies to JA and DA?

The Witness: That is right.

By Mr. Schrup:

Q. Since—

A. Since 1949 they have been it.

Q. All the way back the jobber without agreement never got a discount?

A. That is right.

Q. And all the way back the distributor with agreement, the distributor without agreement got a flat 10 per cent of the invoice?

A. Yes.

Q. There has never been any changes in those discounts?

A. Except those, as I mentioned before, where we changed 92 of them back to a JA where they had a distributor.

702 Trial Examiner Hier: There wasn't any change in the discount; it was a change in the classification?

The Witness: That is right.

Mr. Sprowl: Off the record.

Trial Examiner Hier: Off the record

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Schrup:

Q. Mr. Geyer, what is the exact breaking point as to volume where an account can be sold at a profit or a loss by the C. E. Niehoff Company?

A. We believe that that breaking point comes in somewhere between $1,200 and $2,400, or a hundred dollars a month to two hundred dollars a month.

Q. Any accounts sold below that figures would be sold at a loss?

A. Yes.

Trial Examiner Hier: That is sold at a loss taking into account all overhead, selling expense, administrative expense, and manufacturing costs, all items of expense in getting the goods to that account?

The Witness: That is correct.

Trial Examiner Hier: All right.

By Mr. Schrup:

703 Q. Now, speaking about service stocks, I believe you stated they come in different sizes?

A. Right.

Q. And you quoted some prices. I believe those were the list prices?

A. Those were the net dealer's purchase price.

Q. And what would they be at the jobber's net purchase price?

A. I would have to get a price sheet to give you that exactly.

Trial Examiner Hier: Here is the catalog.

If it is in the record, why go into it? I am talking about this pink sheet, Commission's Exhibit 6-A and 6-B.

By Mr. Schrup:

Q. What are those figures?

A. The number of the service stock and the price there?

Q. What do they range from?

A. From the smallest, which is $18.40 to $138.

Q. Now, does the smallest one of these service stocks comprise what you might term a complete line of ignition items of Nichoff?

A. No. The smallest service stock is a small, very small cabinet that sells to the dealer at $25.00.

Q. Are there any one of those service stocks that would constitute a complete line?

704 A. Yes, the $125 and the $180.

Q. Is that the dealer's price that you are speaking of?

A. Yes.

Q. The net to the dealer?

A. That is right.

Q. And those two figures, net to the jobber, amounted to what?

A. That was net to the jobber, one would be $97 and the other would be $138.

Q. Now, it is your endeavor, as I understand it, to place as many of these service stocks in the hands of the jobber's customers as possible?

A. That is right.

Q. And I understand you also state that the salesman will assist the jobber in placing these service stocks with the jobber's customers?

A. Yes. The jobber will lots of times, when our men contact them, he will tell him he has a prospect down here and our man, the salesman, will contact him and try to sell him.

Q. And those that are actual customers, do they check on them?

A. When you say actual customers—

Q. In your last answer you were referring to prospective customers?

A. Will our salesmen check on them? Not after the
705 sale is made. The jobber's salesman does that after the original sale has been made.

Q. And would you have any opinion as to the number of prospective customers a small jobber would have as against a large jobber covering a larger and wider territory?

A. That would vary very much from each individual account, I think.

Q. Well, I would presume that the large jobber with the greatest volume had the greatest number of customers, would he not?

A. Definitely.

Q. And you would also certainly have the greatest number of prospective customers, is that right?

A. Yes.

Q. You mentioned, I believe, during the course of the examination several jobbers who had grown with the Niehoff line. You mentioned Bergstrom of Rockford, Illinois?

A. Yes.

Q. Were they a large jobber when you joined them, when they joined you, did they have a considerable number of salesmen, a large inventory, when you induced them to take on the Niehoff Line?

A. No, they weren't, Mr. Schrup.

Q. And are they today a large jobber?

A. I would not say so. They have, I believe, three
706 salesmen.

Q. I presume they handle many lines?

A. Yes.

Q. And in the jobber's set up, what are the items or the lines which constitute the major part of their sales, not restricting it to the Niehoff products but general products?

A. Today, and at 1949 there was always a certain number of lines that the jobber carried his major lines out of which he got his major volume. Is that what you mean?

Q. That is what I am thinking of.

A. Yes. And those lines are lines which they go out and push and feel that they can do the best job on, and invariably in all cases, are the most profitable.

Q. What would those lines be?

A. Well, I can give you that very authentically.

Q. Yes. I would like some information on that point.

A. This is got out by the National Parts Association of

which they are all members, and this is the consensus of 532 jobbers. It is the actual figures of what their first two lines are.

Q. May I look at it, please?

A. Sure.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record. We will recess until 1:30.

(Whereupon, at 12:10 o'clock p. m., a recess was taken until 1:30 o'clock p. m., same day.)

707 Afternoon Session.

1:30 p. m.

Trial Examiner Hier: On the record.

Mr. Sprowl: Mr. Hier, we would like to, consistent with the method adopted with respect to Respondent's Exhibit 3, which is coded to our competitors' names by number, we should also like to have sealed Respondent's Exhibits 11-A and -B, 12, 13, 14, and 15.

Trial Examiner Hier: Do you have any objection to that?

Mr. Schrup: No.

Trial Examiner Hier: All right. The record may show that Respondent's Exhibits 11-A and -B, 12, 13, 14, and 15 are directed to be sealed.

Mr. Schrup: They are sealed up with the same understanding that we had of the sealing of the previous exhibits?

Trial Examiner Hier: That is right. In order that the record may be further clear, which it appears it is not at the moment, that means that in this case as a whole up to this point Commission's Exhibit 92-A and -B, 93-A through -D, are sealed, and Respondent's Exhibit 3 has been ordered sealed as the transcript will show.

Mr. Schrup: How about 47-A through -E? Wasn't that included? No, I guess it was not.

Trial Examiner Hier: No, that is your exhibit.

Mr. Sprowl: I would like the record to show I have
708 a complete set of Respondent's Exhibits 10-A through 15, a complete set of copies which are for your file, which I hand you now.

Now, Mr. Hier, we would like your indulgence at this point. We have two gentlemen here ready to testify who

are small jobbers in the Chicago area. They are pretty much one-man operations, and it is not easy for them to be away from their places of business. I would like to take Mr. Geyer off the stand temporarily and put these two gentlemen on. I do not think either one of them will take very long.

Trial Examiner Hier: Do you have any objection? He is in the midst of your cross-examination.

Mr. Schrup: I am in the midst of cross-examination. I do not know how much more time we will have on Mr. Geyer.

How soon can we put them on?

Mr. Sprowl: They are here outside waiting now. Both of them have very small operations. I guess they are both virtually one-man operators. It is very difficult for them to be away.

Trial Examiner Hier: He is in the midst of your examination. It is up to you to object if you want to object.

Mr. Schrup: Is there any way that we can show in the record that my examination will be continuous?

Trial Examiner Hier: No. The transcript is bound 709 to show the intervention of these two witnesses.

Mr. Sprowl: I will have Mr. Geyer here, keep him here all afternoon, and have him here tomorrow and any time that you want to proceed with him.

Mr. Schrup: Well, I do not like to inconvenience anybody, of course. I would prefer to continue my cross-examination.

Mr. Sprowl: I appreciate that. We just do not like to upset our customers any more than we have to.

Mr. Schrup: If your examination is going to be very short as to them—

Mr. Sprowl: It will be.

Trial Examiner Hier: All right. The record may show that Mr. Geyer is temporarily excused from the witness stand from cross-examination pending the examination of two other witnesses to be offered by the respondent.

(Witness temporarily excused.)

Mr. Schrup: May we be off the record?

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

RICHARD BOLAND was called as a witness on behalf of the respondent, being first duly sworn, was examined and testified as follows:

710 *Direct Examination.*

Trial Examiner Hier: Give me your name, please.
The Witness: Richard Boland, B-o-l-a-n-d.

By Mr. Sprowl:

Q. Where do you live, Mr. Boland?
A. My home residence is 2538 North Nordica Avenue.
Q. And what is your business?
A. The wholesaling and retailing of auto parts.
Q. And where is your place of business?
A. 7358 West Grand Avenue. That is in Elmwood Park.
Q. Is that just west of Chicago?
A. That is two blocks west of the Chicago limits, which is Harlem Avenue.
Q. Do you handle among other things the Niehoff ignition line?
A. We handle Niehoff.
Q. What, roughly speaking, type of customer do you serve?
A. Basically we are a wholesale house, servicing a combination garage and gas station, and franchised automobile dealers.
Q. And what area do you cover in your—what area are your customers located in?
A. Well, working from our place, we would cover to about the west edge of River Grove, approximately 8500 west. We go north to the Chicago City Limits on the
711 north side, about Irving Park Boulevard—
Q. That is a mile north?
A. That would be about one mile north; and south to North Avenue, which would be about two miles. That is bordering on Oak Park, and east to about 6000, about Austin Avenue.
Q. That is in Chicago?
A. That is in Chicago.
Q. It would be two miles east?
A. That would be about two miles east, that is right.
Q. And through River Grove would be what, about a mile west?

A. I would say closer to two miles west.
Q. Now, when did you start in business, Mr. Boland?
A. 1946.
Q. At this same location?
A. No, at that time we were at 2426 West North Avenue.
Q. And you have been in the same business right up to the present time?
A. Yes, right up until now.
Q. And when did you change your location to your present address?
A. That would have been in 1947.
Q. After you had been in business one year?
A. One year at the old address.
Q. And during all of that time, have you handled the Niehoff ignition line?
712 A. Yes, we took Niehoff on right after we went into the auto parts business in 1947, 1946, I think.
Q. Do you presently have a contract with the Niehoff Company?
A. Yes, we do.
Q. And what type of contract is that?
A. Well—
Q. What percentages of volume discounts does it provide?
A. Well, the percentage discount is based on volume, the amount of volume you do. Reaching the $1200 bracket in your purchases for the business year, you are entitled to a five per cent additional discount on your merchandise. Then I believe that holds true up to $2400. Then you are entitled to a greater discount.
Q. When was the first year you had such a contract?
A. Well, we signed such a contract when we took on the Niehoff line in 1946.
Q. Did you ever attain the—can you attain the $1200 annual volume in your first year of operation?
A. No, that was about mid-year, I think July or August, when we took on Niehoff and we didn't do it in the first year. The second year in business we did attain it.
Q. You did attain the $1200 average?
A. The $1200 bracket.
Q. And when you started out, did you have any
713 people, any employees helping you in the business?
A. Well, when we started out it was a two-man operation.
Q. You had a partner?

A. I had a partner at that time.
Q. And what happened to him?
A. Well, he lost interest and I took over from there.
Q. And it was your operation alone?
A. That is right.
Q. Then, did you operate it entirely alone for a period of time?
A. No, I hired a man at that time, and we both worked the store together. We both were inside waiting on the counter, and doing what machine shop work we had to do.
Q. You did some machine shop work also?
A. Yes.
Q. Now, in this area are there any other competitors of yours serving the same area who also have handled the Niehoff line of ignition?
A. Yes. Offhand I believe there are four auto parts companies going into the same area handling Niehoff.
Q. Can you name them?
A. Automotive Wholesalers.
Q. Where is that company located?
A. They are down south on Wentworth Avenue, about 3500, in the 3000's, I believe. Automotive Wholesalers 714 is at Chicago and Cicero Avenue, excuse me.
Q. All right.
A. And we have Coliseum Battery & Equipment. That is the organization that is in the 3000's on South Wentworth.
Q. What is the spelling of that?
A. C-o-l-i-s-e-u-m, Battery & Equipment. And then we have right in our neighborhood, Variety Auto Supply, and Montclair Auto Supply.
Q. Now, is Automotive Wholesalers a larger or smaller organization than yours?
A. Automotive Wholesalers is a large operation.
Q. Do they buy Niehoff items at the same discount that you do?
A. Yes, the distributor's price sheet.
Q. They have a volume discount?
A. They have a volume discount.
Q. But their volume is the same as yours or larger?
A. Their volume would be very much greater.
Q. What about Coliseum?
A. Their volume would be much greater. They have several salesmen out.

Q. By virtue of that they make a larger volume rebate or discount?

A. They would undoubtedly get a larger volume.

Q. What about Montclair?

715 A. The same basis.

Q. You mentioned another?

A. Variety Auto Supply. They would be on the same basis as us.

Q. All of these four companies and yourself serve the area that you serve?

A. That is correct.

Q. All right. What has been your experience in meeting the competition of these other four companies to handle the Niehoff line?

A. Well, as far as competition is concerned, I think it narrows down to we are doing business in our neighborhood and with a proportionately smaller overhead. There is a certain amount of personal contact that we have that these organizations that are outside of the neighborhood do not have. They do not bother us too much. They are in there, calling, and maybe we will even meet their salesmen when we are calling.

Q. On the same account?

A. On the same account.

Q. And you have, have you added accounts progressively since the time you started in business?

A. Yes. We have grown by increasing our volume, and adding new accounts.

Q. What type of customer are you speaking of now?

716 A. I had particular reference to the larger organizations that come into our neighborhood.

Q. I mean the type of customer which you would both call on.

A. I see. That is garages or combination gas stations and garages.

Q. Who does the outside selling in your organization?

A. I do.

Q. Anyone else?

A. No, I am the only one.

Q. Your employee does what? Is he entirely inside?

A. Inside work.

Q. And so you would be the salesman of your organization that would personally meet and see the salesmen of these other organizations?

A. That is correct. I make the personal contacts outside.

Q. Now, this year, you will expect to attain more than the $1,200 volume on the Niehoff ignition?

A. Well, yes. This year our purchases, I think, through the month of August, up through the month of August, were well ahead of our purchases last year up to that time.

Q. And was 1950 similarly ahead of 1949?

A. Slightly, a small percentage increase.

Q. And how did 1949 compare with 1948?

A. 1949 was a good increase.

Q. Over 1948?

717 A. Over 1948, substantial.

Q. 1948 was the year you got up to the point where you reached the 1200 or higher volume?

A. Yes. That was the year in which I had another man come in and I decided to go out and increase our volume.

Q. You had a man to come into work inside the store?

A. Inside while I went out.

Q. That freed you for outside calls?

A. That is correct.

Mr. Sprowl: You may cross-examine.

Cross-Examination by Mr. Schrup.

Q. Mr. Boland, do I understand that you are interested in increasing your volume of business?

A. Definitely.

Q. Why, sir?

A. Well, to make more money for one thing.

Q. The greater the volume of business you do the more money you will make?

A. I think I would, yes.

Q. And how would you go about increasing your volume of business?

A. Well, much on the same basis as I am now, by making personal contacts, calling on the garages, and trying to sell merchandise.

718 Q. If you had more salesmen, do you think that would increase your volume of business?

A. Yes.

Q. Increase your profit?

A. It would increase my gross profit. In the ultimate end I suppose it would increase the net profit.

Q. You state that these competitors of yours, Automatic Wholesalers, Coliseum Battery, they come into your territory?

A. Yes, sir.

Q. And they do not bother you too much?

A. No. I do not think they constitute a problem.

Q. Is that for the reason that you both maintain the same resale prices?

A. No. I would not say that is the reason we maintain the same resale prices. I think we are maintaining the same resale prices in order to be competitive primarily with the franchise car dealer.

Q. That is both you and the competitors that come into your territory sell the Niehoff products at the same price to various dealers?

A. That is right.

Q. And they do not bother you too much because as I understand it, you have a lot of personal contacts that influence your making of these sales?

A. I believe it has an effect on them.

719 Q. Now, are you acquainted with the exact type of contact that Automotive Wholesalers has with Niehoff?

A. I am not familiar with it. That is, I have not seen the contract. I would have to say I assume they have the same contract that we have.

Q. And you have what we call the jobber with agreement contract?

A. Jobber or distributor contract.

Q. You mentioned something, you call a distributor contract and a jobber with agreement contract, you consider it as being the same contract, is that it?

A. It is most ordinarily termed that way, but in the particular case of Niehoff, the distributor sheet is the blue sheet. We term it the blue sheet, and that is the sheet we buy from the factory on. It is termed by Niehoff distributor sheet.

Q. What discount do you get?

A. It will fluctuate on various items. Auto-Lite compared to Delco-Remy, the average would probably come out at 60 per cent.

Q. I am talking about the discount from list price that you get from Niehoff?

A. That would be correct, 60 per cent.

Q. That is the discount off of list?

A. Yes.

720 Q. Do you get a volume discount on the amount that you do?

A. Yes, on the contract agreement, exceeding $1,200 we would get a five per cent discount.

Q. Would you be interested in getting a seven per cent?

A. Naturally.

Q. Why?

A. That would be two per cent more for me to have, to handle for my own. Whether I can attain that myself or not, I do not know. It might mean I would have to hire somebody.

Trial Examiner Hier: What would you do with it?

The Witness: To be honest with you, I could not give an honest answer. If I got the two per cent more, if I got it on my own merit, by myself, if I could increase the business by myself and get the additional two per cent discount, I could not tell you where I would put it. I would probably try to put it in the business and better the business.

By Mr. Schrup:

Q. You are interested in the business growing?

A. That is right.

Q. And the better discount the more you can put back in the business and grow, is that it?

A. That is true, yes.

Q. I don't know if you are acquainted with the distributor contract of Niehoff, but I can advise you that

721 the distributor contract for Niehoff and Company pays a flat 10 per cent off the invoice price?

A. Possibly we are talking about two different things.

Trial Examiner Hier: That is the 1949. They have changed it recently. This man may have a different contract.

By Mr. Schrup:

Q. Your present agreement is what I believe you call the jobber with agreement contract?

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

Pursuant to off the record discussion it appears that in 1951 respondent renamed its four categories so that

what was in 1949 called a jobber is now a distributor; what was in 1949 a jobber with agreement is now called a DA arrangement; what was in 1949 a distributor or D arrangement is now a DD arrangement; and what was in 1949 a DA agreement is now a DW arrangement. Since this has been after the filing of the complaint, I take it it is not involved in this suit. So the witness has answered that he has a DA, that is what it is at present, but it is the same arrangement as the JA arrangement in 1949. Go on.

By Mr. Schrup:

Q. Now, what was your volume the latter half of 1946 of the Niehoff products?

722 A. I do not think I could give you the correct answer on that.

Q. And do you recall what your volume was for 1947?

A. No, I could not. The only figure I could give you an intelligent answer on would be last year, and fairly close up to the month of July of this year.

Mr. Sprowl: I think he knows whether 1947 was more or less than $1,200 though.

The Witness: Yes.

By Mr. Schrup:

Q. You handle other lines?

A. All kindred auto part lines.

Q. Have your sales in those lines increased also?

A. Yes.

Q. Have you ever been approached by any other ignition house to sell you their line?

A. Yes, two manufacturers.

Q. And you still kept the Niehoff line?

A. Yes.

Q. Was a lower price offered you by those two manufacturers?

A. They are both lower priced.

Q. You still kept the Niehoff line?

A. That is correct.

Mr. Schrup: I think that is all.

723 *Redirect Examination by Mr. Sprowl.*

Q. You stated that if through your own efforts your sales volume got high enough that you enjoyed an extra

two per cent discount on the Niehoff line, you would put that money back in your business someplace. If that could not be attained through your own efforts, you spoke of a salesman, would you have to have another salesman to attain that volume?

A. That is the only way. That was my point. It would necessitate hiring an individual.

Q. And where would you get the funds to pay that individual?

A. Well, I would have to pay him. A salesman on the average in an auto parts house, paying him on the merchandise he sells, percentage basis, is usually the set up and it varies from six to eight per cent of his sales.

Q. Would that additional two per cent discount be sufficient to pay that salesman's salary and expenses in addition thereto?

A. Not two per cent because he would be getting six to eight per cent on the sales.

Q. You did say this, that in answer to Mr. Schrup's question that as you got bigger perhaps your total would be bigger, but how about your percentage of net?

724 A. I think that is indicated in just what I said there. Your volume increases. That is true. At the same time, your operating expenses increase. Last year, on the basis of which we are functioning, our gross profit on our total volume of sales for 1950, that is, our gross profit was 40 per cent which is exceptional. If you check into the figures of auto parts supplies, it is exceptional.

Q. Exceptionally good or—

A. Exceptionally good.

Trial Examiner Hier: 40 per cent of gross sales?

The Witness: Gross sales, yes, sir.

Trial Examiner Hier: This six per cent that you would pay the salesman would be on the price at which you sold, that salesman sold that article to a garage man?

The Witness: That is right, sir.

Trial Examiner Hier: Whereas the two per cent we are speaking of, the extra two per cent would be on the price you paid Mr. Niehoff?

The Witness: Niehoff.

By Mr. Sprowl:

Q. Would you have any other expenses in connection with that salesman? Would you have to pay him mileage?

A. Well, yes, you would. In fact, I hired a salesman

one time and I let him go because it wasn't paying out.

At that time I gave him a flat rate allowance of $10
725 a week for the car. He was covering a small area that I described before.

Q. His travelling expences wern't too great in that area?

A. That is correct.

Mr. Sprowl: That is all.

Recross Examination by Mr. Schrup.

Q. I take it that the profits for each year are getting better as you grow? You yourself are making more money out of the business?

A. Yes, that is true. Of course, this may be beside the point, we have all aspirations, but we have to balance it a little bit and figure out which way we are going to go.

Q. What are your aspirations?

A. I want to become larger, more independent, make more money in the parts business.

Q. How large would you like to be?

A. Well, I honestly couldn't tell you. The auto parts business is a big operation. The potential is terrific, and what is involved in doing it is terrific.

Q. The better price you could buy your goods at would help you a great deal, would it not?

A. Naturally, if you buy merchandise cheaper it is a longer profit item for you.

Q. And you are interested in buying it as cheaply
726 as you can?

A. Yes. If I may, I would like to add one thing. When you say "interested in buying as cheaply as you can," that is true. By the same token, we have to buy merchandise that we can figure that we can sell.

Q. That is true. On the Niehoff line, you are interested in buying that from Mr. Niehoff as cheaply as you can, are you not?

A. That is true.

Mr. Schrup: That is all.

Redirect Examination by Mr. Sprowl.

Q. You said you had to balance a lot of factors. Is one of those factors that as you get bigger to enjoy these longer discounts you have other overhead problems?

A. Naturally your overhead would be greater. In the first place, you would have to have a larger area or outlet to stock merchandise. That would be number one. You have to build from there on with personnel and supply routes, deliveries.

Q. Your problem of balancing is whether the additional overhead would justify the additional volume, and additional discounts you would obtain on your purchases thereby?

A. That is true. Growing in the auto parts business from my point of view is something that takes years. There are so many factors. You have to be reason-
727 ably certain of what you are doing. My 40 per cent gross on my sales of last year, as I said before, was high.

Mr. Schrup: You still want to grow?

The Witness: Absolutely.

Mr. Schrup: And you still want to buy your merchandise as cheaply as you can?

The Witness: Yes.

Mr. Sprowl: That is all.

Trial Examiner Hier: All right. You may be excused.

(Witness excused.)

WILLIAM KATER was called as a witness by and on behalf of the respondent, being first duly sworn, was examined and testified as follows:

Direct Examination.

Trial Examiner Hier: Give me your name, please.

The Witness: William Kater, K-a-t-e-r.

By Mr. Sprowl:

Q. Mr. Kater, where do you live?

A. I live in Schiller Park, 4312 Ruby Street.

Q. What is your business?

A. I am in the auto supply business, jobber.

Q. And where is your place of business?

A. 9663 Franklin Avenue, Franklin Park.

Q. And what type of business is that?

728 A. Mostly wholesale of automotive parts, some retail.

Q. And how long have you been in business at that location?

A. About two years.

Q. And how long have you been in this particular business?

A. In automotive jobbing business, about two years.

Q. In other words, you started at this location?

A. That is right.

Q. And you started in 1949 some time?

A. In 1949.

Q. And do you handle the Niehoff ignition line?

A. That is right, I do.

Q. You have handled it ever since you started in business?

A. Yes, I have.

Q. What territory, first of all, is Franklin Park west of Chicago?

A. It is a suburb of Chicago.

Q. And is your territory more or less a suburban area west of the City?

A. Yes.

Q. What roughly in miles are the boundaries of the territory you serve?

A. Well, we go about one mile east, about six miles south, up to ten miles west, and about five miles north. It is all suburban, not too many towns through there.

Q. And what type of customer do you serve?

729 A. Service stations and small garages.

Q. And do you presently have a contract with the Niehoff Company under which you purchase your merchandise?

A. Yes, I do.

Q. In 1949, did your annual volume exceed $1200?

A. No.

Q. And in that year you received no discount?

A. No discount.

Q. Where did your volume level of the Niehoff line go to in the year 1950?

A. In 1950 I think that our volume was around just about $1300.

Q. And did that volume give you, by virtue of that volume, did you receive a discount on your purchases?

A. We received five per cent discount for the year.

Q. For that year's purchases?

A. For that year.

Q. You also get a two per cent cash—
A. We take two per cent of the bill when it is paid.
Q. And then you get another five per cent in 1950?
A. Yes.
Q. And how are your sales going in 1951?
A. Well, in this year, we put on another salesman, and I have taken all of the extra territory so I have to boost it up. I have been pushing the cabinets a lot. I have been pushing ignition a lot. Ignition for me is
730 a good in. If I can get an account set up with a cabinet, I have more opportunity to sell other merchandise. I have been pushing ignition pretty hard this year, and we have more than doubled the ignition sales this year.
Q. You hope to obtain more than the five per cent?
A. I would like to. I have to. I have the additional expense of the salesman, delivery truck, commissions.
Q. In this territory you serve, are there any competitors of yours who also serve the same territory who handle the Niehoff line?
A. Yes, there are.
Q. Are there any that buy at a longer discount from the Niehoff Company than you enjoy?
A. There are some a lot bigger than I am, and they do probably get a better discount.
Q. Who are they?
A. Automotive Wholesalers.
Q. Where are they located?
A. Downtown, Michigan Avenue—I am not sure. They operate out of a truck. Coliseum Battery and Equipment have salesmen that call.
Q. Are there any other competitors in this same area that compete with you on the Niehoff line that are more comparable to you in size?
731 A. There is one west of me in Bensenville.
Q. What is the name?
A. Wally's Auto Supply.
Q. Is he about comparable to you in size?
A. He is right now. He does not have a salesman out. He does not have anybody working for him. I cover his territory with my salesman.
Q. Have you experienced any competitive disadvantage in competing with any of these people in this territory on the Niehoff line?
A. No, I think I offer more service. I call on them a

little more often than the big jobbers do. In fact, I have taken accounts away from them.

Q. From Automotive Wholesalers?

A. From Automotive Wholesalers and I took one in Bensenville in this other fellow's territory.

Q. Wally's?

A. That is right.

Q. Do you see the salesmen of these three people in your territory?

A. Just the two; Wally does not have a salesman. Automotive Wholesalers go through town and so does Coliseum.

Q. Wally sells his own merchandise?

A. Yes.

Q. You see Wally?

732 A. I see Wally.

Q. All right. Now, when did you check on this outside salesman?

A. About March, the first of March.

Q. What year?

A. This year.

Q. And do you pay him a commission on the Niehoff line?

A. He gets eight per cent commission on everything he sells.

Q. Do you have any other expenses?

A. We maintain his car, gas, and service on the car.

Q. At what rate do you maintain that?

A. He has his gas and oil. We take care of the gas and oil. He takes care of his repairs.

Q. At this point in 1951, I gather from what you said you were uncertain as to whether you have five per cent or some higher discount on your purchases?

A. I am trying right now, I am going out on my own a lot during the week covering some of the accounts. I am trying to build up new accounts in order to get more cabinets out. I have to get in the higher bracket in order to pay for the salesman.

Mr. Sprowl: You may cross-examine.

Cross-Examination by Mr. Schrup.

Q. Do you think it is worthwhile to get into the higher bracket?

733 A. I think so. I want to increase the volume.

Q. You are interested in growing?

A. Yes.
Q. The more you sell, the more you grow?
A. Sure.
Q. Would it help to buy your merchandise from Mr. Niehoff at a cheaper price than you do?
A. Sure.
Q. You would like to get a better discount than you do?
A. Always.
Q. Why.
A. I am interested in making a profit.
Q. And you think a better discount would give you more profit?
A. Sure, if it would not make any more expense.
Q. Now, would you like to have another salesman besides the one you have?
A. If I could afford it, I would.
Q. Why would you like that?
A. I could cover more territory and get my sales up.
Q. Do I understand you to say that since you employed the salesman you went into Wally's territory who had no salesman and took one of his customers?
A. Yes.
734 Mr. Schrup: That is all.
Mr. Sprowl: That is all.
(Witness excused.)
Mr. Schrup: May we have a short recess?
Trial Examiner Hier: We will take a short recess.
(Short recess had.)

FRED H. GEYER having been previously duly sworn, resumed the stand and continued testifying as follows:

Cross-Examination (Continued) by Mr. Schrup.

Q. At the close of the noon recess, while still on the witness stand, we were talking about what were the major lines handled by a jobber.
A. That is right.
Q. And I believe you were going to give me some information on that?
Trial Examiner Hier: He gave it to you. You have it in your hand.

By Mr. Schrup:

Q. Let's have his opinion as a witness.

A. Well, I believe I started to say that in most cases the jobbers today select a certain number of lines, anywhere from 12 to 20, which they call their major lines on which they know that they can do the greatest volume
735 due to them having the best acceptance from the dealer, and on which these lines show them the best margin of profit.

Q. They consider everything, do they not, Mr. Geyer, the price of the line is not always the determining factor? If it has what we call dealer acceptance, well known in the community and wanted, regardles of the price, the jobber is going to take it?

A. That is right. It is the acceptance of a line and the many years that manufacturers have built up the prestige that the line carries. It has a great deal to do with whether or not the jobber will push that line.

Q. I take it you consider Niehoff a sort of a prestige line, do you?

A. We believe that we have spent a lot of money in advertising this line over a period of many years. We have printed many many catalogs each year, a new catalog each year. We have given dealers service stocks. We have tried to sell them on the program that our line has dealer acceptance due to the advertising which we have done on the line and the prestige which we have created for it.

Mr. Sprowl: May I interrupt off the record?

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Schrup:

736 Q. Now, I believe you told us, Mr. Geyer, that you lost 42 accounts in the year 1949, is that correct?

A. I believe that is correct.

Q. Now—

A. 42.

Q. 42 in 1949. Were these accounts lost to a number of competitors, or was there one main competitor that got them?

A. They were lost to a number of competitors. One competitor might have got more than another.

Q. Would you look at respondent's Exhibit No. 3 and

the code there and give us an idea as to who was the competitor that you thought got most of them and so forth down the line?

Mr. Sprowl: There is no objection to using the names of the competitors for this purpose.

Trial Examiner Hier: All right.

The Witness: I had one of these marked up. I marked up this copy here, which you see. I did not mark all of it. I took the Standard Motor Parts because we lost during 1949 four of our jobbers to the group, and four where they did not belong to a group.

Trial Examiner Hier: That is eight.

By Mr. Schrup:

Q. Would you say—would you tell us the competitor by referring to the list?

A. Standard Motor Products.

737 Q. What were the groups that you lost the customers to?

A. Well, the Kansas City group, I forget—Midwest.

Q. You might give the names of the customers that you lost.

A. Okay. Motor Supply Company—wait a minute. Motor Supply Company, DesMoines, that was lost to Midwest. Hanson Gray at Fort Smith, Arkansas was lost to Midwest.

Trial Examiner Hier: You mean by virtue of their membership in Midwest? You lost them to Standard Auto Parts?

The Witness: That is right. They joined the group in which they enjoyed a preferential discount.

By Mr. Schrup:

Q. That was extended to them as members of the group by Standard Motor Products?

A. That is right.

Q. Continue with the names, please.

A. Motor Supply Company of Dallas, Texas was lost to the—I think they call themselves Tex-Ark.

Q. That is a group?

A. Tex-Ark-La, Texas, Arkansas and Louisiana. That is what it means.

Q. That group is sold, to your knowledge, by Standard Motor Products?

A. Yes, it is. There is the Davis Company, Greenville,

South Carolina. I do not know the name of the group That is down in the southeast. It originates, I think, in Chattanooga.

738 Trial Examiner Hier: Warehouse Distributors?

The Witness: That is correct, Warehouse Distributors, that is correct.

By Mr. Schrup:

Q. Who was the wholesaler there?

A. A. Davis at Greenville, South Carolina.

Q. That account was lost to Standard Motor Products?

A. Yes, sir.

Q. Continue.

A. We lost one account to a group in Cleveland, Ohio. The name of the account was Miles Auto Supply. The group is— I can't tell the name of that group. It is a local group in Cleveland, has about 10 or 12 jobbers amongst it. That was lost to Wells.

Q. And what was the seller who obtained that account?

Trial Examiner Hier: Wells, he said.

By Mr. Schrup:

Q. I thought you said that was lost—

A. No, the group, Wells sold the group.

Q. Wells Manufacturing Company, Fond du Lac, Wisconsin?

A. That is right. The rest of them to the best of my knowledge were not lost to jobbers in a group. I may be wrong about that. May we be off the record.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

739 Trial Examiner Hier: On the record.

By Mr. Schrup:

Q. You stated you lost some accounts in California?

A. Yes.

Q. What were the names of those accounts?

A. Well, we lost about six of them, but there are only two that I can remember who they were changed over to.

Q. And what were the names of the accounts and who did they change to?

A. Allen Dietrich to P&D, and Valley Auto Supply at San Bernardino to G&P.

Q. Were there other accounts lost during 1942?

A. 1949?

Q. Yes?
A. Yes.
Q. And who were those accounts lost to?
A. I don't know. I did not keep a record of them.
Trial Examiner Hier: Let's find out this way. Give him back the sheet and ask him if there is any competitor on that sheet to whom he did not lose one of the 42 accounts in 1949.
The Witness: I can tell you other accounts were lost, some of these marked up.

By Mr. Schrup:

Q. I am not interested in knowing it unless I know
740 who the competitor was.
A. We lost Auto Parts in St. Louis, a very large account to Standard. We lost Slager Supply Company in Chicago to Standard. We lost Snyder & Taylor at Champaign, Illinois to Standard. We lost G. J. Moss of Richmond, Virginia.
Trial Examiner Hier: Hand him Exhibit 3. I still would like to have an answer to the question. Look at Respondent's Exhibit 3 and tell me if there is any competitor listed thereon to whom you did not lose an account in 1949.
The Witness: We did not lose one to—
Trial Examiner Hier: Yes?
The Witness: Yes. We did not lose an account to American Motor Products, to Andrews Manufacturing, Echlin Manufacturing Company, Machine Parts Corporation, Preferred Electric, Automotive Specialty Corporation, Tungsten Manufacturing Company and Kim Manufacturing Company.
Trial Examiner Hier: All right.

By Mr. Schrup:

Q. You are acquainted, you say, Mr. Gever, with the jobber price list and discounts the Standard Motor Products gives?
A. Yes.
Q. Would you say, if you know, that the sale by that corporation, Standard Motor Products, to the various members of the Cotton States group was a departure from their normal pricing system?
741 A. Would you repeat that question?
(Would you say, if you know, that the sale by that

corporation, Standard Motor Products, to the various members of the Cotton States group was a departure from their normal pricing system?)

By Mr. Schrup:

Q. Not the Cotton States, I was thinking of your selling the Cotton States.

A. That is why I asked you to repeat it.

Q. To the groups which you have mentioned, where your customers departed.

A. They left us and joined, became a customer of Standard Motor Products.

Q. Yes?

A. Yes.

Q. There was a departure from the normal pricing system?

A. That is right.

Trial Examiner Hier: Wait a minute. Standard Motor Parts offered to the group as a whole a lower price than they offered to the other customers, is that what you mean to imply or state?

The Witness: I mean to imply that we lost them because our price was not as could or we could not meet the price that Standard Motor Products had given to the 742 group, and our customers joined the group because they enjoyed a better price from the group.

Trial Examiner Hier: That is the point. That is an entirely different proposition.

By Mr. Schrup:

Q. Do you consider that Standard Motor Products gave this group a special price?

A. Right.

Trial Examiner Hier: "Consider" does not satisfy me.

The Witness: I know they gave them a 20 per cent price, let me put it that way.

By Mr. Schrup:

Q. Outside of the members that you lost on the basis of their joining groups, sold by the Standard Motor Products Company, turning your attention to all of the accounts you lost to the various competitors that you mentioned, can you say of your own personal knowledge that you lost the account solely because the competitor offered a lower

net price or was there some other consideration involved?

A. To all of the accounts or just the ones to Standard?

Q. No, I am excluding those we have discussed that joined the groups and were sold by Standard. Now we are going to the accounts you lost because other competitors came in and sold them.

743 Trial Examiner Hier: All competitors or Standard?

Mr. Schrup: The various competitors.

Trial Examiner Hier: All right, all of them then, excluding group losses from the 42 that you lost in 1949.

By Mr. Schrup:

Q. There are some that you have the opinion that you lost them on the basis of price, you tell us. If there are some you thought you lost because of other consideration, tell us.

A. I think the accounts that we lost to P&D were lost on the basis of price to GP.

Q. That is Guaranteed Parts Company?

A. Yes, sir. I do not know that we—

Q. What about the balance of the accounts that you lost to Standard that did not join groups? Were there some?

A. Yes.

Q. On what basis do you think you lost those?

A. I think those accounts were possibly, were definitely lost due to, I believe, the price situation, although they weren't lost by these jobbers belonging to a group.

Q. I do not follow that.

A. Well, let me rectify that. There are also certain large accounts that although they do not belong to a group they enjoy a better price.

Q. Oh, yes, I understand that.

A. That is what I mean.

744 Q. What I am asking you is, you lost, as I understand you, various accounts to Standard Motor Products?

A. That is right.

Q. Some of those accounts you lost because they joined groups which the Standard Motor Products was selling?

A. Right.

Q. Some of those accounts you say you lost to Standard were not members of groups?

A. We lost accounts due to the prestige of the salesmen in the territory, the Standard having agreed to give them

an extremely large amount of missionary work, good salesmanship on their part, any number of—

Q. That would apply, the last remark would apply to any competitor? You may have lost a lot of accounts not because of price but on the prestige of the product, the liking of the accounts for the salesmen, and so forth?

A. That can happen to us the same as it does to them.

Q. Now, Mr. Geyer, I believe you stated that you have been with Niehoff Company about 18 years?

A. That is right.

Q. And in the latter portion of that time you have been sales manager?

A. Yes.

Q. And you have also been active in ascertaining costs of the products and the making of the resale prices,
745 that is the making of the prices to the jobber, and things of that nature?

A. Yes, the competitive prices and establishing our price to the jobber.

Q. You are familiar with the over-all cost of the Niehoff Company from your experience?

A. I could not give you the over-all cost or the cost on any individual item.

Q. Mr. Geyer, I seem to recall that you stated that sometimes due to your cost you could not meet certain competition. What was that meant to convey?

A. Well, certain items have a list price established by a manufacturer, like for instance particularly Ford Motor Company, which may be very low and we do have to meet the list of the company as large as the Ford Motor Company. By the time we make up the dealer's, wholesaler's, and jobber's price, it puts us in a position where our costs will not allow us to meet competitive situations of that type.

Q. When you are talking about the list price, are you talking about the eventual dealer price that you work back from?

A. The consumer buys it at, then the dealer, then the jobber.

Trial Examiner Hier: By the time you take off all of the mark ups down the line, that is below your cost of production?

The Witness: That is right.

746 Trial Examiner Hier: Then I take it you do not manufacture that item?

The Witness: Well, in some cases we are forced to sell it, but our prices are higher than the competitor's, and we may not sell as many as our competitors do. We would like to have it in the line if it is physically possible.

By Mr. Schrup:

Q. Just so that you have a complete line?

A. That is right.

Q. Now, you also stated somewhere along the line that you were quite positive that you had to make sales of a hundred dollars a month to a customer for it to be profitable and you had records to prove that sales below that amount would be unprofitable, is that correct?

A. Yes.

Q. And what would those records be, sir?

A. Well, I believe —

Q. Are those the records that you are in the process of preparing?

A. They are, I believe, prepared.

Q. I beg your pardon?

A. They are prepared, but Mr. Sprowl will have a witness—

Mr. Sprowl: I did not hear the question.

The Witness: They are to a certain extent. We know from our many years of experience, Mr. Schrup, that 747 you can't service an account whose volume runs less than a hundred dollars a month, and when we get through trying to help that account, it becomes very costly to us. You know that.

Q. That is what I wanted, that is what I was interested in seeing the records upon which you may have based your testimony. I presume they are going to be shown to us.

Now, you also stated that the time spent on the small account as against a larger account was 50 per cent greater, by the salesman?

A. That is right.

Q. Now, would you describe to us what you mean by a small account?

A. Well, I again mean the account, when we sell them, we take them on, one of our DA, rather, talking in 1949, JA agreements which of course today we are talking about DA, we have an educational program with this man that we have got to sell him first of all that the ignition business is a very profitable business and is a major line, is one of the 20 lines that the jobber does his greatest volume on.

Our salesman has to continuously contact this account to try to build him up to a point where he is a good account for us and does a nice volume for himself on the Niehoff line.

Q. I do not recall how many accounts there are—

Trial Examiner Hier: 200.

Mr. Sprowl: I have it here, 228 in 1949.

748 By Mr. Schrup:

Q. And were those accounts that you do a 50 per cent greater business on than you do with your larger account—

A. Wait a minute. I did not say that.

Q. Excuse me. Maybe I am mistaken.

Trial Examiner Hier: He said less than a hundred dollars a month, which would be the J accounts.

By Mr. Schrup:

Q. That is right. As I understand your testimony—

Trial Examiner Hier: That is not 238. The J accounts are a different figure.

Mr. Sprowl: You are talking about Mr. Niehoff's testimony of yesterday, and what Mr. Niehoff said was that there are 299 J accounts representing 7.5 per cent of the sales volume.

Trial Examiner Hier: And that is what this witness said cost him 50 per cent more to service.

Mr. Schrup: He is talking about jobber with agreement accounts.

By Mr. Schrup:

Q. Is that right?

A. I was talking about a hundred dollars a month or less. That is the question you asked.

Q. Somebody said JA in there?

A. I said to try to get that account up to that 749 point or better.

Q. How much time do you spend with the JA accounts?

A. Well, after an account gets to functioning, where it has gone anywhere from above $1200 to the, let's say, $1800 or more, we are just as anxious to try to get him into that $2400 bracket, and so is he. So, again, we make every effort to try to help him and he also by that time has developed into a little better account so he is working a little harder on the line, just as one of these witnesses explained.

Q. Well, do I understand you to say that you work just as hard to get a jobber without agreement to be a jobber with agreement as you do when he becomes a jobber with agreement and advance him along the brackets?

A. No. We do get a little relief after this account becomes a little stronger because he himself goes out and stimulates this business because he knows and had had experience and his amount of service—

Q. In other words, as I understand it then, you do not give to each of your accounts the same amount of service from the salesmen?

A. We do not try to shirk any one. We try to give everyone as much service and as much help as we think it necessary and in many cases certain jobbers will demand a little more help. That is only human nature.

Q. Do you consider the service of your salesman
750 to the accounts of value to them?

A. Would you say that again?

Q. Do you consider the service that your salesmen perform for these various accounts of value to those accounts?

A. Definitely.

Trial Examiner Hier: Are you in a positon to tell us where the breaking point is as regards these four types of accounts, and what level you start to make a profit?

The Witness: We believe that we make a profit after the account becomes a $1200 or better account. We are also sure that our price structure is set up so that at each level we know that we have saved on our costs and can make a profit.

By Mr. Schrup:

Q. Of course we have not seen your salesmen's salaries and commissions—

A. No, I have a notation from you—

Trial Examiner Hier: October 10th.

The Witness: —on which you asked us to do—

By Mr. Schrup:

Q. Did the salesmen's commissions arrive at a substantial sum?

A. Some do. Older salesmen, they have been on the territory longer, they have a larger territory, and they have more jobbers in their territory.

751 Q. What ratio would they more or less run to in their salary?

Trial Examiner Hier: We do not have the salary—

The Witness: I would rather wait until we submit it to you, Mr. Schrup:

Trial Examiner Hier: Send that down to him in a letter. If he wants to use it, all right.

Mr. Sprowl: We can have that breakdown prepared by the company auditor.

Trial Examiner Hier: I do not see that there is any point in having this company's commissions, pay and commissions spread on a public record.

Do you have any more?

Mr. Schrup: Yes.

By Mr. Schrup:

Q. This morning in response to Mr. Sprowl's question about the feasability of selling at the same price or different prices at the point of sale, words to that effect, you talked about your base price would be so out of line that you would not be close to competition and could not hold any accounts and could not sell any new accounts. What is the base price that you are talking about?

A. Jobber's price.

Q. That is the list price?

A. That is the jobber's cost price.

752 Q. You are talking about which exhibit here?

Trial Examiner Hier: Exhibit 6-A.

The Witness: The pink sheet which you have there.

Trial Examiner Hier: I think it is Exhibit 6-A.

By Mr. Schrup:

Q. And that is the present price upon which you are selling or were selling that category of customers that were denominated in 1949 as jobbers without agreement, is that right?

A. That is right.

Q. But, in fact, you now have in reality for your four different classifications four buying prices, have you not, with different buying prices in the same classification?

A. Yes.

Q. Now, you have a buying price, as I understand it, for your jobber without agreement?

A. That is right.

Q. You have a different price, buying price, for your jobber with agreement, with several different prices, buying prices, depending on their volume?

A. That is right.

Q. You have again a different buying price for your distributor without agreement, and then again another different buying price for your distributor with agreement, with various buying prices in there depending on the volume?

A. Yes.

753 Q. Well, now, why doesn't that cause you just as much trouble as this would cause you if you had a common base price?

A. As I said before, in all cases our levels which we have given to the jobber, we have saved on the cost of that volume which we received and the cost of saving permits us to allow that discount.

Q. Well now I think also when you are talking about that base price you also said that it would be troublesome because the various jobbers would come back to your salesmen or to the company to see if they could get a better price, is that right?

A. That is right. I said it wasn't at all equitable and you could not do it if you had to use that type of a base price.

Q. Why would they come back to get a better price?

A. That price would not get us the business, that is for sure.

Q. It would get you the business with the jobber without agreement, does it not?

A. Yes, but we cannot thrive or live off of that kind of an account. That is for sure. We would drop by our own weight very quickly.

Q. I believe when we were talking about the major lines for the various jobbers that we neglected to finish the question, I neglected to ask you what were those major lines.

A. Well, I could not mention all of those lines off-
754 hand. In most cases, the jobbers use the steel parts line which consist of pistons and pins, all of the parts that go into a motor, valves and so on, which is considered the top line with most jobbers. Fan belts, rubber line, hose, those are considered a top line. So is the spark-plug situation, and batteries, that is considered a top line.

Q. Where do the ignition parts fit into that?

A. Ignition parts and hydraulic are also considered as major lines with most jobbers.

Q. But not as much of a major line as those items you first mentioned?

A. Well, they are broken down in the volume that most jobbers do in their business. I have a report here which I just checked a very short time ago. For instance, with the leading gasoline service stations throughout the United States, ignition parts is in eighth place. Anti-Freeze is in first place, which does not run true to what the average jobber does; the batteries are in second place. Fan belts are in fourth place. Spark-plugs are in fifth place.

Q. Now, if you want to refresh your memory from this you go ahead.

A. I have one here.

Q. Now, would you say that the position of the various major lines in an automotive jobber would sort of depend on the total over-all sales volume of the jobber?

755 A. Well, these lines here, if that is what you are referring to, are made up from the position of them and is placed according to the volume that they have done during the previous year on these particular items. In other words, the jobber's total volume on motor and chassis parts will average out about seven or a little better than seven and a half per cent of his total volume.

Q. And what about piston rings?

A. Piston rings would run about four and one-half per cent.

Q. Spark plugs?

A. Spark plugs would run about four and a half, 4.47 to be exact. I am quoting the figures.

Q. What about ignition parts?

A. Ignition parts, about 5.4. That does include starters and generators which are not in our line or most of the ignition parts line.

Q. What percentage of the ignition parts would be included? I mean, put it this way, what part of ignition parts would generators and so forth amount to, what percentage?

A. We believe about four per cent is correct for ignition parts, so that would be possibly one and one-half per cent for the starters and generators. Now, that is the jobbing business. That is not the electric service business where it increases considerably. What I meant is the difference between the 41 shown here and the differ-

760 ence—

Q. You gave a percentage of what the overall percentage of the jobber would be for ignition parts?

A. Four per cent.

Q. And of that four per cent, what would generators and armatures consist of?

A. Not any.

Q. No?

A. The figures we show here are five and four hundredths per cent.

Q. Put it this way. Let's exclude generators and armatures from ignition parts. What would it consist of, what percentage?

A. Approximately four per cent.

Trial Examiner Hier: What is the purpose of this examination? The object of it escapes me.

Mr. Schrup: Well, I have in mind to see what part in the overall jobber's business the ignition part plays. I also would like to find out for brake parts.

Trial Examiner Hier: The ignition parts are about fifth or sixth, and—

The Witness: On brake parts, the only thing I can give you is the figure that we have here. Our own would not compare even with the figures shown here, which is about two and six-tenths per cent. Ours would be less than that.

By Mr. Schrup:

757 Q. Now, will you turn, Mr. Geyer, please, to Respondent's Exhibit 10-A and -B? Under the name Nichoff at the top of the sheet, I see no date. Would you tell me how many prices Nichoff had in effect during 1949?

A. I believe one. I am not positive whether there was two that year or not.

Q. I suggest possibly there may have been three.

Mr. Schrup: Perhaps we had better go off the record and clarify that.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Schrup:

Q. The record shows, Mr. Geyer, Commission's Exhibit 6-A which was in effect August 1, 1949, then there is Commission's Exhibit 8-A in effect September 28, 1949, and Commission's Exhibit 9-A operated from October 1, 1948 to February 28, 1949?

A. That is right.

Q. That operated two months in January and February 1949, Exhibit 9-A?

A. We actually had two price sheets that we had issued, two sheets in 1949.

Q. So that for the year 1949 you had different periods in that year, three different price sheets in effect?

758 A. Yes, that is correct.

Q. We are talking about the jobber price list?

A. The jobber price sheet.

Q. The pink sheet?

A. Yes.

Q. Now, the prices that are set out in the column entitled "Niehoff" from which price lists were those taken? Were they taken from all three or any one individual price list?

A. I am sorry but I cannot give you the answer. I did not work these up.

May we be off the record?

(Discussion off the record.)

Trial Examiner Hier: On the record.

The Witness: We have a regular catalog and price department that work on this continuously.

Trial Examiner Hier: That information can be supplied at a later date. Even if you had it, you could not interrogate this witness much about it.

Mr. Schrup: I don't think so. There are very many discrepancies here apparently.

The Witness: We can get that information for you.

Trial Examiner Hier: They will get the information for you.

Mr. Schrup: As I understand it, a date will be supplied under the name "Niehoff" on Respondent's Ex-
759 hibit 10 indicating the price list from which the comparisons on this sheet are to be made?

Trial Examiner Hier: That is right.

By Mr. Schrup:

Q. Mr. Geyer, who selected the Niehoff items on this sheet for the purposes of comparison with competitor's items?

A. I did.

Q. And how many items do you say that you have in your line?

A. Well—

Trial Examiner Hier: He said about 2,000 this morning. A great many of those are obsolete as appears in these exhibits.

The Witness: These items were selected, Mr. Schrup, as the fastest and best moving items and the ones on which the jobber does the greatest volume and we in turn do the greatest volume with him. That also holds true with any of our competitors. We select each bracket, Auto-Lite, Ford, Delco-Remy, the points, the condensors, roters, cams, switches, coils, we select the major items in each different bracket for each popular number.

By Mr. Schrup:

Q. Are the Niehoff items that are shown here identical with the items of competitors?

A. We use a comparative number of the competitors which compares with ours. That is the way that we arrive at the numbers of our competitors.

760 Trial Examiner Hier: Where the competitor does not sell the item, it is indicated by a horizontal line at that point?

The Witness: That is right, or we might not have a price on that particualr item.

By Mr. Schrup:

Q. Now, the prices under competitor number one, in each instance what does that price represent? Is that the jobber's cost price before any discount?

A. Yes.

Q. And does the same apply to column number two, competitor number two?

A. Yes.

Q. Competitor number three?

A. Could I get that key just so that I do not make a mistake? Yes.

Q. Competitor number four?

A. On competitor number four, yes.

Q. The answer to competitor number four is yes?

A. Yes.

Q. Column five?

A. Yes.

Q. Column six?

A. Yes.

761 Q. Column seven?

A. Yes.

Q. Column eight?

A. Yes.

Q. Column nine?

A. Yes.
Q. Column ten?
A. Yes.
Trial Examiner Hier: In other words, every price on Respondent's Exhibit 10-A and 10-B is a jobber's price of that particular comparison?
The Witness: Right.
Trial Examiner Hier: Before any volume or other discounts are deducted?
The Witness: Yes.

By Mr. Schrup:

Q. As I understand it, Mr. Geyer, column one under the Niehoff line—
A. Yes.
Q. —represents only the buying price paid by them during 1949 by Niehoff jobbers without agreement, is that correct?
A. Correct.
Q. Now then the different buying prices paid by other Niehoff jobbers would have to be computed according to their classification and their volume of purchases?
762 A. That is correct.
Q. And is there any one of these competitors that has an identical classification such as the Niehoff Company has for its jobber customers, for jobber classifications?
A. You have the copies of seven of them, I believe, there. I do not know whether any is identical to ours. I cannot tell you that offhand.
Q. Can you tell us of any company that has the same type of jobber classification that you have?
A. No.
Q. What would be the companies that have something closely approximating it?
A. Well, number one.
Q. What type of customer classification do they have?
Mr. Sprowl: I think, Mr. Schrup, I think all of these particular competitors' contract forms have been received as exhibits, and I imagine that they speak for themselves. If you want the witness to pick up each one and read it, it is all right with me.
Mr. Schrup: The materiality of this, I presume you want to yourself show the exact similarity of the dis-

counts and the fact that one particular customer of yours—

Mr. Sprowl: I think that is in the record.

Mr. Schrup: I do not understand the testimony to be that way. I understand—

763 Mr. Sprowl: Go ahead.

Trial Examiner Hier: Whether or not it is in the record, it is his dance. I do not see what you want to try to prove his case for.

Mr. Schrup: I am trying to find out the materiality of this exhibit.

Trial Examiner Hier: You have objected that it was immaterial. I overruled it. It is material.

Mr. Schrup: I do not suppose there is any reason—

Trial Examiner Hier: I do not see that it is a complete defense or is all of it or a substantial part of it. I can see where it can be material when we get through with it.

Mr. Schrup: May we have a short recess?

Trial Examiner Hier: Yes.

(Short recess had.)

Trial Examiner Hier: On the record.

Mr. Schrup: That is all.

Further Direct Examination by Mr. Sprowl.

Q. Mr. Geyer, you named six or seven companies from Respondent's Exhibit No. 3 to whom you in the year 1949 did not lose any accounts?

A. To whom we did not—

Q. Did not lose any accounts. You named six or seven?

764 A. That is right. To the best of my knowledge I do not know that we lost any business to those concerns.

Q. Have you ever lost business to those concerns?

A. Yes.

Trial Examiner Hier: All of them or any of them?

The Witness: To competitor number eight.

Mr. Schrup: Who?

The Witness: Competitor number eight.

Trial Examiner Hier: Since you named the others you might as well name these.

The Witness: Standardized Products Company.

By Mr. Sprowl:

Q. Did you ever lose one to American Motor Products?

A. Not to my knowledge. Of course, I did mention before, Wells, which is the same company.

Q. I see. Are there any others?

A. Not to my knowledge.

Q. That is in the last year or two, three, that you are speaking of?

A. That is right, I am talking about 1949 and since then.

Q. They are still competing in the field nationally?

A. Yes, sir.

Q. Now, you testified on cross-examination that according to the statistics of 1951 released by the National Standard Parts Association that ignition parts 765 ranked third if they include generators and armatures, but if you excluded generators and armatures ignition parts would be about four per cent of the business, is that correct?

Mr. Schrup: Just a minute. I asked the witness for his opinion, which he gave, as sales manager of the company.

Mr. Sprowl: You asked for his opinion.

Mr. Schrup: If you are asking for his opinion—

By Mr. Sprowl:

Q. After you gave your opinion, you gave precise percentages. Where did you get those percentages?

Trial Examiner Hier: The witness did give precise percentages.

The Witness: I got them from the book, the record of 1951 NSPA submitted to all jobbers and all manufacturers who belong to that Association.

By Mr. Sprowl:

Q. You were holding a copy of that and Mr. Schrup was holding a copy of that when the questions were asked and the answers given?

A. That is right.

Mr. Schrup: I want the record to show that I asked for the opinion of the witness.

Mr. Sprowl: I do not think the record will stand that interpretation when he was giving the precise percentage

figures. He had this in his hand and you had it in
766 your hand. I think I am entitled to pursue this examination.

Trial Examiner Hier: He was asking his opinion. If he chooses to give as his opinion the opinion of another, it is still his opinion. Anticipating perhaps what you have in your mind, I do not think that makes that book competent as such. He can testify over here from his experience.

By Mr. Sprowl:

Q. Well, I want to get at it. Mr. Schrup had the record indicate that ignition parts ranged third. Now, casting out the generators and armatures and reducing ignition parts to four per cent of the volume enjoyed, how far down that list in rank would four per cent place ignition parts?

A. Seventh place.

Q. Thank you.

Now, referring to Responden's Exhibit 10 which you have before you, at the time I first examined you concerning that, I had two copies of it joined together and had it marked Exhibit 10-A, 10-B, 10-C and 10-D. Actually, it consists of two pages, 10-A and 10-B. I asked you to testify as to the meaning of some summaries appearing at the end of what I described as Exhibit 10-D. Would the answer which you gave at that time apply in fact to the summaries appearing at the foot of Exhibit 10-B, those are the summaries you testified about earlier?

A. Yes, sir.

767 Q. You said that in compiling that you limited it to the fast moving items which you stated were approximately eight per cent of the dollar volume of the Nichoff Company in ignition, and that you used what you called the A and B as the faster moving items. Does the Nichoff Company in fact have a grading system denoting fast and slow moving parts?

A. Yes, sir.

Q. And what else are used?

A. On all of our price sheets we show the letters A, B, C, D, and E.

Q. What does A indicate?

A. A is the top or the fast moving item. That is the best seller.

Q. Does that code appear on any exhibit that is in evidence?

A. Yes, on all of the price sheets that are in evidence.

Q. Do you have one before you?

Trial Examiner Hier: Exhibit 6-A.

The Witness: Give me the number.

Trial Examiner Hier: Exhibit 6-A.

Mr. Sprowl: Commission's Exhibit 6-A.

By Mr. Sprowl:

Q. And is the code at the bottom of the first page?

A. The top, about the top.

Q. Right under the heading "Popularity classification guide," is that correct?

768 A. That is correct.

Q. And Exhibit 10 is made up of A and B items and some C items, is that it?

A. A few C items, yes, sir.

Q. And what ones were omitted?

A. D and E, all E items.

Q. Are you acquainted with Automotive Wholesalers in Chicago, 4841 West Chicago Avenue?

A. Yes, sir.

Q. In the year 1949 what type of agreement did that company buy its ignition merchandise from the Niehoff Company, Mr. Geyer?

A. I believe that company was sold on a "D" basis.

Q. Could you check that?

A. I could check that and give you that information.

Q. You could do the same for Coliseum Battery?

A. Yes. I do not happen to have those records with me.

Q. Could you get the information for the last three or four years?

A. Yes. Do you want it for Automotive Wholesalers?

Q. And for Coliseum Battery and Equipment, which I understand is on Wentworth Avenue. Are you acquainted with that account?

A. Yes, I am. Do you want the 1949 basis and 1950 and 1951?

Q. Yes, I would like to show you pages 73 and 74

769 of the record which is your earlier testimony and call your attention to page 73 to the word "national" on line 21; the word "national," on line 22; the word "na-

tional" on line 1 of page 74. I will ask you if that word "national" was correctly transcribed?.

A. Let me read it.

To my knowledge there was no—

Q. What was the word used?

A. This is my testimony?

Q. Yes.

A. It must have been "original".

Q. "Original" in every case?

A. Definitely.

Q. The Niehoff Company in addition to paying the base salary and commission to its salesmen pay their expense in the field?

A. Yes, we pay our salesmen a daily expense plus a car mileage.

Q. Based on so much per mile?

A. So much per mile.

Q. Is that uniform?

A. Yes, the same to all men.

Q. Referring again to the pamphlet you held in your hand when you were testifying on cross-examination, I show you a page out of those statistics called "com-
770 bined operating and performance ratios as they relate to jobbers or wholesalers." The underlying question, I want to ask you again, were you once in a wholesaling or jobbing business once yourself?

A. Yes, sir.

Q. What size of a business were you associated with in that period?

A. Our volume for the last year I was with the company, we had a volume of about $675,000, I believe.

Q. And in the first year you went with them, was it lower or higher?

A. Well, it was considerably lower. It was many many years before that. That was way back in the early automobile days, and I think they were probably doing maybe $50,000 or $75,000.

Q. You went through a steady growth up to the volume you mentioned at the time you left the company?

A. Yes.

Q. All right. Have you an opinion as to the relationship of net profits to total annual volume on a small jobber operation as compared to a large one?

A. Yes. In most cases the small jobber that runs his

business quite efficiently can show a net profit anywhere from five to five and one-half per cent.

Q. How about in the bigger jobbers?

A. A jobber in the, say, medium group class, doing business say of $300,000 would show a margin of net
771 profit of about three and one-half per cent.

Q. And that is after you have taken into account the additional volume discounts that that larger jobber has obtained in the course of the year's operation that was not available to the smaller jobber?

A. Yes, sir.

Q. And is there a similar progression as to the total gross profit, that is just the original cost of the merchandise less the cost of the merchandise sold?

A. The gross profit with the small jobber, would show anywhere from 35 to 40 per cent, where the gross profit to the jobber doing a volume of $300,000 would show 30 to 32 per cent.

Q. All right. Now, the statistics that you have in front of you in an open book are related entirely to the larger operation, that is the $250,000 annual sales and up?

A. These figures show from group one to $250,000—

Mr. Schrup: This witness can give his opinion but I want it understood it is his opinion.

Mr. Sprowl: That is all right. I want to show the other figures he spoke of were strictly his opinion from his experience and there was not anything before him to help him. If that is the way the record appears, I do not want to pursue it any further.

By Mr. Sprowl:

Q. And there again, in the difference of that gross
772 profit, that is after taking into consideration the longer discount at which the larger operator buys his merchandise on a volume basis?

A. Correct.

Mr. Sprowl: That is all.

Mr. Schrup: I think the record might well show this: The booklet that he had before us, that he had before us when testifying just now was the book of National Standard Parts Association. That was a booklet in the witness' possession that he had handed to me to look at.

Trial Examiner Hier: The record may so show.

The last four questions which you have answered to Mr. Sprowl, do they represent your independent knowledge

based upon your experience or do they represent an opinion adopted by you from the booklet denominated by Mr. Schrup?

The Witness: Before these books were issued, and they weren't issued until 1949 and 1950, our own opinion, my own opinion from figures which we gathered from jobbers and from the many years of contact with jobbers, and my own experience in the jobbing business, and discussing these problems with jobbers, we have had this knowledge. It wasn't broken down exactly the way it is broken down here because this is submitted to jobbers and manufacturers who belong to the Association showing the breakdown of the different groups, and was made up by 530
773 jobbers, I understand, who belong to the Association.

Trial Examiner Hier: In other words, the booklet referred to confirms rather than supplies the opinion which you expressed here, is that correct?

The Witness: That is correct.

Recross Examination by Mr. Schrup.

Q. Let's come back to the matter of your opinion of operating profits. You classify a small jobber up to about what annual volume?

A. $100,000.

Q. That is a small jobber?

A. There may be some that run a little smaller than that.

Q. And a medium jobber?

A. About $250,000.

Q. And what capacity do you have to be as regards volume to be called a large jobber in your opinion?

A. In my opinion $400,000 to $500,000, and above that.

Q. Above $400,000 or $500,000?

A. I would say above $500,000.

Q. Above $500,000. What was your opinion as to the—was the gross operating profit you were giving in response to—

A. Both gross and net.

Q. What is your opinion as to the gross operating
774 profit of the small jobber?

A. Between 35 and 40 per cent.

Q. 35 and 40 per cent, and the net profit?

A. Five per cent.

Q. Five per cent. That is after taxes and everything?

A. That is correct.
Trial Examiner Hier: Net?
The Witness: Net.

By Mr. Schrup:

Q. And the medium jobber, what is his gross profit would you say?
A. 30 to 32 per cent.
Q. And his net?
A. Three and a half.
Q. And the large jobber, his gross profit?
A. Between 29 and 30 per cent.
Q. And his gross profit?
A. That is his gross.
Q. And his net?
A. From two and three-quarters to three per cent.
Q. On the basis of my figures, Mr. Geyer, we would arrive, as I estimate it, the annual profits for a small jobber would be approximately on that basis of $5,000, and the annual profit, net profit of the medium jobber would be approximately $8,750, and the annual net profit of
775 a large jobber on the basis of two and three-quarters per cent net profit would be $13,750, and on the basis of three per cent it would be $15,000, is that correct?
A. I wouldn't know. Taking your figures, it is approximate, and it may be correct.
Q. Well, accepting my figures are correct, that statement would be true, is that right, sir?
A. I would say that your figures are correct, probably that is correct.
Mr. Schrup: That is all.

By Trial Examiner Hier:

Q. The reference in your testimony about the influence which competitive prices have on your price fixing, generally speaking, what I would like to know is where the question of cost justification leaves off, the question of competitive price comes in, or do they overlap? We will start out with what I think is a correct assumption, that the cost of manufacture is your floor. No prices are fixed below that?
A. That is right.
Q. It is somewhere above that?
A. Yes.
Q. It is somewhere above that?

A. Yes.

Q. Then, you fix your price, do you, to get the maximum amount of sales with the maximum profit, taking those
776 two things into consideration?

A. We would like to do it that way but sometimes we cannot due to the competitive situation.

Q. Now, when it comes to giving discounts on a base price, we will assume, for instance, that you find that you can give discounts on a given volume because it costs you less to sell a hundred thousand dollars worth of products then it does two thousand dollars, make that assumption. Do you thereupon go ahead and fix that discount regardless of competition? That is the cost justified?

A. We fix that, we use the discount which in all cases shows us a margin of profit. If your competitor can sell it cheaper, we cannot help that. We cannot put ourselves in that position because we are not able to due to our costs.

Q. Wait a minute. It is a hard thing to put in question form. If you have any objections, I wish you would state them. I do not want to unnecessarily lead the witness, and I do not want to be unfair to you. I do not think this matter has been straightened out.

Assume, for instance, that you find from a cost survey or from experience, from whatever data you take as valid, that you can give a 10 per cent discount on a given volume. It is perfectly legal then, up to that point, to give that discount even though you are charging others the same price. We will assume that. You do not need to go
777 all the way up to the 10 per cent, but you can go that high. Now, do you ever exceed that 10 per cent because of competition when you are fixing your prices for a given period of time?

A. We take into consideration when we establish our prices our net basic jobber's price, what that article will sell for by the time it gets to the account who receives it from us, the extreme cost price.

Q. Now, what is the limit of that extreme cost? Is that the maximum that you can justify on a cost basis?

A. That is right. The cost basis, including our selling expense, and distribution cost, that is right.

Q. Is there any point at which this question of cost leaves off and competition alone decides the level at which the discount will fall?

A. I do not know, Mr. Hier, just how to answer that.

Q. You are a businessman and I am a lawyer. It is very hard for our minds to get together, I know. I am trying to find out whether these two factors overlap or whether they are separated fields in which they operate?

A. Well, as I have tried to explain, in all cases our price set up has always been made up in relation to our cost in doing business with this account, and the cost of naturally what the material costs us, plus selling expense, plus the general overhead expense that we have with any account or any different bracket that we do business with.

778 Q. Well, maybe I can get at it another way.

We will assume again that legally and otherwise you are perfectly safe in giving a 10 per cent discount on a given volume. Now, if you can get the business without that, you do not give it because the less you give the more profit you make. I assume that is the normal business reaction, is that correct?

A. Yes, but we do give it according to the volume the man does because we do not want to leave ourselves open to losing this account.

Q. But if you can get the business without giving the 10 per cent that you legally can give, for instance, if you can get it by giving only 5 per cent, I assume as a good businessman is all you would expend. That is a hypothetical situation.

A. Yes.

Q. Now, let's go up the other line. You give the full 10 per cent and you still do not think you can get the business. You still know as a fact you cannot get it. What determines whether you go beyond that 10 per cent?

A. We determine that with our agreement. We do not go out and sell a line on the price basis. We never have and we can't afford to. We sell the account on the basis that this is our price structure. This is the agreement which we have with you on the basis of your volume.

779 You will receive from us these prices, and we will try to get you into the bracket that you are going to do this business. We are going to do everything physically possible that we can to help you establish a volume so that you can enjoy this business.

Q. What I want to know, does the 10 per cent ever force you to give more than the cost justified percentage which you can give on that volume?

A. A competitor might force us or want to force us to do that, but we don't do it.

Trial Examiner Hier: Are there any questions?

Further Direct Examination by Mr. Sprowl.

Q. As I get it, then, your actual discount that you grant never exceeds what that volume of business will actually justify in a cost savings?

A. Correct. The success of this company has been on the volume of business that we have done with the jobber and we have never deviated from these prices.

Trial Examiner Hier: Is there anything more, gentlemen?

Mr. Schrup: I think that is all.

(Witness excused.)

Mr. Sprowl: Mr. Schrup, I reserved as Exhibit 9 our recapitulation of Respondent's Exhibit 2, revised, using the cost figure for making each salesman's calls shown 780 in Respondent's Exhibit 8. It is merely a mathematical computation. I would like to get it in now just to clean up the record.

Mr. Schrup: The same objection I placed to the former exhibits I make now.

Trial Examiner Hier: The record may show that he makes the same objection as was placed against Respondent's Exhibit 5.

Mr. Sprowl: It is the reserved Exhibit No. 9.

Trial Examiner Hier: All right. The record may show that counsel in support of the complaint makes the same objection to Respondent's Exhibit 9 for identification as was entered with respect to Respondent's Exhibit No. 2, and that those objections are overruled and Respondent's Exhibit 9 is admitted into evidence.

The record may also show there is now being delivered to the reporter and he is charged therewith Respondent's Exhibits 10-A and -B, Respondent's Exhibits 11-A and -B, 12, 13, 14, 15, and 9.

(The paper referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 9, was received in evidence.)

782 Room 1500, 173 West Madison Street,
Chicago, Illinois,
September 7, 1951.

Met, pursuant to adjournment, at 10:00 o'clock a. m.

Before Frank Hier, Trial Examiner.

Appearances:

Eldon P. Schrup, Attorney for the Federal Trade Commission.

Charles R. Sprowl, Taylor, Miller, Busch & Wagner, 134 South LaSalle Street, Chicago, Illinois, Attorney for the Respondent, C. E. Niehoff & Company, Inc.

783 Proceedings.

Trial Examiner Hier: Proceed.

SIDNEY GOODMAN was thereupon called as a witness for the Respondent, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Sprowl.

Q. Where do you live?
A. 5000 West Quincy Street.
Q. In what business are you engaged?
A. Wholesale auto parts and supplies, distributor.
Q. Where is that located?
A. 4841 West Chicago Avenue, in Chicago.
Q. And the name is?
A. Automotive Wholesaler's, Incorporated.
Q. You are the head of that organization?
A. Yes, president.
Q. You are the president. How long have you been engaged in this business?
A. Around 28 years.
Q. That is the company you are with?
A. No. I have been in the automotive business myself 28 years. We have been in business since 1933.
Q. You incorporated that?
784 A. In 1935. We started out in 1933 and were incorporated in 1935.

Q. Has that always been in the Chicago area?

A. You mean the business?

Q. Your business has always been in Chicago?

A. We operate outside the city too.

Q. Principal location in Chicago?

A. Yes, the principal location is in Chicago. We don't have any other place of business except trucks that we send out of town.

Q. Directing your attention to the current year, do you handle the Niehoff ignition line?

A. Yes.

Q. What type of a purchase contract do you have for that line?

A. We have a 10 per cent off the jobber's sheet and then we have a volume rebate that runs, I believe, 7 per cent which is a top maximum. As a matter of fact, we hit the maximum volume on that.

Q. You also have a 2 per cent cash discount?

A. Yes.

Q. In the year 1950, did you have the same kind of contract?

A. Yes.

Q. Did you obtain the maximum?

A. Yes.

785 Q. So you got your 7 per cent rebate in that year?

A. Yes.

Q. How about the year 1949; was that the same?

A. Yes, sir.

Q. In the year 1948, did you obtain the maximum rebate?

A. We did not have a volume rebate in 1948.

Q. Did you get a discount?

A. We just got the 10 per cent and 2 per cent cash discount.

Q. In what area do you sell the Niehoff ignition line?

A. We sell it in the entire city of Chicago and then we cover Illinois and various states. We ship it all over the country in about seven or eight states.

Q. Do you have salesmen operating?

A. Yes, six traveling salesmen, three salesmen in the city of Chicago and we have three merchandise trucks with salesmen on it.

Q. Who are some of your competitors in the Chicago area who also handle the Niehoff ignition line?

A. There is Diversey Auto Parts.

Q. Where are they located?

A. On Diversey Avenue. Then, there's Coliseum Battery. They have quite a few salesmen that compete with us. Diversey is a small operation. There's Bolmar Auto Supply, I believe it is.

Q. Where is Bolmar located?

A. On Grand Avenue, 7300 west. We have one 786 of our best accounts across the street there.

Q. Is that Mr. Baldwin's business?

A. That is right. Then, there is another one right in that same area but I can't recall.

Q. Did you ever hear of Franklin Park?

A. Yes, Franklin Park Auto Supply. They are located in the Franklin Park area. We have our men traveling through there. Then, there is also, Harrison Wholesale Catalog House.

Q. All these companies you have named handle the Niehoff ignition line?

A. That is right.

Q. In Chicago, what has your competitive experience been with these other companies you have named?

A. Take most of them we sell, and they started out just two or three years ago and they have grown right against our own customers. In order to continue getting volume, we had to go further and further out. The little ones seem to be able to take the business away from us. I don't know why it is that way, but we had to put out trucks in order to hit the sticks in the suburbs where they couldn't go out. As long as they are a small organization, they have no overhead and they can handle the surrounding areas without any trouble or time, whereas, we have to have a lot of salesmen, pay them and the expenses of other stuff.

The only way for us to get additional volume and 787 to keep profits was to go further away. We are doing that constantly all the time.

Q. In the area that Bolmar competes against you, were you serving that area before Bolmar entered into that field?

A. In fact, when we started in business, we started selling stuff until they got big enough to.

Q. And they became your competitor?

A. Yes.

Q. You have lost customers to Bolmar?

A. Yes—Diversey, Franklin Park—we used to sell them when we first started.

Q. You are recovering that lost business or trying to by going farther out?

A. That is right.

Trial Examiner Hier: Wait a minute—recovery you mean replacing?

Mr. Sprowl: Yes.

The Witness: It is very rough competition. I am not talking about Niehoff. When you compete with a small man, he has no overhead, see?

If we can sell them at a 10 per cent above our cost and he can go out and undersell us even and save the customer money because he hasn't anything to pay. He has no expenses. He hasn't got bookkeepers, or billing, or inventory losses or equipment or any of that stuff. As you get larger you have all that to compete with and you
788 have to have more gross profit in order to come out even to sell for the same prices.

By Mr. Sprowl:

Q. Can you give me, for the year 1938, your gross volume figure—

A. I have with me—

Q. Do you have something you can refresh your memory from?

A. We keep an auditor's report. Here is one that gives us our balances from 1938 to 1944 and I have the various years by itself.

Q. You are refreshing your memory from these reports that you have in your hand?

A. Yes.

Q. What was the volume of your business in 1938?

A. We did $148,000.

Q. What was your gross margin of profit?

A. Gross profit was 14.1.

Q. That was the difference between—

A. Selling price and the cost of the merchandise.

Q. Just what you paid for the merchandise?

A. Difference between what we paid for the merchandise and sold it for.

Q. In determining what you paid for the merchandise, does that take into consideration all discounts and rebates you receive?

A. That is right.

789 Trial Examiner Hier: Does that 14 per cent result after the salesmen's commissions?

The Witness: No, this is the gross profit. That is, in 1938, it was 14.1 per cent.

By Mr. Sprowl:

Q. Net profit in that year was percentagewise?

A. About ¾ of 1 per cent.

Q. What about 1939? Give me the same figures.

A. We did $184,000; gross profit went up to 15.6 per cent.

Q. Gross profit and gross margin are the same thing?

A. Yes, we call it gross profit. Our net profit was about 3½ per cent.

Trial Examiner Hier: Three and a half per cent of your volume?

The Witness: That's right.

Trial Examiner Hier: Not figured on capital invested?

The Witness: Yes.

Mr. Schrup: In 1933 it was ¾ of 1 per cent and in 1939, it was 3½ per cent?

The Witness: Yes, our volume went up quite a bit. We did $40,000 more business.

By Mr. Sprowl:

Q. In 1940?

A. In 1940, $194,000.

Q. Gross margin of profit?

790 A. 17.2 per cent. Our net profit was approximately 1¼ per cent.

Q. In 1941?

A. We did $252,000.

Q. Gross margin of profit?

A. 18.5 per cent.

Q. What was your net profit?

A. Net profit on that would be, approximately, a little less than 2½ per cent. I would say, 2¼ per cent.

Q. 1942?

A. We did $230,000.

Q. Gross margin of profit?

A. 24.3 per cent.

Q. What was your net profit?

A. About 1¼ per cent.

Q. Can you give me the same figures for 1943?

A. $314,000; 25.3 per cent gross and approximately 2 per cent net.

Q. Slightly under 2 per cent or over?

A. Slightly under; just approximately 2 per cent. In 1944 we did $387,000; gross percentage was 25.7.

Q. Your net?

A. That would be about 2¾ per cent.

Q. 1945?

A. If you want the exact percentage on '44, it
791 is 2.6 per cent. In 1945 we did $455,000 worth of business.

Q. In 1945?

A. That's right; 455,000 and our gross profit was 21.2 per cent.

Q. What was your net?

A. 2.2 per cent.

Q. 1946?

A. That was an abnormal year.

Trial Examiner Hier: Which was?

The Witness: 1946.

By Mr. Sprowl:

Q. Was that the year you have been looking for all these years?

A. Once in a life time you get a year like that. We did — wait a minute — excuse me on that — on that 1945 figure, we did $513,000 instead of $455,000.

Trial Examiner Hier: That is in 1945?

The Witness: Yes. In 1946 we did $978,000.

By Mr. Sprowl:

Q. What was your gross?

A. 25.5 per cent.

Q. And your net?

A. 4.8 per cent.

Q. 1947?

A. We did $757,000.

792 Q. Gross?

A. Gross was 24.8 per cent.

Q. Your net?

A. Net was 1.7 per cent.

Q. 1948?
A. In 1948 we did $525,000.
Q. Your gross?
A. Gross was 29.9.
Q. And your net?
A. Six tenths of one per cent.
Q. That was a profit?
A. That is right, a little better than a half of one per cent.
Q. 1949?
A. We did $477,000.
Q. What was your gross margin?
A. 26.3 per cent.
Q. Your net?
A. We had a loss of 3.9 per cent.
Q. That was a loss year?
A. 3.9 per cent.
Q. 1950?
A. We did $636,000. Our gross percentage was 27.5 per cent.
Q. Your net profit?
A. One per cent.
793 Q. That carries you down to the last completed business year up to date?
A. That is right.
Trial Examiner Hier: Are these net profit percentages that you have given us, after taxes?
The Witness: That is right.

By Mr. Sprowl:

Q. Calling your attention to the year 1946, you had an unusually high volume that year. Was that a good year in general for the jobbing or wholesale trade or just particularly your company?
A. No. In 1945 and 1946 and 1947, there were three years, I guess, it all accumulated, hit the peak in '46, where practically every jobber in the automotive field had what we call a lifetime year, because I don't think we will ever reach that same peak again because we almost doubled business in 1946 over 1945 but not adding too much overhead so your profit could really get up there.
Normally, you take over a period of years, as you increase, your business overhead goes along with it but when your business increases fast in one year, you have what you call fast sales and you make your profit right then and there.

Q. I want to go back a little, when you said you lost business to Bolmar and to Franklin Park. That was on the Niehoff line?

794 A. We lost it on the Niehoff line and other lines.

Q. As well?

A. Yes.

Q. It included the Niehoff line?

A. That is right.

Q. Now, you explained how gross margin is achieved. I assume that you then deduct from the gross margin, all your other costs of doing business.

A. Yes, overhead, salesmen's commission—everything that pertains to expenses are deducted. Whatever is left you pay taxes on and then you have your net profit.

Q. What overhead does an operation such as yourself have, that the small man, such as Bolmar and Franklin Park would not have?

A. Well, I was in the same operation as they were. I started the same identical way as they did. When we first started out, it was what they call a one man organization. You got your merchandise in and did your own packing and your own selling and did your own delivering and billing. However, as soon as your business started to climb a little bit, you are not physically able to do all at one time what you did before; you had to either put a delivery man on or you had to have somebody help you take merchandise and check it and fill orders. When you did that, your overhead started to climb.

As your business increased little further, you start
795 getting volume rebates from various companies. Your volume comes up and in order to reach the maximum, you wanted to go a little further to do more business so you put salesmen on.

As you put salesmen on, you are paying the salesmen commission; in many instances you pay them traveling expense, car expenses and then you have to have a bookkeeper. You have to have statements and you have to have losses because, as your inventory comes in, there is a lot of merchandise that deteriorates, that in time does not sell. You have to take your losses, whereas the small man buys as he needs it. Your capital is limited. If you start out, say, with $100,00, you are turning your money and getting your cash as you are selling it.

As you go a little bigger, you start to open up charge accounts and it costs money to handle charge accounts and

the expenses run up quite a bit. So, many times, the volume rebate that you put on for extra sales, sometimes doesn't even compensate. The only way you can do that is, if you can get additional volume without the overhead, see?

Just like when I first started, I did so much business. I did $80,000 by myself. If I did $81,000, I couldn't do no more. I would have to put a man on. In order for me to make as much money as I did before, I would have to do at least another 30 to 50 per cent more business in order to pay for the man, but if I couldn't hit that volume, I
796 would be losing money by putting another man on.

We tried every angle including mail order, to see which could be worked out. We find that the little man, if he handles the surrounding area, he can compete with us and give better service and work at a smaller margin of profit and make more money than we do.

Q. That has been your personal experience as well?

A. Yes. I find our gross percentage, in all these years, has been going up steady. If we originally started at 8 per cent gross in 1933 and we started to go up as high as close to 30 per cent gross.

Q. That was in 1948 you attained your highest gross profit?

A. I don't remember the exact year.

Q. 29.9 per cent.

A. Yes, and yet, outside of one big year, our net profit fluctuated very close to a point where, if we didn't make our cash discounts, we would have lost money.

Q. Are these cash discounts, as I understand it, 2 per cent for paying promptly?

A. Yes.

Q. Can you tell me just what your 2 per cent cash discounts amounted to in some of these years?

A. I have the picture here on it. Starting with 1950, and going back—

Q. These are just the 2 per cent cash discounts for
797 prompt payment.

A. That is right, the discounts earned; could be rebates in there too because I am not familiar exactly. It says, discounts earned, $8,953.98 and our net profit was $6,320.73, so if we would not have been able to discount our bills, we would have lost money in that period. I can't go into 1949.

In 1949 we had a loss. I can show you discounts that we earned in 1949; in 1949, $6,132.30.

Mr. Schrup: Does that include cash discounts?

The Witness: Yes, and rebates and we had a loss of $18,365.12.

Trial Examiner Hier: You say cash discounts and rebates but you are not certain that that includes rebates, or you are a little uncertain.

The Witness: I can't say positive. I have a monthly sheet and then my monthly breakdown gives me exactly what we have for rebates and I guess it is all thrown in together and discounts earned, I am not positively sure.

By Mr. Sprowl:

Q. It would not include your first 10 per cent that is taken off your invoice?

A. No. The only thing it would include—

Q. Two per cent.

A. If you are talking about Niehoff, it would be the volume rebate of 7 per cent.

798 Q. Might include that or might not?

A. Yes.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Spowl:

Q. Are volume discounts and rebates quite customary in the automotive field?

A. Yes, it is and has been that way for many years.

Q. You have other lines besides Niehoff on which you get such arrangements?

A. Yes, we have accounts like Packard Electric Corporation, Westinghouse, Thompson Products and Ramco Rings—those are major companies that we do business with on that. There are quite a number of other ones. I just can't recall them. Do you want any more of these discounts back in 1948 or 1947?

Q. No, I think those are typical. Maybe Mr. Schrup will when he gets around to it. Tell me again, how many salesmen do you have out at the present time?

A. Right at present, we have twelve.

Q. That is in addition to yourself?

A. That is right.

Q. What is the situation with respect to the size of the

inventory you have to carry now, as compared to when you had a small operation?

799 A. Our inventory right today—I'll give you an idea. We'll take 1945 and go back to that year. In 1945 we had an inventory of $67,000. At the end of 1950, our inventory was $174,000.

Q. Of that portion, what would have been the Niehoff ignition inventory? Your best estimate.

A. Run about $8,000.

Q. That includes all the slow moving as well as the fast moving items?

A. That is right. It could be a thousand over or under; close to that figure.

Q. You have employees that work in your stock room and inventory rooms, where you carry your merchandise?

A. Yes.

Q. What are their duties?

A. They receive the merchandise, put it on the shelves and check it against the packing slips, see that the merchandise is all uniform—that is, the obsolete merchandise we do not over-stock.

Q. Some sort of control system?

A. That is right. We get a very fast turn-over on the Niehoff line and a lot of numbers are stationary, sometimes doesn't move for some time.

Ignitions, you have to carry all the way to Model A Fords. We stock those yet, today. In fact, we sold

800 Model T Fords. In country towns they still have these little old Model T Fords running.

Trial Examiner Hier: How many employees do you have in the main office and stock room?

The Witness: We run, I think, between 22 and 25. We run over 30 already.

By Mr. Sprowl:

Q. In addition to salesmen?

A. Some of the salesmen are not counted in that because they are on a commission basis only, so we can't actually call them employees because they are not on the payroll. They are on commission. They work, actually, like independent salesmen. We pay them for what they sell. They handle one or two of the lines so we don't have them as an employee.

Q. What is their commission rate on Niehoff?

A. Ten per cent.

Mr. Sprowl: You may cross-examine.

Cross-Examination by Mr. Schrup.

Q. Mr. Goodman, what per cent of your total business consists in sales of the Niehoff line of products?

A. We do approximately a thousand to fifteen hundred dollars a month on Niehoff. We do the same volume in the year that we do less or more. The Niehoff line has been increasing with us. I can't say—I would have to take
801 the actual figure and break it down.

Q. Can you give us an estimate of your over-all annual sales of all your products?

A. Last year we did, say, $600,000. Our sales in Niehoff would be approximately $15,000.

Q. What is your margin of profit on the Niehoff line, do you know?

A. Our margin on Niehoff, I think, gives us about 33⅓ per cent; close to that figure.

Q. Do you follow the Niehoff suggested resale prices?

A. Sometimes we do and sometimes we don't because you are running into various territories and we have so much competition, see? There are mail order companies that can under sell us. There are these little small jobbers that under sell us. In order for us to keep the business, many times we have to meet the price that is in the territory. We try to sell so we can make a profit, but sometimes an account is a good customer and we don't want to lose him so we have to meet the competition that is in the field.

Q. You cut Niehoff prices sometimes, to meet competition on the Niehoff line?

A. Yes.

Q. That competition would be other large jobbers and small jobbers and medium jobbers carrying the Niehoff line?

A. Yes.

802 Q. Do you carry any other ignition lines other than Niehoff?

A. Yes, American Motor Products.

Q. Do you know where they are located?

A. Fond du Lac, Wisconsin.

Q. Is your business with American Motor Products, of Fond du Lac, substantially less or about equal or more than Niehoff?

A. Less than Niehoff. We also buy from American

Bosch. We also buy from various companies what they call, specialized ignitions that they may only handle like coils and a few other lines.

You have to have at least two or three sources of supply if you are going to do any sort of volume because one manufacturer—you can not put all your eggs in one basket because when things get a little rough—they are short of material so you use one or two companies that way.

Q. From your description of your business, I take it that you get about the top discount in all the lines you handle, is that right?

A. We try.

Q. And that is very important to you?

A. It is because otherwise, we would have to be out of business.

Q. Would a reduction of, say, one per cent in your trade discount, be very important to you?

A. We would lose money.

803 Q. If you got less than—

A. If we lost a one per cent discount on our lines, you can see if our cash discounts run $9,000 or $8,000 and our net profit is only sixty-six, we couldn't come out very well.

Certain years we would lose money because certain years we only made $2,000 and we earned about $6,000 or $7,000 in trade discounts so, if we took off one per cent, that would be half of our net profit. We would show a loss for the year.

Q. When you started out in 1933, you did an annual volume of about $80,000?

A. That is right.

Q. What was the net worth of your business about that time?

A. We originally started with $6,300.00.

Q. What would you state to be the worth of your business today?

A. About $115,000.

Q. So that by and large, your business is worth a lot more money?

A. We put the money back every year. I didn't take any money out of the business. Every year we made a profit, we kept on throwing it right back in and building it up. We have a period of eighteen years of putting back profits in there.

One year we made our biggest profit. We made $47,000 net after taxes in 1946 and that put us on our feet to
804 give us that big percentage. Otherwise, we would have a normal growth over a period of eighteen years.

Q. Who is the Bolar Company that you were talking about?

A. A man that is working for some concern and he started out and opened up a little store for himself.

Q. You stated you had one of your best accounts right across the street from him?

A. Yes.

Q. What is that?

A. West Grand Motor Sales; right across the street. I have sold this West Grand Motors for eighteen years.

Q. Bolmar was never able to—

A. Some of the business he took away.

Q. Of Bolmar?

A. Yes, because he is right in the neighborhood and has the merchandise and they don't have to chase for it.

Q. Matter of service?

A. Also, he can sell it to him cheaper in some lines.

Q. You are talking about the Niehoff line?

A. I don't know if it is Niehoff or others. We have lost a certain portion of the business.

Q. You don't know what his buying price is?

A. Right today, no, because I have no contacts. West Grand used to give me $1,000 a month and his volume is down to $250 or $300 today.

805 Q. You say that includes Niehoff products?

A. If they are handling Niehoff.

Q. Bolmar?

A. I am talking about West Grand Motors. He handles some stuff of Niehoff but most of it is—they handle some Niehoff Ford stuff but the majority they handle is Auto-Lite so I can not say. We did sell them sometime back, but today, I couldn't tell you the picture on that.

Q. I presume from the size of your organization and the number of salesmen that you employ, that you require quite a bit of catalogs and price lists and things of that nature from your various suppliers.

A. We also issue our own catalog.

Q. You issue your own?

A. Yes, we make up price lists of our own that we pay for. In fact, right now we are in the midst of our fall sheets, printing up a sixteen page catalog.

Q. Do you get any assistance from your suppliers in helping you merchandise their products?

A. Yes.

Q. What kind of assistance is that?

A. They help us sometime with some catalog sheets from the lay-outs. For instance, Niehoff will furnish us catalogs and tune-up charts so we can take it to the customers and sell them a stock of ignitions and we set
806 it up so they know how to sell it. Without information, you can not sell merchandise. We can sell it but the customer can't sell it.

Q. Who is the Niehoff salesman that calls on you?

A. His name is Melina.

Q. Does he help you along?

A. Yes, he will help us in case we need help for some customers that don't understand about ignitions. He will go with our salesman over to the customer and help him straighten out the stock and set it up and explain how to do it. They do give us quite a lot of help.

Q. Have you any idea how often he calls on you?

A. They call on us at least once a week to check our stock because your stock turns over rapidly.

Q. You are talking about the Niehoff man?

A. That is right. Most salesmen call once a month but we push Niehoff very extensively and we like to keep our stocks up to date so I have him come up—I think it is almost every Monday. He comes to the place and writes up his own order. We carry, like a control stock and he knows the amounts marked on there and whatever is missing, he puts it right in there.

Q. He spends considerable time in your place?

A. Yes, at least a couple of hours on a Monday. Sometimes, it could be a Tuesday, but most of the time it is on a Monday.

Mr. Schrup: I think that is all.

Redirect Examination by Mr. Sprowl.

807 Q. It doesn't matter what you call this one per cent that you said you couldn't afford to lose; it wouldn't matter whether you called it a cash discount or a volume discount or a rebate, it would still be one per cent, wouldn't it?

A. That is right.

Q. Your couldn't lose one per cent of any of these classifications?

A. No. Times are rough right now. Figuring Niehoff, we have, right now, a situation—I don't know if you heard of "Heat". It is a gas additive. You put it in the gas tank to prevent freezing. We sell approximately $50,000 of that a year and it is usually sold in the next two or three months but in June, July and August and September we sell our stuff earlier so that the customers can be prepared when the season comes on.

That is an item that costs us $6.00 and we get a volume rebate on that of approximately 10 per cent and yet, the jobbers are selling it to sub-jobbers and they are selling it to our dealers for $6.50. We can't compete. That is how rough it is. A small man makes 25 cents a case and they have no overhead, no nothing and they can make as much money by themselves doing it that way than we can. If we wouldn't have had the rebate on the Heat line, we couldn't have handled it.

Recross Examination by Mr. Schrup.

808 Q. Why did you handle that line particularly?

A. It is nationally advertised. The demand is there. We try to sell everything that is nationally advertised. That is the easiest way to have your customers sell it.

A lot of customers today are merchants but do not know how to sell. They put the merchandise on the shelf and if your salesman walks in and after he sells a bill of goods and walks in the following week and that merchandise is not moving, it does not do any good to sell him. We have to have something to see that that merchandise moves off the shelves.

We have our salesmen walk in and bring in advertising, set it up there, straighten out the man's stock there, etc. because you have to help the man move the merchandise. Take, for instance, a gas station set up. If they have a man there on the drive-way, all they do is sell gas unless they have something to show or set up and if you have a sign showing that you have wiper blades, or we explain to them a lot of times to check the wiper blades and he can sell more blades by doing that. Sometimes you can sell a man an extra blade to put in the glove compartment.

You have to educate all your customers as well as how

to sell the consumer because when they turn that merchandise over, that is where our profit comes in, selling it back to the seller.

809 Q. Do you have sales meetings, for instance?

A. That is right.

Q. Where the various manufacturers come and does Niehoff do that?

A. Yes.

Q. Instruct your salesmen?

A. That's right. They explain to them how to read the catalogs and the other data. You see, Niehoff has what they call tune-up charts and tell them not only about selling ignitions, but also tells them the difference in the timing and the points and the other various stuff. They have it all lined up on the chart. If your man knows that, he can explain it to the customer and show him how to read it. There is a lot of lost motion because a man doesn't even know how to read a chart.

Mr. Schrup: That is all.

Mr. Sprowl: No questions.

Trial Examiner Hier: Mr. Goodman, you mentioned that occasionally you deviate from the suggested resale price on the Niehoff line to meet competition. I would like to ask you, whether or not this competition of which you speak includes the company of which Richard Dolan is the owner.

The Witness: That I don't remember off hand. In order to do that, I would have to have our salesmen in the territory check to make it positive. That is something

810 that would be just out of my mind.

Trial Examiner Hier: Same answer applies to Franklin Auto Parts Company?

The Witness: As far as I know, we have never had much trouble with them on price cutting. They get along with the schedule they have and seem to be doing all right with that.

Trial Examiner Hier: Do I understand you to say that you do not deviate unless somebody else deviates?

The Witness: We try to make all the profit we can because if you don't make a profit, you can't stay in business.

Trial Examiner Hier: In other words, translated, that means you try to maintain the suggested resale price because that would give you more profit?

The Witness: According to the area. Each area has

a different jobber, a different set up there. You may also have just like we had on this Heat. You may have somebody walk in and sell it to one of your best accounts and in order to keep the account you have to sell it at the price that is prevailing at the time. It is possible that some of the jobbers may be pinched for money, maybe pinched for business and want to take your business away and the only thing you do is fight for it.

Trial Examiner Hier: How long have you been handling the Niehoff line?

The Witness: It is quite a number of years; I can not recall exactly.

811 Trial Examiner Hier: What I am interested in, did you handle Niehoff when your volume was $80,000 when you started out; when you were a small operation?

The Witness: Yes, we handled it. We built it all the way up from small. That is the reason I like it because the line is good and there is a chance to make money and if you do more volume, you get a chance to bring your profits up.

Trial Examiner Hier: When did you reach the volume discount stage?

The Witness: In 1949.

Trial Examiner Hier: I am not talking about the top volume. When did you reach any volume of discount stage with Niehoff?

The Witness: Let's see. I can't tell you the exact year, but as soon as your volume hits a certain set figure, just like Westinghouse or Packard, if you do, say a thousand dollars, you can get one per cent. Two thousand dollars, you get 2 per cent. It took time to build it up to a point where we are doing $15,000 a year. It isn't done in one year.

Trial Examiner Hier: What I am trying to find out is whether or not there was a period of time during your operation when your operations grew without the benefit of discounts from Niehoff.

The Witness: It may be in the early stages when
812 we first started. Niehoff may have been a small portion of the business. You are taking an over-all picture. We have thousands of items. I say that Niehoff is one of our key lines.

Trial Examiner Hier: Any questions?

Mr. Sprowl: No.

Mr. Schrup: No.

Trial Examiner Hier: The witness may be excused.
(Witness excused.)
Trial Examiner Hier: We will adjourn until 2:00 o'clock p. m. today.
(Whereupon, at 11:00 o'clock, a recess was taken until 2:00 p. m., this day.)

813 Afternoon Session.

2:00 p. m.

Trial Examiner Hier: Come to order. You may proceed.

M. F. ELDRIDGE was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Sprowl.

Q. Where do you live?
A. 6633 North Kelling Avenue, Lincolnwood, Illinois.
Q. What is your business?
A. Federal tax consultant and accountant.
Q. Do you have a firm?
A. That's right, I do.
Q. What is the name of that organization?
A. M. F. Eldridge and Associates, 4753 Broadway, Chicago.
Q. Are there other accountants in that organization beside yourself?
A. There are. I am a partner.
Q. The firm bears your name?
A. That's right.
Q. How long have you been in the accounting field?
A. In excess of thirty years.
814 Q. Among the accounts you have served in your accounting work, is C. E. Niehoff and Company one of those?
A. That is right.
Q. How long have you done that company's general accounting work?
A. Approximately sixteen years.
Mr. Sprowl: I should like to have marked, as Respondent's Exhibit 16—

The Witness: I would call this, "Allocation of Overhead Burden to the Cost of Processing Orders."

(The paper referred to was marked Respondent's Exhibit 16 for identification.)

By Mr. Sprowl:

Q. Directing your attention to line one with the number (1) at the left of it, "Direct Factory Labor for 1949", I see the figure, $96,810.01. Where did that figure come from?

A. Off of the factory payroll.

Q. That is actually from the 1949 books and records of the Niehoff Company?

A. Yes.

Q. What is the second line?

A. The second line is total general administrative expense for the year 1949, taken off the actual records of the company.

Q. What figure is that?

A. $194,817.35.

815 Q. Explain to me what line three is.

A. Ratio or the percentage of the direct labor to the overhead.

Q. Is that the ratio of line one to line two?

A. Yes, resulting in 201.24 per cent of general administrative expenses to the direct factory payroll.

Q. What is the material which appears below that?

A. Below is a record of the direct labor as taken from the factory payroll records and allocated to the processing of orders for the year 1949.

Q. How much is that?

A. $21,736.13.

Q. What is the entry below that?

A. That is consistent with our method of figuring overhead and the ratio to other direct labor departments as allocated to the direct labor involved in the processing of orders. In other words, applying the 201.24 per cent to the direct labor in the processing of orders, we arrive at $43,741.79 for overhead applicable to the processing of orders in the year 1949.

Q. In connection with a cost study which was recently made at the Niehoff Company by Mr. Dreyer, in his work in that connection, did he request you to furnish him with this proper overhead burden?

A. Yes, this overhead was computed on his request.

Q. What ratio or percentage did you tell him to 816 use in his calculations?

A. 201.24 per cent of direct labor in the processing of orders.

Q. In other words, in ascertaining how much the direct labor cost to fill an order, you then had to increase that by virtually 200 per cent to get the actual cost?

A. That is right.

Q. To the Niehoff Company?

A. Yes.

Mr. Sprowl: I would like to have marked as Respondent's Exhibit 17 for identification—it has three exhibits, A, B, and C, so it will be Exhibit 17 in total.

Trial Examiner Hier: Yes, and we'll mark it A, B, and C.

(The papers referred to were marked Respondent's Exhibits 17A, 17B, and 17C, for identification.)

By Mr. Sprowl:

Q. I show you Respondent's Exhibit 17 and ask you first generally, with reference to that entire exhibit, by whom was that prepared?

A. It was prepared by myself and an assistant.

Q. I wish you would turn to Exhibit A in that document. Referring now to the first column headed, "Actual 1949" and tell me what those figures represent.

817 A. The figures in the first column represent the net sales for the year 1949 of the C. E. Niehoff Company, and the cost allocated to cost of sales.

Q. In other words, as I understand it, the first column rounded out to even dollars and cents are the actual sales, cost of sales, expenses, and finally the net profit before income taxes of the Niehoff Company for the year 1949.

A. That is right.

Q. Will you explain what the three columns appearing to the right of the first column represent.

A. The second column of figures shows the net profit result if the sales volume was reduced to the figures indicated at the top of the column. The third column shows the net profit results, all of which are before income taxes, if the sales volume were reduced to the amount shown at the top of that column. The fourth column of figures shows what the break-even point of the company would be without experience either of profit or loss as indicated by the volume at the top of that column.

Q. In preparing these projections, I assume of course, the volume figures are hypothetical.

A. That is right.

Q. Are the cost projections hypothetical entirely or are they based and projected from the actual cost that the company experienced in 1949?

818 A. The projected columns which are hypothetical sales and the cost and expense are hypothetical, estimated figures based on actual percentages that prevailed in the year 1949, taking into consideration variable expenses which would have been reduced, in my opinion, if such sales volume reductions were experienced.

Q. In other words, those columns represent, in your opinion, working from the cost figures actual of 1949 on the volume of the company in fact enjoyed, of what the company's cost would have been on progressively reduced gross volume of sales in the three columns that appear.

A. That is right.

Q. That appear to the right, and you say some of those were variable to a greater extent than others, in your opinion?

A. That is right.

Q. These figures represent your conclusion and a matter of your opinion as to what they would have been?

A. That's true.

Q. Turning to Exhibit B that appears in Respondent's Exhibit 17, will you tell me what that page represents? Describe it generally.

A. Represents an estimated loss statement based on the 1949 volume of business that could have been anticipated if a ten per cent over-all rebate was made—allowed, to our entire sales volume.

819 Q. By that, you mean that it was a fixed 10 per cent of jobber's list and did not go above that?

A. That is right.

Q. In making that calculation, did you reduce the actual net sales of the Niehoff Company for the year 1949 in any amount?

A. Yes, sir, I did.

Q. What did you cast out of that?

A. Approximately one million dollars.

Q. Why did you disregard those sales?

A. For the reason I have assumed that any accounts where we allow in excess of 15 per cent discount—

Q. Ten per cent, you mean?

A. In excess of 10 per cent discount—if we could only allow them a ten per cent discount that we would have lost that business.

Q. Where the company did not in fact grant ten per cent, as much as 10 per cent to certain classes of accounts in 1949, did you recast those sales and reflect the 10 per cent?

A. That is right, average out the 10 per cent.

Q. Then, you have certain deductions from there, representing cost of sales and expenses. How did you arrive at those figures?

A. Those figures are arrived at by allowing for the prevailing cost of sales percentages from the actual figures of 1949, and by using the actual 1949 other
820 expenses and making certain allowances for variable expenses which would be reduced with reductions of volume.

Q. You produced the net loss which appears at the bottom of this Exhibit B of some $123,000?

A. That is right.

Q. Will you explain to me what Exhibit C, of Respondent's Exhibit 17 is?

A. Exhibit C is an estimated loss giving effect to a potential over-all 15 per cent rebate to all customers in place of the actual rebate that was allowed in the year 1949.

Q. When you speak of rebate, you are including the discounts and the rebates?

A. That is right.

Q. You are just lumping them together as a general term, rebate?

A. That is right.

Q. On that basis, I would assume from our previous answer, that you treated the customer volume as the same but had to reduce it by the further discounts that would have been granted.

A. That is right.

Q. Where does that adjusted sale figure appear?

A. The adjusted sale figure—

Q. Is that the top figures? I don't want to use the numbers.

A. The adjusted sales figure appears under net sales adjusted.

Q. Then you have made, I assume, some deduc-
821 tions from that projected figure for cost of sales and so forth. Do those appear on that exhibit?

A. No, they do not, for the reason that the cost of sales would remain the same. The same number of units would have been sold and the same existing prevailing expenses would have continued, so I have only made the adjustment between the difference between the reduction in sales as compared to the actual profit that was experienced.

Q. That produces a loss figure?

A. Of $98,000.

Q. I see a foot note there.

A. There is a foot note here to give effect to the same consideration going back for the previous four years, and using the same method on our estimated basis, it would have shown an average of approximately $35,000 loss per year for the previous four years.

Q. That would have been computed on the same basis as you have explained this Exhibit C?

A. That is right.

Mr. Sprowl: You may cross-examine.

Mr. Schrup: May we have a short recess?

Trial Examiner Hier: Yes.

(A short recess was taken.)

Trial Examiner Hier: Come to order. Proceed.

Cross-Examination by Mr. Schrup.

822 Q. When were these documents, which comprise Respondent's Exhibits 16 and 17 completed?

A. Within the last two weeks.

Q. What date, approximately?

A. Well, this report is dated September 5th.

Trial Examiner Hier: Exhibit 16 is dated August 8.

Mr. Schrup: Of course we'll go ahead with what cross examination we can. It was my understanding Mr. Sprowl was going to furnish this material the same as we furnish our material, in advance of his cross-examination.

Mr. Sprowl: If I committed a breach of courtesy by not—

Mr. Schrup: It is difficult to go ahead on this.

Mr. Sprowl: I appreciate it. I don't know what to suggest.

Trial Examiner Hier: It seems to me, as to Exhibit 16, there are only two things in question—could be in question, the accuracy of the totals and his method of allocation which appears in the 5th entry.

The Witness: Did you say Exhibit 16?
Trial Examiner Hier: I said Exhibit 16.
The Witness: That was prepared the 8th of August.
Mr. Schrup: Exhibit 16 was prepared the 8th of August?
823 The Witness: Yes.

Cross Examination (Continued) by Mr. Schrup.

Q. This other booklet which is Exhibit 17, when was that completed?
A. September 5th.
Q. That is when it was actually typed up?
A. Yes.
Q. When was the completed work available to you?
A. I would say around the 31st of August. Labor Day come in there.
Q. This work was all done by you, sir, or under your supervision?

828 (Discussion off the record.)
Trial Examiner Hier: On the record. Proceed.

LOUIS DREYER was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Sprowl.

Q. Where do you live?
A. 4517 Wrightwood Avenue, Chicago.
Q. What is your business or occupation?
A. Industrial Engineer.
Q. How long have you been following that particular vocation?
A. Since about 1914.
Q. Where did you receive your college education?
A. Cornell University, New York.
Q. Since 1914, you have been following this type of work?
A. That is right.
Q. Where have the various companies been located, naming a few, if you can, that you have serviced, such as Niehoff?

A. All of the work has been east of the Mississippi and in eastern Canada, and covers half of the states east of the Mississippi.

Q. What types of companies?

A. About every type. I don't know how I can say that exactly, but I mean almost every type of manufactur-
829 ing, that is, commonly listed as working as a consulting engineer, working as a staff engineer or working on the company payrolls in various capacities. There are many woodworking plants, steel manufacturing plants, machinery plants—almost anything you could mention?

Q. Have you been recently engaged in preparing some studies for the company, C. E. Niehoff?

A. Yes, I have.

Q. When did you start working on those studies?

A. The last week in May.

Q. Of what year?

A. Of 1951.

Q. When did you complete them?

A. About a week or so ago; week or ten days ago.

Q. In that interval, when you started until you finished, how much of your available time did you devote to that study?

A. Of course, I did some other work for the Niehoff Company at that time, but of the five day week, say three and a half to four days.

Q. Each week from the last week in May?

A. Until a few days ago.

Q. Of this study of which you are about to testify, what particular phase of the Niehoff operation does it cover, generally speaking?

A. The processing of orders through the plant. That is, from the time the customer's order is received in
830 the mail, until the shipment is made.

Q. I think, perhaps as a background, I would like you to tell the various steps within the plant, what such an order follows from the moment it enters until it is completed or shipped and the invoice has been sent to the customer.

A. It is broken down into 21 steps which would include all the efforts spent—time and effort spent and orders.

Q. Will you describe those steps?

A. The first step was opening the mail. The mail, as it is received in the Niehoff plant, is a miscellaneous assortment of letters, circulars, small packages, and other mis-

cellaneous things, of which between 15 to 20 per cent consists of orders or letters pertaining to orders.

The mail, as received, is sorted by the supervisor of the mailing room. They are passed through a letter opener and passed on to a girl who performs the second step which includes segregating customers' orders from the other mail.

Q. Let me ask you, you describe these as step one and step two. Do you carry those step numbers on through your later exhibits?

A. Yes, I do.

Q. So these will be permanent numerical descriptions of the steps you are talking about?

A. That is right.

Q. Go ahead with step two.

831 A. The company addressed mail, that is, as distinguished from the correspondence directed to specific persons or departments, is removed from the envelope by a clerk who then sorts them into different piles or groups, according to what they are: customers' orders, domestic orders, foreign orders, general correspondence, checks, freight bills and miscellaneous items. After they have been sorted, she checks the various things to see there is nothing left in the envelopes and then distributes these various piles to the people who work on them next, depending on their nature.

In making the study, only that part of the time was used in the tables which pertains to domestic orders, used in the analysis. In other words, all the other time was ignored.

Q. I think we can later on come back and follow through precisely the manner in which you time studied an order through these steps. I think it might save time if you go on and describe the steps and then we will come back to your physical timing of the process.

A. Now, the third step is the credit approval. In the studies which I made, the customers' orders, after having been delivered to the office manager who is also the credit manager, were checked by him as to the status of the company, for approval and he initialed the orders and passed them on.

In the studies I made, there were no questions raised.

832 Q. As to credit, you mean?

A. Yes. My understanding is, of course, that that

doesn't always happen but it was so in the studies I made and that is all I can go by.

Q. The typical orders you selected, in every case there was no credit problem?

A. In checking the credit, they were the miscellaneous orders as passed by in the segregation of the orders.

Q. In other words, their credit was established and nothing had to be done?

A. Nothing had to be done in the studies actually used in this analysis. It so happened. In other words, most of the customers repeat their orders again and again and their credit is well known. There is nothing to do except initial the order.

The customers' orders are then reviewed by the sales manager and he makes various notes as to correspondence, check the size of the individual items ordered, size of the order and he makes notes about correspondence, either with the customer or with the salesman and that is all he did. None of this time, however, was included in this analysis. I am only pointing out as part of the process because that is part of the burden of running the office, rather than part of the analysis of the study. In other words, he looked them over chiefly for his own information and guidance.

833 The next step—

Trial Examiner Hier: Wait a minute. The last step, regarding the sales manager, is that number four?

The Witness: Part of step number three.

Mr. Schrup: Part of step three?

The Witness: Yes.

Mr. Schrup: It wasn't considered, you said.

The Witness: Not included in the time analysis because that is administrative or a sales administrative function and that is partly part of that analysis.

By Mr. Sprowl:

Q. You did consider the time it took to approve the credit?

A. Yes, that is part of the processing of the order.

The fourth step was the perpetual inventory. The approved customers' orders are passed on to a girl who has charge of the perpetual inventory records. She has available files in which there are back orders listed, customers' correspondence, notes about returned merchandise that has to be replaced, and so forth.

Her first step is to check these files and see whether

there is anything in them pertaining to the actual customer whose order is being checked.

Their next step is to check the availability of the various items on orders against her records and she does that. If they are not available, under the present procedure, they are cancelled, although very, very few of them are back ordered.

Q. What do you mean back ordered?

A. In the back order, where the perpetual inventory shows that none is at hand, then the clerk so records it on the customer's order. Then, at a proper time, an order is written up to ship them at a later date whereas the present procedure, by far in the majority of cases, is to cancel such orders and to notify the customer of the order.

Q. You mean cancel just that portion of the order?

A. Each item that is not available. Then, she also prepares orders for literature, such as catalogs, instruction sheets and so forth, for which there is no charge.

Then, each sheet of the customer's order is date stamped, and although there is a card system—a tally sheet is used to record the quantity on each item that is ordered by the customer so it may be deducted from the perpetual inventory. At specified or intervals, these totals on the tally sheet are then recorded on the inventory cards. That is the fourth step.

The fifth step is to type a combination sales order and invoice. This consists of six printed sheets with the serial number printed in the upper right hand corner, all sheets and headings being the same. However, one sheet has the pricing blanked out and is used as a packing slip, but the six copies are printed simultaneously and the first four copies of these will be explained later—they are reserved for invoicing. The fifth and sixth copies are the sales orders. In other words, to make it clear, the first four copies will be used as invoices and the last two copies are used for processing the orders in the succeeding steps. In that manner there is no possibility of errors.

Orders requiring more than one sheet, they are printed similar to the other sheets, except, that where the serial number appears in the upper right hand corner, there is a blank space and the serial number with the proper dash numbers typed in there by the order typist. The items which were cancelled are listed at the bottom of the sheet; bottom of the last sheet for the customer's information so

the customer is fully informed as to everything that was done about his order.

A rubber stamp is printed on the customer's order sheet to record the work done by who did each of the various steps in processing the initial part of the order and the typist initials that.

The typing is done on an I.B.M. electric typewriter so all copies are quite clear.

The sixth step is checking and separating. After the typist is finished, the six copies are turned over to another girl in the office who checks the typing against the original
836 customer's order. That includes not only the items by the customer's name and any information that the customer saw fit to type on his order, but also includes the quantities and part numbers. If there are any corrections necessary, it is made by the same typist who originally typed the order.

Then, the set of six copies is separated into the two parts I mentioned before; four invoice copies and the two sales order copies. The checker, of course, initials her space on the rubber stamp and it is passed on to another girl who files the four invoice copies. They are filed alphabetically according to state, city and customer name. The sales order number is copied on each sheet of the original customer's order which is then placed in another file, according to state, city and customer name.

Step 8 is the shipping, office listing and routing. The 5th and 6th copies of the set, which are called the shipping copy and the packing slip, are delivered to the shipping clerk. Deliveries are made several times a day ordinarily, depending on the volume of business. The date received in the shipping department is stamped on the shipping copy. The shipping clerk then separates the orders into groups, according to the size of the order and the method of packing; express, parcel post and pick-ups are usually classified as smaller orders and orders shipped by freight are larger orders.

Then, he has already prepared or had prepared, a list of serial numbers which corresponds to the sales
837 order numbers—serial numbers, and he records on his sheet—that special sheet, the customer's name, address, order number or the sales order number, method of shipment and later on, provision made for the name of the carrier and the date shipped. Most customers being repeat customers, they already have a card showing the

preferred method of shipment. Who ever does it in the shipping office, the shipping clerk usually writes that on to the shipping copy of the sales order. If that is not available, then the shipping clerk has to go to work and determine that.

The 9th step is picking the order. The shipping clerk has charge of that and he assigns the work to one of several girls. Each order has a girl. As the girl finishes an order, she is given another. If the orders are small, he may give her two or three but not as a rule.

Now, the stock consists of packaged items, arranged on shelves according to a system which is well known to these order pickers. They do not have to look for things and fumble around. They know where to go for each item. The items are comparatively light in weight so that the order picker can carry a number of them. There are a few bulky items like a five gallon can of break fluid, for which occasionally orders come in, which the girls do not handle. They are handled by the assistant shipping clerk.

If there are any orders for literature, usually the 838 pickers get these from the mailing room.

As the regular stock items are taken from the shelves and placed on the truck, they are checked off the sales order by drawing a line against the item. If more than one truck is used, an identification ticket is then placed on each truck.

Q. How big are these trucks?

A. They consist of two shelves, one at table level and they are about five feet long and possibly eighteen inches deep.

Q. The other shelf is lower than table height?

A. Yes. It is very seldom used because of the awkwardness of stooping down and picking up things down there. The girls would rather use more trucks and it is a little more convenient.

Q. They may be pushed by hand?

A. Yes, pushed by hand. Items not on hand are recorded in the back order column. Occasionally it happens that the perpetual inventory record is not quite accurate and the items which are supposedly in stock are not there, so the girls write the quantity in the back order column. These are not necessarily backordered. They are usually cancelled but as far as the order picker is concerned, she has been instructed to record such items in the back order

column, so that will appear on some of the orders which are to be shown later.

Q. That would occur where the perpetual inven-
839 tory records perhaps showed something should be inventoried, but when the picker got there, the cupboard was bare?

A. Yes. That completes the work of the order picker who initials the space on the bottom of the customer's order and she leaves the sales order with the last truck that she used.

Step 10 is the check picking. The order checker compares quantities called for on the sales order with the quantities placed on the truck by the order picker. Each line is crossed off as it is found to be correct. In case of an error, the picker is called upon immediately to correct it.

After the checking is completed, the packing slip, which is the sixth copy, is detached from the shipping copy and placed in an envelope with the words "Packing Slip" printed on it. The order checker initials and dates the shipping copy of the sales order and moves the truck to an available packer.

Some of the small orders are delivered to the parcel post section for packing and mailing.

Now we come to step 11, which is packing the order. The packer first checks the stencil rack for the stencil which shows the customer's name and adress as it appears on the sales order. Since most of the orders are from previous customers, the stencil is usually available. If not, the assistant shipping clerk is instructed to cut one. In other words, the packer himself does not take any time to cut stencils.

840 Practically all of the items to be shipped are packaged in small display cartons or in packing boxes. These are put in shipping cartons, the sizes of which are determined by the size and weight of the item. Usually, a number of shipping cartons are used to pack one order and the selection of the proper size, is a matter of experience on the part of the packer. These cartons come flat and must be set up, glued and taped. The packer places the packing slip in an envelope, in the last carton packed. On the last carton, he puts on a sticker printed "Packing Slip" and on it records the number of shipping cartons used on the order. Cartons containing coils are so marked. Each carton is stencilled with the customer's

name and address. The Niehoff Company's name and address is also stencilled on cartons on which it is not printed.

The packer weighs the various cartons according to the classifications printed on the sales order and records these weights and totals on the order. He initials and dates the shipping copies and delivers the finished order to the assistant shipping clerk who stores it on a loading dock for the carrier to pick up.

The assistant shipping clerk also takes charge of the sales orders and stencils, the latter being placed on the rack and the former taken to the shipping office.

Step 12 is the shipping records. The shipping copy
841 is used in the shipping office to prepare bills of lading, labels and so forth, depending on the method of shipment.

For freight shipment, four copies of the bill of lading are typed. The fourth copy is filed in the shipping office. The second copy goes to the carrier, and the original and third copies are attached to the shipping copy. The name of the carrier and the date of shipment are recorded on the numerical list. A stamp showing the date is printed on the shipping copy and also on the fourth copy of the bill of lading.

Parcel post orders are weighed and the amount of postage attached, according to the postal zone. The amount of the postage is shown on the shipping copy for inclusion with the billing. A label is typed, showing the customer's name and address and is pasted on the carton.

Pick-ups are marked with the customer's name and address and stored close to the shipping office.

Step 13 is price order. Each morning the shipping copies, with two copies of the bill of lading attached of the orders shipped on the previous day, are delivered to the pricing clerk. She records on the order, the name of the salesman to be credited with the sale and also, the classification of the customer. Items cancelled by the order picker are listed and the list is turned over to the perpetual inventory clerk for adjustment of the record.
842 Each item shipped is then priced from the current distributor's price sheet. The price clerk initials and dates the shipping copies and turns them over to the billing department, usually on the next working day after the pricing.

Step 14, assigned invoice number. The billing clerk receives a batch of priced sales orders, usually the previous

day's pricing and sorts them alphabetically, according to the state, city and customer's name. These are then matched with the four invoice copies which were filed, as explained under step seven.

A serial invoice number is then stamped in a block provided for this purpose on each shipping copy. Each invoice sheet is stamped with a perpetual inventory stamp.

Step 15 is typing the invoice. The billing is done on a Burrough's billing machine, prices being copied from the priced shipping copy of the sales order. The sub totals are printed on each sheet and carried forward to the next sheet. The Niehoff invoice number and the date shipped are also recorded.

Step 16 is making up back orders. After the billing is completed, a back order is typed for all items falling into that category. The general typing procedure is the same for customer's orders. Four invoice copies are filed in the same manner but the shipping and packing slip copies
are turned over to the perpetual inventory clerk who
843 files them in her back order file according to customer's name. In some cases, these back orders are held until the customer sends in a new order, at which time the back order file is checked, and if the item is available, the back order is attached to the customer's order.

In other cases, as soon as the items are available, the perpetual inventory clerk sends the shipping and packing slip copies to the shipping department for the filling of the order. Many items at present are not back ordered; they are cancelled and the customer is requested to reorder them on his next order.

Step 17, check invoice. The billing clerk delivers four copies of the invoice to the billing checker who checks the prices on the invoice, item by item, against the pricing on the shipping copy. She also checks the totals on each sheet of the invoice and the gross and net totals of the entire invoice. The gross amount discount, if any, and the net amount of the invoice are copied on to the shipping copy. In the case of parcel post shipments, the amount of the postage is also copied on to the shipping copy. A comptometer is used to do the checking. Any error found is corrected by the biller responsible.

Step 18, separate invoices. After the invoice checking has been completed, the four invoice copies are separated.
Copies one and four go to the customer; copy two
844 goes to the accounts receivable, and copy three is the salesman's copy. The original bill of lading is stapled

to the customer's copies. The remaining copy of the bill of lading is attached to the shipping copy. Then, there are three notices stamped on the first sheet of the customer's copy of the invoice. I have copies of those.

Q. We can get to those notices when we get to typical invoices.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Sprowl:

Q. Proceed.

A. Step 19, statistical. The salesman's copy of the invoice is delivered to the statistical clerk. She marks each item with a number, obtained from a marked master copy of a price list showing to which of the nineteen classifications it belongs, such as coils, regulators, and so forth. If service stocks are included in the order, the items included in the stock are listed and classified.

Each invoice is checked against a record of territory assignments to assure that the proper salesman is credited with the sale. The invoices are then grouped according to salesmen and taken to a national cash register tabulating machine. Here, the amount involved in each item 845 is recorded according to its classification number and the total for each classification determined. The tape is then removed from the machine and separated according to salesmen.

The net sales for each group are determined by applying the customer's discounts and gross and net totals checked against the invoices. Weekly and monthly tabulations for each salesman are also made.

Hearing Officer Hier: Off the record.

(Discussion off the record.)

Hearing Officer Hier: On the record.

The Witness: Weekly and monthly tabulations for each salesman are also made; these are not included in the analysis.

By Mr. Sprowl:

Q. That is, the time that those required were not considered in this time study?

A. That is right. The reason for that is, one or two items in many, many dozens of sales made by a salesman, would be hard to pro rate. Eventually, I don't think it

would mean anything. So little time and money is involved, it wasn't feasible or wasn't practical to do it.

Step 20 is file. The shipping copy is sent to the file clerk, who pulls the original customer's copy from a file and staples them together. They are then filed according to customer's name and sales order number.

846 Step 21, mail invoice. The customer's invoice, with bill of lading, if any, is delivered to the mailing room where it is folded and inserted into a window type envelope. The stamping and sealing are done in a Pitney-Bowes mailing machine.

Q. That consists of the 21 steps through which each order received by the Niehoff Company is processed?

A. That is right.

Q. What you did, in fact, was to take actual orders and time study them through each of these steps?

A. Yes, I did.

Q. How were those orders selected?

A. They were selected through the sales manager, Mr. Geyer. They were selected in this manner: Each morning when I was ready to make a time study of an order, I went with Mr. Geyer and told him that I wanted an order or several orders in a certain price range. That is to say, one day it might be a twenty dollar order; the next day it might be a $100 order or $150.00 order. Regardless of who they were or whether they were big customers or little customers, I wanted certain orders of certain value and he would go through the mail or the orders as he received them. Of course, I couldn't judge; they were just a disarray of numbers to me and he would pick out such orders as being representative. They were not picked ahead of time.

847 Q. That is, you don't know in your own mind, what the dollar amount would be on an order because no figures were on it?

A. That is right, merely quantities and item numbers. They meant nothing to me. I am not so familiar with a part number system that I know certain items listed on an order might be 10 cents or two dollars. I could not tell it so I had to rely on the knowledge of the sales manager.

Q. Each day that you would make a request for a particular order or one or two orders; would that be selected from the orders then received actually, on that day?

A. In every instance that is so.

Q. How many orders in all did you time study?

A. It happened to be seventeen. I mean, I didn't do that on purpose. It just happened that it seemed to be enough. The category went from about $12.00 to about $850.00 and that seemed to be fairly representative.

Q. If you had one order that you had to follow through, how long did it take you to complete your time study as to that order?

A. It varied, of course, depending on the size of the order and a number of circumstances. In other words, I never tried to urge anyone of these people in any one of the steps to give any special consideration. Whatever they did, was all right with me. I mean, through using
848 a stop watch on each order, if a girl, for instance, went to the washroom or anything like that, I just stopped the watch and the time was not included. Do you understand what I mean? In that way, an ordinary time study, I took two days. Sometimes I took a little more; I mean, not continually. Sometimes I was able to run two at a time, at different stages. For instance, the order picker might not be available, so I would go on something else. I don't like to waste too much time.

Trial Examiner Hier: If I may interrupt a minute, when you went to Mr. Geyer to get the orders for study that day, had they already passed the first two steps? Did you have to retrace them?

The Witness: Their credit had been checked and that is as far as they had gone. After the credit had been checked, they were given to Mr. Geyer in a stack—a small pile, and he looked them over and I asked him for an order of an approximate money value. He would look at the orders and pick certain ones out.

Trial Examiner Hier: What I was interested in, did you have to take that order back and have it go through the first two steps in order to time it?

The Witness: No, for the reason that will be explained later. The time involved for mailing, or opening the mail, you can't do that on one order. You can't do it to segregat-
ing on order on one order, nor can you do it on a credit
849 analysis. Time for that is the same regardless of whether it is a large order or small order, so enough of those were studied to give one value or any size order.

Trial Examiner Hier: All right.

The Witness: That is explained, I think, a little later.

By Mr. Sprowl:

Q. Do you have any additional sets of the time study sheet—those three big sheets?

A. Yes.

Mr. Sprowl: I should like to have marked for identification, these sheets, as Respondent's Exhibit 18A, B, and C.

(The papers referred to were marked Respondent's Exhibits 18A, 18B, and 18C for identification.)

By Mr. Sprowl:

Q. Directing your attention to Respondent's Exhibit 18A, B, and C, I would like to direct your attention to the very first column, at the far left, with the word "Step" at the top, which has projection of numbers, one through twenty-one. Do those represent the 21 steps you have heretofore described?

A. They do.

Q. And the description which follows is the same description which you have already given as to those steps?

A. That is right.

850 Q. The next column, a double column, is headed "Rate per minute and hour."

A. Taking first the rate per hour, those are the figures given to me by the payroll department as applicable to each of these steps.

Q. The employees' hourly rate in that department?

A. That is right. Then I changed that by dividing by 60 into the rate per minute because all the time was in minutes.

Q. The stop watch you used was dividing—

A. Into hundredths of a minute.

Q. It is not a second that we are dealing with?

A. Not split seconds; hundredths of a minute.

Q. Is that the typical type of stop watch used for time study?

A. It is.

Q. In the next column, let's follow step one across—the word "Minutes" and in that column is the figure .61.

A. That is the average. If you will look at all the sheets you will find that same number repeated because that is an average of a number of studies made for opening mail and it applies to large and small orders indiscriminately; therefore, on an average, it took that time. The time study will show how it was arrived at.

Q. Sixty-one hundredths of a minute—opening mail on each order?

851 A. Yes and multiplying that by the rate per minute which is .02. Point 0122 is dollars and cents.

Q. In other words, you multiplied .61 times the minute rate of 2 cents a minute to get a product of .0122 as the cost of that step for salary alone?

A. That is right. The same procedure is, of course, for each step.

Q. Does that rate per minute apply to each extension after each of the 21 steps?

A. Yes, it does.

Q. And does the computation of the minutes taken for the step, times the minute rate give a product of the amount of money that it costs in salary to perform that step apply with equal force to each of the 21 steps which follow?

A. Yes.

Q. Stay on that first page, but at the very top, there is a column called "Sales Order Number" and I notice across the sheet of 18A there are six numbers that follow that. Are those the sales order numbers that were studies?

A. They are.

Q. The next line is the number of sheets. What does that mean?

A. Number of sheets involved in the sales order. That is, there were six copies but each order was one sheet. In other words, there are so few items that all of them

852 were typed on one sheet.

Q. That is, order 44524 was one sheet?

A. Yes.

Q. But going over to order 45968, that was a two sheet order?

A. Yes.

Q. The next column is "Number of Items". What do you mean by number of items?

A. Name of the article ordered by the customer; for instance, coil, regulator, or point sets and this particular customer ordered one item.

Q. That is the first order, 44524?

A. That is right.

Q. In the next one I notice you have the number of items—that is, order 44524, six shipped and one cancelled. Explain that.

A. The customer ordered seven items. Only six were

available and only six items were time studied because the other one was not there.

Q. The only thing time studied on that order would have been the time of that clerk in that particular step in the perpetual inventory records or something she discovered wasn't available and cancelled?

A. That is right. Of course there is a little bit in the typing where she has to show that it was cancelled.

853 Q. But no time for the filling of that item.

A. No, wouldn't be. That is right.

Q. The next one is the number of packages, the fourth line from the top. I notice under order 44524 it consisted of two packages whereas on number 44525 there were 23 packages. What is the difference between items used in the column ahead of that—or the line ahead of that, as compared to packages?

A. Well, customers like the first one, who order 20 point sets—there are 10 point sets to a package so there were two packages.

Q. And the next customer, with the 6 shipped items had 23 packages.

A. Depending on the number of boxes it took for each item. For instance, he might have ordered five of this and six of that and one of this and so forth, which totaled 23 packages.

Q. Those are the individual packages actually setting on the cart after she has picked the order?

A. That is right.

Q. Let me ask you with reference to the first order, 44524. Let's assume that instead of ordering 20 sets of points in two packages, ten to a package, he had ordered 12 sets of points. You would have one package with ten and two separate packages of one each?

A. We call that three packages because three packages had to be handled. The size would make no difference
854 in this analysis. In connection with that, I don't know whether you are leading up—

Q. I think we can just explain this and then come to all that later on. I notice under each invoice order number, in the fifth line down, is net billing. What does that figure represent?

A. Figure taken from the actual invoice sent to the customer net billing shown on that after any discount was applied, if any. It did not include postage or anything like

that. In other words, money due to the Niehoff Company for the item shipped.

Q. Going back to the first line, sales order number, is that the number of the Niehoff sales order written up from the customer's order which it received?

A. The sales order number is the number that is printed on the six copies in the upper right hand corner.

Q. That is the Niehoff Company form?

A. Yes.

Q. The explanation which you have given me of these first five lines on Respondent's Exhibit 18A, would that apply with equal explanation with the same headings on sheets B and C of Respondent's Exhibit 18?

A. Yes, it would.

Q. Dropping down to the word "Total" just under line 21, I notice that under the column "Amount", refer-
855 ring to order 44524, is a total of .4384. Am I correct in assuming that that is the sum of all of the numbers which appear above the total right up to the word "Amount"?

A. That is right.

Q. That represents the cost in dollars and cents of the actual direct labor in doing the 21 steps?

A. Not including allowances or burden.

Q. I understand that.

A. That is right; otherwise, yes.

Q. In your next column, you have basic cost per dollar of the net invoice, and how is that figure, which is .03653, as it pertains to order 44524 determined?

A. By dividing .4384, the total analysis cost, by the net billing amount at the top of the column which is $12.00.

Q. And that produces a net direct cost of time of this .03653 dollars per dollar of invoice?

A. That is right, net invoice.

Q. I notice under that is a total cost per dollar of net invoice as compared to the previous line "Basic Cost" and the figure that follows that entry as it pertains to order 44524, is .1370. How is that figure arrived at?

A. It requires a little explanation. In the ordinary operation of any job or doing of any work, there is a basic time—time it did actually take. However, in addition to
856 that, there must be allowances made for personal time —going to the washroom, time for getting information or instructions from superiors, certain time for unnecessary idleness and miscellaneous delays of any na-

ture. In other words, at the end of the day, there is so much work done and the total time for the different jobs must take care of those items too, must include everything. Therefore, from long experience along those lines in operations where there is no wage incentive involved, no pressures exerted on people, I found by adding 25 per cent to the basic time covers such requirements.

Q. In other words, if the basic time were four minutes as shown by your stop watch time study, you would raise that to—

A. Five minutes as being the real time it takes on an average to do that job, including all delays and allowances.

Q. I assume then, by the same token, that in making the time study, if the clerk is interrupted for any reason you stop your stop watch?

A. That is right. That of course involves a lot of experience and a lot of common sense. It isn't a question of being severe or strict with an operator. Little delays—part of any job—that time was not clocked out. That is part of doing a job. You or I or anyone else don't keep on working at a steady pace all day long; you can't do it. You do need these extra little times in performing the normal job and those items were not clocked out. How-
857 ever, if a person left the job or they were unnecessarily delayed, or they made a mistake which was their own fault and had to be corrected, that I clocked out.

Q. Then you corrected it by this 25 per cent you have just talked about?

A. That is right; that 25 per cent allowance does cover such things.

Q. In all of these steps, are the employees paid on a straight hourly basis without a wage incentive?

A. Yes.

Trial Examiner Hier: Did you say you added 25 per cent to the figure .03653?

The Witness: That does not make it 13 cents.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Sprowl:

Q. In addition to this 25 per cent adjustment in the actual clocked time spent, does that line reflect any other adjustment?

A. Are you referring to the last line?
Q. Very last line.
A. Yes, that includes the burden assigned to the processing of orders as developed by Mr. Eldridge.
Q. That is the 200 per cent?
A. His figures were two hundred and one point something per cent. I used 200 per cent in round figures.
858 Trial Examiner Hier: Let me see if I understand this correctly. The $12.00 which is the net billing on order 44524, was divided into the total cost of the processing of that order through 21 steps, namely, .4384 and you arrived at the basic cost per dollar of net invoice, namely, .03653. Then you added one-fourth of that sum to that?
The Witness: That established what is ordinarily called standard cost.
Trial Examiner Hier: And that came something like—
The Witness: That figure is not shown. Then to that total, after adding the 25 per cent which established standard cost, to the standard cost 200 per cent was added, and that resulted in .1370.
Trial Examiner Hier: Off the record.

860 Room 1500, 173 W. Madison St.,
Chicago, Illinois,
Monday, November 5, 1951.

Met, pursuant to adjournment at 10:00 o'clock a. m.

Before: Frank Hier, Trial Examiner.

Appearances:

E. P. Schrup and Francis C. Mayer, Attorneys for the Federal Trade Commission.
Charles R. Sprowl, 134 South La Salle Street, Chicago, Illinois, Attorney for the Respondent.

861 Proceedings.

Trial Examiner Hier: This hearing will now come to order.
The reporter will show the appearances as heretofore noted.
Mr. Sprowl: Since the last hearing at which we identified Respondent's Exhibit No. 18 A, B, and C, concerning which Mr. Dreyer was then testifying, I understand

that certain errors in the extension of figures on the last page have been caught and corrected. Also, while Mr. Steel was visiting the C. E. Niehoff and Company plant with some of his staff, one or two of these figures that are the rate per hour of employees at various steps have been changed. I think that the best way to proceed is to withdraw Exhibits 18 A, B, and C which were previously identified and substitute a new Exhibit 18 A, B, and C, reflecting all of those changes.

Trial Examiner Hier: That will be all right providing there is no argument as between the present and the new Exhibit 18 A, B, and C. If you will agree on the copy to be substituted we will give it the same number. I presume everyone is agreed upon that. Since it has not been received in evidence as yet, we can use the new copy in lieu of the old one. Off of the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

862 Mr. Sprowl: It has also been agreed that the following changes should be made in the transcript:

At page 851, line 2, figure .0122 should be .0127. On the same line the figure immediately preceding the one I described, the rate per minute of .02 should be .0208. On the fourth line on page 851 the figure .0022 should be .0127. On page 855 the figure in line one, .4384 should be .4400. On the same page, line eleven, the figure .03653 should be .03666. On the same page, line 13, the figure .4384 should be .4400. On the same page the figure .03653 should be .03666. On the same page, line 21, the figure .1370 should be .1375. On page 857, line 11, the figure .03653 should be 0.3666. On page 858, line 4, the figure .4384 should be .4400. On the same page, line 5, the figure .03653 should be .03666. On the same page, line 13, the figure .1370 should be .1375.

LOUIS DREYER, resumed the stand and testified further as follows:

Direct Examination by Mr. Sprowl.

Q. Mr. Dreyer, I would like you to look at pages B and C of Exhibit No. 18 and tell me if the twenty-one steps set forth on those pages are the same steps that are described on sheet A of that exhibit?

A. They are identical

Q. What about the rate per minute and hour?

863 A. They are the same.

Q. And Sheet A merely carries the detail of the six order numbers appearing at the top of that page?

A. That's right.

Q. And sheet 18 B has six different order numbers at the top and it relates to those six different orders?

A. That's right.

Q. And the last sheet carries the detail as to the five order numbers appearing at the top of that page?

A. That's right.

Q. As I gather, from looking at these 17 orders which have been recorded in detail on this exhibit, I gather that you have arranged them in order from the lowest amount to the highest amount?

A. Yes, I did.

Q. What are the extensions at the extreme right hand column of page 18 A. Are those merely the aggregates of the figures appearing in the column to the left?

A. Under the "total" column, yes.

Q. Under each order relating to time, you have "minutes" and "amount". What is the total, is that of the "minutes" or the "amount"?

A. Well, "minutes" represent the actual time as represented by the time studies. The "amount" will be the multiplication of those minutes by the rate per minute.

864 Q. Look at 18 A—what does the figure .0318 represent?

A. That is the average total of the amounts.

Q. Not the time?

A. The amounts.

Q. In other words, the total which is next to the last column to the right is money?

A. That's right.

Q. That refers to money?

A. That refers to money.

Q. So that represents the total of each column directly to the left which is headed "amount under each order"?

A. Yes.

Q. What does the figure 4.5494 represent?

A. That would be the total of the column and would be a cross check by the total of the individual columns.

Q. It represents the aggregate of all of the figures appearing immediately to the left of it in the same line?

A. That's right and also of the figures immediately above.

Q. And under "averages", the last column to the right, what does that represent?

A. Under that would be the result of dividing 4.5494 by the number of columns, which is six.

Q. Number of columns?

A. Yes.

Q. So that all these two columns at the right hand
865 side of Exhibit 18 A for identification show is just as to the six orders on that particular page—they show an average?

A. That's right.

Q. Now, turning to Exhibit 18 B for identification. Do the columns at the extreme right of that exhibit merely purport to show an average respecting the six orders detailed on that page?

A. Yes.

Q. And with respect to Exhibit 18 C for identification, which records the detail as to five order numbers. Do the two columns at the extreme right hand side of that page merely purport to give the averages of the detail under those five orders?

A. That is right.

Q. Mr. Dreyer, do you have the copies of the orders and of your work sheets from which the detail appears on Exhibits 18 A, B and C, from which that detail was prepared?

A. Yes, I have.

Q. Will you produce them?

A. Here they are. (Handed to Mr. Sprowl.).

Mr. Sprowl: I should like to have marked for identification, as Respondent's Exhibit No. 19, a bound batch of copies of orders received by the C. E. Niehoff & Company and which contains the 17 orders which are the subject of analysis on Respondent's Exhibit No. 18 A, B and C for identification.

Trial Examiner Hier: Is there any way of identify-
866 ing those orders one from the other or do we have to give them sub numbers?

Mr. Sprowl: Each order has its number and where it is more than one page, it will have a dash and show the number of pages to the order.

Trial Examiner Hier: It will be marked as Respondent's Exhibit No. 19 then.

(The document referred to was marked Respondent's Exhibit No. 19 for identification.)

Mr. Sprowl: These are the orders that were furnished to Mr. Steel at the last hearing and which he had photostated.

I should like to have marked, as Respondent's Exhibit No. 20, the time studies relating to each step and process by Mr. Dreyer with respect to the seventeen orders.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record. It appears that Respondent's Exhibit No. 20 is a bound list of time study sheets and that there is no indication of anything to distinguish one page from the other. Therefore, the reporter is directed to mark each page consecutively from beginning to end before sending it in to Washington.

(The volume referred to was marked as Respondent's Exhibit No. 20 for identification.)

By Mr. Sprowl:

867 Q. I show you Respondent's Exhibit No. 19, and ask you if those are carbon copies of the actual seventeen orders which are the subject of the analysis in your Exhibit 18 A, B, and C for identification?

A. They are.

Q. Are those the orders originally typed up in what I think you have described as step number five?

A. Yes, they are.

Q. They are extra copies and at that point there were no price extensions appearing on those orders?

A. There were none.

Q. Since the last hearing, have you had occasion to go over those orders with Mr. Steel and members of his staff?

A. Yes.

Q. You gave them the location of the records that ultimately carried the price extensions at which the items on those orders were billed?

A. I introduced Mr. Steel to the office manager and he may have done so. I don't recall exactly which one of us did.

Q. As to the price figures that I show you—the net billing at the top of the fifth line from the top of Exhibit 18 A, B & C with respect to each order—where did you get that figure of net billing?

A. From the original invoice.

Q. That would be the original invoice of which
868 Respondent's Exhibit No. 19 are copies of?

A. That's right.

Q. And the difference would be that the original invoice would have a price extension put on at step thirteen?

A. No, the extension would be on step fifteen.

Q. What is step thirteen?

A. That is done by the pricing clerk who marks a shipping copy with the prices to be used in the extension. It is in pencil.

Q. You were actually present when both steps 13 and 15 were accomplished with respect to each of these orders?

A. Yes.

Q. And that is where you got the figure for the net billing?

A. That is right.

Q. And those records have all been made available to the Federal Trade Commission people?

A. Yes.

Trial Examiner Hier: While we are on Exhibit No. 19, how do these orders come to C. E. Niehoff? I assume they are all different types of papers, etc? Are prices marked on them or just the quantity?

The Witness: Just the quantities and part numbers.

Trial Examiner Hier: Are these different orders in Respondent's Exhibit No. 19 simply a copy of what comes in?

The Witness: That's right. The customer may send
869 in his orders on a form already prepared by C. E. Niehoff or he may even use a piece of wrapping paper, to go to the other extreme. The order is brought in and segregated and from that it is finally typed into this form.

Trial Examiner Hier: As to the detail then, Respondent's Exhibit No. 19 represents all that comes into the plant?

The Witness: Yes, it does.

Trial Examiner Hier: With the addition, by the respondent, of the words "cancelled" or "voided", or other things which appear here?

The Witness: That's right.

By Mr. Sprowl:

Q. Directing your attention to Exhibit No. 20; will you tell me what that rather large volume represents?

A. It represents detailed time studies of each cus-

tomer's order. We went thrqugh the plant during the processing of that and that is shown in the twenty-one steps on Exhibit No. 18. In most cases it meant a detailed study of the operation as it occurred. In some instances, such as opening the mail and credit approval, the group of orders were studied and an average was taken rather than trying to make individual studies on each particular one, which would mean nothing.

Q. Who made these time studies?

A. I did.

870 Q. Did you make each and every one?

A. I did.

Q. Personally?

A. Personally.

Q. With respect to each item on each of the 17 orders?

A. That's right, with the exception of where they were grouped as I mentioned before.

Q. Such as opening mail and checking credits?

A. Yes, where the average was taken rather than an individual study.

Q. What type of mechanism did you measure the time with?

A. The ordinary time study watch used in manufacturing plants for that purpose, where the minute is divided into hundreds of a minute rather than in split seconds.

Q. Taking any one of the pages in Exhibit No. 20, can you tell us how any information that may appear on the work sheet ties into Exhibit No. 18 A, B, and C. Give us the sheet number when you do that?

A. Well, take, for instance, sheet number 12, where part number 44524 is under study.

Q. By part number—isn't that really the order number?

A. That's the order number, yes. The time study sheet was made, of course, for study in the plant and the 44524 refers to the order number. This case was one of the smaller orders.

Mr. Schrup: I was wondering about the procedure

871 on this because it has not yet been received in evidence. I think the witness will have to give us a little background as to what the papers are so the Examiner can properly determine whether they are germane or have any effect on the matter.

Trial Examiner Hier: You are right, but this is merely a matter of statistics. If the docket is not—if the exhibit

is not received in evidence, the facts will go out with it. Certainly I want to know the background and how it ties in, especially if you are going to object to it. Go ahead, Mr. Dreyer, and take that sheet again and tell us how it works.

The Witness: This was one of the smaller orders and in picking the order the girl went to the shelf and took several packages off the shelf and put them on a truck. It took her a minute and a half and that was the extent of that particular time study.

By Mr. Sprowl:

Q. Does the figure 1.50 represent the minute and a half?

A. That's right.

Q. What does the date up at the top mean?

A. The day the time study was made.

Q. The name of the object is the employee who picked the order?.

A. That is right—that is Step No. 9.

Q. That operation number with the "9" above it is the ninth step recorded on Respondent's Exhibit No. 18, is that right?

872 A. Yes, that is correct.

Q. Turning to Exhibit 18 A, I see that the 9th line is that particular order?

A. Yes.

Q. Where does the time study figure of 1.50 come in on Exhibit No. 18 A?

A. Under the column headed "minutes".

Q. Do you have in that batch of time study sheets a time study sheet for each figure that appears under each order in Exhibit No. 18 A, B, C under the word "minutes"?

A. That's right with the exception that in a few cases where the same time applied to all orders, there is one sheet to cover all orders rather than to have extra sheets for each order.

Q. In other words, the first sheet in Exhibit No. 20 shows a time of .61—that's sixty-one hundreds of a minute?

A. That's right.

Q. For what step?

A. Step No. 1, opening the mail.

Q. And, referring to Number 18 A, B and C, under step one, in every case the time alloted is the same?

A. That's right.

Q. Directing your attention to the rate per hour used in Exhibit No. 18 A, B, and C. At the last hearing we had an exhibit very much the same as the one you now have before you with slightly different rates per hour and today was have substituted a new exhibit No. 18
873 A, B, and C. Why were those changes made?

A. When I first made the study I obtained the information regarding the rates per hour from several sources in the plant, the office manager, personnel manager and time study department. I don't know where I got all of them but each figure was obtained from legitimate sources and there the records should have all agreed. However, when Mr. Steel checked with the personnel manager they found discrepancies.

Q. In some of the rates per hour?

A. Yes. So, in a discussion with Mr. Steel, it is my understanding that the figures that he and the personnel manager agree upon were the correct figures.

Q. So you merely recast your exhibit to reflect the figures that Mr. Steel requested you to use?

A. Well, I won't say that he requested me to use them but he and Mr. Ames did, to my understanding, come to an agreement that those were the correct figures.

Q. At least, since our last hearing, Mr. Steel has been over the hourly rates with Mr. Ames?

A. Yes.

Q. And you have corrected this exhibit to show the new hourly rates?

A. I have. The final results were very small in the final total sales.

Q. Did any of those changes make any appreciable difference?

874 A. Practically no difference in the final results. That is the point we wanted to bring up.

Mr. Sprowl: I would lke to have marked as Respondent's Exhibit No. 21 A, B and C and C and D four graphic charts, each carrying the name of the C. E. Niehoff & Company and Mr. Dreyer's name as Industrial Engineer.

(The papers referred to was marked Respondent's Exhibit No. 21 A, B and C for identification.)

By Mr. Sprowl:

Q. I show you Respondent's Exhibit No. 21 A. Will you explain to me what that purports to be?

A. It's an exhibit showing the relation between the net billing obtained from Exhibit 18 A, B a d C and the number of packages involved in each order as obtained from the records at the C. E. Niehoff Company, chiefly from the distributor's price list. The number of packages used is shown on Exhibit No. 19, penciled in on that exhibit.

Q. Referring to the figures in the upper right hand corner of Exhibit No. 21 A for identification; what does that mean?

A. Those were the sales or numbers used on the check up.

Q. They are the same orders that were the subject of Exhibit No. 18 A, B, and C for identification?

A. That's right.

Q. The next column is "net billing". Is that the same thing that appears in Exhibit No. 18 A, B, and C for identification, on line five?

875 A. That's right.

Q. The third column, "number of packages", is that the same as appears on line four of Exhibit No. 18 A, B and C?

A. No—yes, that's right, it does.

Q. It's the same?

A. Yes.

A. By "net billing" you mean the price that appeared on the invoice as it left the plant, and reached the customer?

A. Yes.

Q. If there were any discounts taken after the face of the invoice—that would be reflected in this billing?

A. Yes, that would be the net amount shown on the invoice after discount.

Q. Any discount taken off the face?

A. Off the face.

Q. But not any discount that may accumulate later, such as two per cent cash?

A. On the discount shown on the face of the invoice.

Q. Then on the same exhibit graphically portrayed, the figures going up the left hand column of the page—do those represent 200, 400 and 600?

A. Yes, they do.

Q. If ten of those little squares represents $200, one square would represent about $20.00?

876 A. Yes.

Q. Then going from left to right, across the bottom

of this exhibit—the number of packages per hour—is that in units of packages?

A. The number of packages handled.

Q. I see the figures of 100, 200, etc.?

A. Yes, that's right, in units of packages.

Q. Then the graph line that I see on that is the medium line between the various figures of billing and packages relating to the order numbers recorded in the upper right hand corner?

A. Yes.

Q. What does that portray?

Mr. Schrup: I object to this line of questioning until the exhibit is admitted into evidence—I don't think it is proper.

Trial Examiner Hier: I will sustain the objection. The face of the exhibit indicates what it is.

Mr. Sprowl: I assume that if there is any further clarification I wish to make that I will be permitted to recall the witness.

Trial Examiner Hier: Yes.

By Mr. Sprowl:

Q. Turning now to Exhibit No. 21B—I see in the upper left hand corner the same set of figures I observed in Exhibit 21A; are they the same?

A. Except the third column—which is headed 877 "number of items" whereas previously it was headed "number of packages".

Q. We had better take that in detail then. Order 44524 appears as the first item in that column and that is the same you have already testified about?

A. That's right.

Q. The next column shows the net billing?

A. Right.

Q. And the last one is the number of items in that order?

A. Yes.

Q. And that is one where on Exhibit No. 21A, the number of packages was two?

A. Right.

Q. Then that is the same thing?

A. No, it is not—it may involve one or a dozen or more packages and still become one item. If somebody ordered ten sets of points that is only one item but it might take two packages to properly ship it.

Q. It would not take two packages for 10 sets of points?
A. One, but if an item called for twenty, that would be two.
Q. That's because they are packed ten sets to the package?
A. Yes.
Q. By the same token, if they had asked for five sets of points, you would have one item but five packages?
A. Yes.
Q. Because you break the master package into five little ones?
878 A. Yes.
Q. Again calling your attention to Exhibit 21B, the figures going upward on the left hand column—200, 400, 600 and so on—those are dollar amounts?
A. Yes.
Q. Each little box on the graph represents $20.00?
A. Yes.
Q. Going from left to right across the bottom—what are those figures?
A. They are the number of items per order as shown on Exhibit No. 18A, B and C.
Q. And your graph line is obtained by plotting the information respecting the orders that are recorded in the upper left hand corner of the exhibit?
A. Yes.
Q. Turning to Exhibit No. 21C—I again see in the upper right hand corner the three columns of information. The first is the sales order number. I assume that the 17 orders tabulated under that column are the same orders you have already testified about in Exhibit No. 18A, B and C for identification?
A. Yes.
Q. And the column of net billing is the net billing of those orders you have already testified about?
A. Yes.
Q. The last column headed "total projecting costs
879 per dollar" there is a figure in that column on each sales order number? Where did you obtain the figures that appear in that column?
A. From Exhibit No. 18, the bottom line.
Q. That is the total cost per dollar of net invoice on Exhibit No. 18A, B and C?
A. That's right.
Q. And, again, on the left hand side of the graph, the

figures 200, 400, 600, etc.—they are dollar figures of net billing that have already been testified about?

A. Yes.

Q. And each little box represents $20.00?

A. Yes.

Q. Across the bottom of the graph, from left to right, I see you start at zero and then go to the figure .02, .04, .06, etc. What do those represent?

A. Hundredths of dollars.

Q. The first figure, .02, is two hundredths of a dollar or two cents?

A. Yes.

Q. And the last figure is fourteen cents?

A. Right.

Q. The graph line is the recording of the information appearing in the upper right hand corner?

A. That is right.

Q. What is the next exhibit?

880 A. That shows the relation between the total processing cost per order against the net billing in dollars.

Q. I notice you have three columns at the top of this exhibit. Where do you get the figures appearing in Column "A"?

A. From Exhibit No. 18—they were taken from the previous exhibit, number nineteen.

Q. Can you take a specific example?

Mr. Schrup: I think you are now getting into a discussion of what the exhibit intends to portray. I have no objection in giving him some leeway but until it is put into evidence I don't think we should go into this kind of discussion.

Trial Examiner Hier: I don't agree with you. I want to know what the columns mean and where he got the figures because it is going to come up again. If this is not put into evidence all this can be stricken.

By Mr. Sprowl:

Q. What is this twenty under "A"?

A. Exhibit No. 21C shows a total processsing cost per dollar of net invoice. What we intended on that basis is how much it would cost to produce an entire order. Take, for instance, two hundred dollars on Exhibit 21C and then reading across until it hits the graph you will see that it goes a little beyond the half way mark, .003—.002 being

half way, and that gives the value. Do you see what I mean?

Q. Yes.

881 A. And the reason for that is this—if I may explain why a graph is used. In a graph all of the minor inequalities due to slight variations in the type of order—they are eliminated.

Q. Let's stick to Exhibit 21B. How was the third column on Exhibit 21B computed?

A. By multiplying columns "A" and "B", which would give the total processing cost per order. Assuming you had an order for $200 and it costs .031 per dollar; then the total processing cost per order would be $6.20.

Q. What are the coordinates that appear on this exhibit?

A. The net billing in dollars and the total processing cost also per order, in dollars.

Q. And the net billing is at the column at the left side, from zero, to 200, 400, 600, etc.?

A. That's right.

Q. And the total processing cost per hour is across the bottom, from zero to ten?

A. That's right.

Mr. Sprowl: May we go off the record?

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

Mr. Sprowl: I would like to have these documents marked as Respondent's Exhibits No. 22 and 23.

Trial Examiner Hier: They will be so marked.

882 (The papers referred to were marked Respondent's Exhibits No. 22 and 23 for identification.)

By Mr. Sprowl:

Q. I direct your attention to Exhibit No. 22 for identification and in that connection I would like to hand you Commission Exhibit No. 47A, which is commonly referred to as the Steele exhibit. I don't mean to infer that Mr. Steele is a common person. Can you tell me what the figure $21,895.86 is?

Mr. Schrup: I have the same objection to this line of testimony as I have had in the previous exhibits.

Trial Examiner Hier: I think he has a perfect right to show where the figures came from. That goes to the validity of the source. I am going to overrule the objection because the exhibit has to be explained.

By Mr. Sprowl:

Q. Can you tell me where the figure of $21,895.86 appears?

A. That appears on Sheet #4 of the Steele exhibit.

Q. Under the column of processing costs per dollar there appears the figure of 178, what is the source of that figure?

A. That comes from Exhibit No. 21C for identification.

Q. That's what the graph shows as cost of processing that or per dollar?

A. That's right.

Q. An order of that size?

A. Yes.

883 Q. What is the last column?

A. The last column would be the product of the two preceding columns.

Q. Is it one and one-half times $608.00?

A. Yes.

Q. That gives an extension of $8.12?

A. Yes.

Q. Did you derive the figure .0156 in the same manner?

A. Yes.

Q. What is the next line?

A. The actual cost of filling Union Electric orders.

Q. Where are those figures obtained from?

A. From the net proceeds times the actual processing costs per dollar.

Q. What is the next line?

A. The actual cost of filling the orders.

Q. In other words, has C. E. Niehoff been able to fill the orders of Union Electric as cheap as it filled Stratton Warren orders you would get this figure of $18.32?

A. That's right.

Q. And by subtracting that figure from $78.38 you get a difference of $50.06, which is an additional cost to the C. E. Niehoff Company for processing the order of Union Electric?

A. Yes.

Q. What is the next line?

884 A. That shows the net amount actually paid C. E. Niehoff by Union Electric, obtained from the Steele report.

Q. That's the same figure, is it?

A. It's column three.

Q. Total sales at jobbers prices?

A. Which is $1413.00. That's from Commission Exhibit No. 37D.

Q. What is the next line?

A. The net amount which would have been paid to C. E. Niehoff and Company by Union Electric for the same volume of purchases on the Stratton Warren purchase basis, which was 82.6%.

Q. Of the purchases at jobbers prices?

A. Yes, of $1313.00, which would be $1084.54 from the $1221.09 which would result in a price differential of $136.55.

Q. What is your last line?

A. The amount of price differential justified by cost savings in processing orders.

Q. Will you now look at Respondent's Exhibit No. 23 for identification. First of all, I should like to state for the record, that respondents exhibit number 5 and 6 and the Steele exhibit were the basis for some of this testimony.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Sprowl:

Q. I call your attention to Respondent's Exhibit No. 885 23 for identification. I will ask you if that is prepared with respect to the two customers shown on that exhibit?

A. Yes.

Q. And in the same manner as Respondent's Exhibit No. 22—the procedure was the same?

A. With the exception that the number of sales and the average amount per sale was obtained from Respondent's Exhibit No. 5.

Q. Whereas, in your Exhibit No. 22, they would be obtained from Exhibit No. 6?

A. That's right.

Q. And the other figures were obtained from the Steele exhibit?

A. Page two.

Q. The figures on Exhibit No. 23 were made in the same manner you just described with respect to Exhibit No. 22?

A. That is right.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record. Inasmuch as it is now 12:05 P. M., we will take a recess for lunch until 1:30 P. M. Please get back so we can start promptly.

(Whereupon, at 12:05 p. m., a recess was taken until 1:30 p. m., this day.)

886 Afternoon Session.

1:30 p. m.

Trial Examiner Hier: Come to order. You may proceed.

LOUIS DREYER resumed the stand and testified further as follows:

Cross-Examination (continued) by Mr. Mayer.

Q. Mr. Dreyer, how many time studies similar to the one presented in Respondent's Exhibit 18A, 18B and 18C have you prepared?

A. I don't quite get the question. You mean in connection with this?

Q. No; how many time studies similar to this particular time study have you prepared in your experience?

A. Time studies?

Q. Yes.

A. They number in the thousands.

Q. How many of those studies involved order processing similar to Respondent's Exhibits 18A, B and C?

A. Well, the exact procedure of that nature there were practically none but there is a lot of work in analysis. I mean, I have never been connected with a case of this nature but so far as following work through a plant is concerned, I have done a lot of that.

Q. Am I correct, then, in saying that this is the
887 first time that you have prepared an order processing analysis similar to that which is found in Respondent's Exhibit 18A and B?

A. If you want to get right down to the real technical phase of it, for an exhibit of this nature involving a hearing, it is. As far as the work in the plant is concerned it pays all through costs for the benefit of the owners of the company. I have done quite a bit of that. In other words,

making up the total cost of an item as it goes through a plant, much of my work has been involved in that, I would say very many hundreds of cases.

Q. And those cases were limited, then, to order processing analysis?

A. Practically, yes.

Q. As distinguished from the manufacturing costs?

A. Well, it is hard to draw any line of demarcation there. Most of my work has been in the line of establishing the standards and establishing costs. That is to say, standards are something that you shoot at; costs are something that you attain.

Q. But those, as I understand it, Mr. Dreyer, were directed more to the manufacturing costs than to the specific analysis of order processing?

A. Yes, I would say so. In other words, the problem there becomes not so much of what happens to the customer's order as it does represent cost to the manufacturer, that is true.

888 Q. Have you been informed by the Niehoff Company in relation to matters other than this particular order processing analysis which you have submitted as Exhibits 18A, B and C?

A. I have been with them off and on since about 1941. Most of the time there have been small gaps, not a full week, maybe one or two weeks, in the last two or three years, and previously to that at other intervals back to about 1941.

Q. Were you employed on a regular salary basis by the Niehoff Company?

A. Never.

Q. Would it be correct to say that you are fairly familiar with the operations of the Niehoff Company based upon your experience since 1941?

A. Yes.

Q. Now, would you tell us if this is the first order processing analysis which you have ever made for the Niehoff Company?

A. For the Niehoff Company, yes.

Q. And is this the first order processing analysis that you have made as an individual analysis as distinguished from the fact that it might have been contained in an overall manufacturing cost analysis?

A. For the Niehoff Company?

Q. Yes.

A. I have never done any analyzing of customers' 889 orders up to this time. I mean so far as the office, etc. are concerned. I have done similar work in checking the office costs and procedures for other companies at other times but not for C. E. Nieloff.

Q. Now, Mr. Dreyer, would you explain to us again if you would, the exact manner which you used in selecting the orders which are found on respondent's Exhibits 18A, 18B and 18C?

A. Yes. I started this some time in May and the procedure was very simple. I went to the sales manager and I asked him, I said: I am ready to make some studies. Will you pick out of today's orders some representative order in, say, the $50 group or the $100 group, or the $400 group, depending on what I wanted.

And he would take the orders that came in that day in the mail and he would show me one and say: Here, this is representative of that group. He would know from his experience with the pricing, etc., he would know if that involved maybe $50, $100 or $10, whereas to me, I knew the part numbers but I was not too familiar with the price, the value of that order, so he would say: This is about a $50 order, do you want it?

And I would say: All right, O. K. I would study that, and that was about the general procedure.

Q. Were you, in the final analysis, solely responsible for the selection of these orders?

890 A. The final selection of the orders themselves, so far as I was concerned, all I did was stipulate the price range. The final selection of the order itself was done by the sales manager, Mr. Geyer. He would pick them out.

Q. As a matter of fact, in the selection of orders within these various price ranges, to your knowledge a particular day on which you selected, for instance, the $12 order which appears on Respondent's Exhibit 18A, there might have been 10 or 20 orders in that range that particular day with the selection having been made in the last analysis by Mr. Geyer?

A. That is right. There might have been.

Q. Now, were these orders selected with a base of the amount of the net billing alone, or did that alone control the selection of the order?

A. I wouldn't really know. What I know is I would talk it over with Mr. Geyer. I would say: I have this order in this range. I would like orders in some other range to

fill the gap. What his mental process was in selecting those orders, I don't know. I would say: Give me it, and so far as I know, this is it.

Q. Would you tell us now the range which you just mentioned a moment ago of the amounts in the selection of these orders which you gave to Mr. Geyer?

A. Well, I figured the range up to about the maximum shown here. I have forgotten what it is, somewhere
891 around $800 would be fairly representative.

There are some orders which are larger than that, but they are unusual and I figure that anything between zero and $800, enough orders to sort of split them up fairly well, split up that range fairly well, they would be what would be satisfactory for an analysis of this type.

Q. For example, in the selection of the order 44525 which appears on Respondent's Exhibit 18A, with an amount of $37.66, what price range did you give Mr. Geyer on that, in selecting that particular order?

A. $50.

Q. And was that the same basis you gave him for the selection of orders 44524 and 44576, as they appear on Respondent's Exhibit 18A?

A. Well, after some of these studies have been made and they have been priced, I would tell them: Now, I have studies made of orders in which the net billing is, say, $12, and $50; let us have one in between, if you can give it to me, or one a little higher.

In other words, that is the way the gap was filled. He, himself, could not get it down to a fine point. He would have to estimate what the value of that order would be.

Q. No, directing your attention to the heading Net Billing, as it appears on Respondent's Exhibit 18A, 18B and 18C, would you tell us just exactly what you mean by Net Billing?

892 A. Yes, after the order billers were finished they had on the customer's copy the gross bill, the discount, if any, not all of them had discounts, and the net bill.

I took the lowest figure, the net billing. If there was no discount; for instance, in the first item, $12, my recollection is there was no discount on that, so there was no deduction. On others they are 10% and the net billing, or course, was the gross minus the 10%.

Q. Mr. Dreyer, do you have the basic documents with you which would show the net billings by the C. E. Niehoff

Company for each and every one of these orders as they appeared on Respondent's Exhibits 18A, 18B and 18C?

A. No, I haven't, but they would be obtainable.

Q. Does Respondent's Exhibit 18 take into consideration any rebate which might have been paid based upon these orders?

A. No, sir.

Q. In determining these particular orders was the classification of the customer by the Niehoff company discussed with you by Mr. Geyer?

A. I told Mr. Geyer that I had no interest whether it was a large or small customer. So far as processing the order was concerned, I wanted orders in a certain price range. I didn't care whether a large customer ordered $50 worth of goods; to me that was just as good as a customer who was smaller ordering $50; it was the same
893 work in processing, so I didn't care in which classification the customer happened to fall. All I cared was the range of billing of that particular order.

Q. In other words, there was no particular attention given to the classification of the customer or his annual total volume of business done with the C. E. Niehoff Company?

A. Not so far as I was concerned. I don't know whether in Mr. Geyer's mental processes he took that into consideration or not but not to my knowledge.

Q. Were there any peculiar circumstances, Mr. Dreyer, which dictated the selection of any one of these orders over any similar order which might be selected?

A. Not to my knowledge.

Q. Now, was there any discussion as to why a group customer accounts were not considered in Respondent's Exhibits 18A, 18B and 18C?

A. No, there was not.

Trial Examiner Hier: Do I understand from your question that none of these 17 orders on here happened to come from any group buyer?

Mr. Mayer: They do not.

The Witness: I don't know. I didn't check into that at all because I wasn't interested in it. Now, whether some of them are group buyers I really couldn't say. I am not familiar enough with the customers to give any other answer.

894 Trial Examiner Hier: As a matter of fact, I take it you are not familiar with the sales of the business.

The Witness: No; I take very little interest in that.

By Mr. Mayer:

Q. Mr. Dreyer, would you give us again the factors which determine that only 17 orders should be selected as a basis for your Exhibit 18?

A. There wasn't any reason, only I looked over the net billing and it seemed to be enough. It was my own judgment; nobody's else's.

Q. You wouldn't consider that 17 orders would be a representative number of orders of the orders annually received by C. E. Niehoff Company?

A. No, but you consider that these studies took a long time to make. They started around the middle of May and they went way into July and beside the other work, beside the making of the studies, compiling of figures, etc., it involved a lot of work.

Q. Actually, the work involved would not determine whether 17 orders are representative when it is considered against thousands of orders, would it?

A. No, the thing I had in mind mostly was whether the gap between zero and $850 or some such figure, whether
enough studies had been made to be fairly representa-
895 tive of that range and to me it seemed so.

Q. In other words, then, you would consider that 17 orders number-wise would be representative of the entire number of orders received by the Niehoff Company which ranged between zero and $800, is that correct?

A. I think so and I think that is substantiated by the location of the dots on the graphs. In other words, if you will look at the various graphs you will see point locations of these. Now, if you have points in a certain location you could have a half dozen on one and still not change the location of that graph.

Q. No, sir, but since we are talking about points, the location of one does not necessarily mean the location of 6. It means precisely what it says: one single order analyzed by yourself, is that correct?

A. Yes, excepting that the one order by itself would mean nothing but the relation of that order to 16 others on a graph paper would mean something.

Q. Well, the relation of 1 to 16 when 17 is compared to, say, 10,000?

A. It is a little confusing to me, the question there, but I think I know what you mean there. What I would say to

that is that in working along with this a number of studies as reflected by the graphs seem to be sufficient to show the objectives or show the results, and the addition of a
896 dozen more would not have changed it, and the time limit was such that there probably wouldn't have been time to take something like a hundred studies or more, if they wanted a larger percentage.

Q. Did you examine 12 more orders to determine whether or not this was a representative group?

A. No, I didn't. My objective was to get a range fairly well covered.

Trial Examiner Hier: Mr. Dreyer, do you have any reasonably accurate knowledge of how many orders, as orders, the Niehoff Company receives in a given year?

The Witness: No, I haven't.

By Mr. Mayer:

Q. In the final analysis, then, Mr. Dreyer, you took these 17 orders as representative of the orders which were received by the Niehoff Company from all of its customers in the zero to $800 bracket during the year, is that so?

A. It seems so to me, yes.

Q. Do these 17 orders represent all of the orders which you processed in drawing up Respondent's Exhibit 18?

A. Yes.

Q. Then would it be your opinion that $12 is representative of the smallest order which would be received by the C. E. Niehoff Company?

A. I think it is fairly representative as it was a
897 short item order, you can't get less than that and whether it involves a few cents, more or less, wouldn't make any difference.

Q. Did you make any study to determine whether or not a $12 order was representative of the smallest order which was received by the C. E. Niehoff Company?

A. No, except in a general discussion with Mr. Geyer, the sales manager, those various items were discussed and it seems to be that if a few more studies could have been made they wouldn't have been any more illuminating.

Q. But no further studies were made to determine whether they were more illuminating or not?

A. No. All studies made here are shown in the report.

Trial Examiner Hier: Apparently counsel is making the point, in this cross-examination, that the number of orders selected, i.e., 17, in relation to the total number of

orders received by the Niehoff Company during the year, the exact number of which now is unknown, is inadequate.

I am not too familiar with the accounting practice, maybe it varies with the accountant; I don't know. Does counsel have in mind any particular percentage of orders which should be studied in a survey of this nature, to be representative?

Mr. Mayer: None other than the fact that 17 orders would not seem to be a representative number of the total number of orders which were received by the Niehoff Company.

Trial Examiner Hier: Go ahead.

898 By Mr. Mayer:

Q. Now, directing your attention to order No. 45968 as it appears on Respondent's Exhibit 18A, could you tell me what steps you took to insure that that particular order was a representative order of the normal $125 order?

A. In most cases I had to rely on the sales manager for that information. In other words, I had to rely on him to the extent that after I asked him to supply an order, a representative order, a normal order in this particular price range around $125, say, and he selected that, I had to take that, I did take it as good enough, as satisfactory. In other words, I had no basis of judging otherwise.

Q. Now, Mr. Dreyer, in preparing a cost study of this nature for a client, a customer of yours, wouldn't it seem that you might take some steps other than relying on opinions to determine that this particular order we are talking about was a representative order of all orders found in that class of approximately $125?

A. Well, I wouldn't know exactly what steps to take. In other words, I would have to rely on other people's opinions there too. One man's opinion might be a little different from Mr. Geyer's, but he was a man of experience in that particular business. He was a man to whom all such questions would be referred where anybody else would be consulted.

Q. The fact remains, however, is that there was no
899 sampling of $125 or orders within that particular bracket which you requested to determine whether or not this particular order would be representative of the orders that size from the Niehoff Company, is that correct?

A. It was done by Mr. Geyer at the time. In other words, he would take— There might be maybe a half

dozen or more orders in that group that he would look over that particular morning.

Q. Did you, as a matter of course—

Mr. Sprowl: Have you finished your last answer, Mr. Dreyer?

A. (Continued.) He would then look them over and he would pick one out and say: Mr. Dreyer, this one is representative of that group, and in about the price range you want, and he would give it to me and I would use it.

By Mr. Mayer:

Q. Did you ask Mr. Geyer if it was representative, for instance, of the number of items which were contained in the order?

A. We took it that way at the start, I mean to try to get some kind of balance. In other words, I didn't want any $125 order which involved just several items. On the other hand, I didn't feel that I was privileged or should tell him the number of items which I think should be involved in a $125 order. He had better knowledge of 900 that than I did. I mean in the normal business procedures, from the normal order receipts; I wouldn't know.

Q. Am I to understand it, then, in perfect fairness that you did inquire a little bit further than the net billing in the range you wanted from Mr. Geyer?

A. Yes, I would look them over after he gave them to me. Naturally if it looked to me as if they were out of line with the others I had received before in the number of items, etc. I would call his attention to that order, but generally he knew what he was doing, at all times, so far as I know. But I did go, to some extent, into that.

Q. And did you return some selections of Mr. Geyer which you thought were misrepresented?

A. No, the things usually had a fair explanation for them but we did discuss the various orders. He might bring up two and say: Do you want one or the other? I would ask him naturally what he thought was the difference in them. And we would discuss it back and forth that way. I don't think there was anything at that time to arrive at, excepting that we did try to see that it wasn't becoming an unbalanced matter, if you know what I mean, a great dollar volume in a couple of items and a small dollar volume in the rest of them. The orders were pretty well balanced to that extent.

Q. Then in the preparation of Respondent's Exhibits 18A, 18B and 18C, the orders you felt would be out of
901 line with your own analysis or the idea you had in making the analysis those particular orders were not selected, is that right?

A. The question came up but I don't recall any case where there was any really rejected order.

In other words, naturally in any discussion along those lines with a sales manager, the question would come up: Is this a fairly representative order? And if it isn't, why isn't it? and things of that nature. Well, he was very meticulous in his selection of the orders and I think he gave me about what I wanted; that is, it is fairly representative, fairly balanced in, what shall I say, the customer make-up, of the order, and there wasn't anything in the line of any disagreement.

We discussed the thing before and he knew in his selection when he selected what he wanted and he gave me as close as he could come to it.

Q. Now, sir, would you tell us just what you told him that you wanted?

A. I told him I wanted fairly representative orders, something that contained items which are in the general line; I didn't want anything containing, for instance, some odd lines like a lot of cabinets and things of that nature because of the fact that they would require a little special handling, and things of that nature, and that on a comparative basis it would throw things out of kilter,
902 that if any consideration were to be given to those it could be done later on.

I wanted those that included the regular line at all times and that, of course, involves practically every order there is and he understood what I wanted on that and he gave it to me.

Q. Now, I believe you mentioned a moment ago about discussing some times with Mr. Geyer when there was a possibility of selecting one order from two or three, when he had them, and will you tell me now the basis for the rejection of, say, the alternative order rather than the one which appears on your exhibit?

A. No, it was generally a matter of selecting one of the three or four. If he didn't have one of these I would look them all over and I would say: I will take this one. And there wouldn't be too much difference but some times he would offer a choice.

So far as I was concerned, I was in a dark alley so far as the valuation was concerned, so I would pick one of them up at random and take that or I would say: You pick one, and I will take it. It didn't make much difference. I believe that in all cases the results would have been about the same, no matter which one I would have taken.

Q. Now, directing your attention, Mr. Dreyer, to Respondent's Exhibit 18A, and particularly to the order numbered 44524, directing your attention more in par-
903 ticular to the times as they appear in the minutes column opposite the 21 steps indicated in your description column.

Now, I ask you if you ran this identical order again through these identical 21 steps if the results would be identical to those shown on this exhibit as far as the time consumed is concerned.

A. Well, practically, yes, there would be variations, of course, due to human nature and things of that kind, small delays here or longer delays there, but I think they would average out about the same.

Q. The question was: If you ran this particular order, the identical order again, would your results be the same as they appear on Exhibit 18A?

Mr. Sprowl: I submit that he has answered the question.

Trial Examiner Hier: I don't think he has answered it exactly but you are asking him to expound, are you not? You ran these but once?

The Witness: Yes.

Trial Examiner Hier: You are asking his opinion?

Mr. Mayer: Yes.

A. My opinion is that they would be approximately the same. Now, remember this: When you make a time study of this nature, as I mentioned on the previous testimony,
904 say a girl left the work and went to the wash room for ten or fifteen minutes or something like that, I would clock if off but for minor delays you can't clock it off.

A study of this nature is not like a study intended for cost purposes where you can make three or four sample studies and block out a pattern and follow that pattern.

In these studies you get your time the first study you make or not at all, so, in answering your question I would say there are bound to be changes in the detailed times,

but I do believe that the total, by the law of averages, one person will take a little more time, another person will take a little less time in these various steps, and the total would be approximately the same again.

By Mr Mayer:

Q. You wouldn't call the figures you have approximations?

A. No, these are actual studies but I also say they are actual studies without any discussions or anything of that nature. I mean if it took 2 minutes, it took 2 minutes; if it took 2.2 minutes, it took 2.2 minutes.

I wasn't there to act as judge or all that stuff; I took their time and whatever it was I put it down so, in some cases, here, the various times under various conditions they won't be in line. They can't be because the studies were honestly taken and whatever the time was, that was put down.

What I mean by that is if you handle four items, it won't take twice as long as it took to handle two items. It
905 is not in the books that two items might take more than four items, for instance.

Trial Examiner Hier: To get this down to more specific language: Step 9, packing the order you have .0148. That is the time you have clocking the clock.

The Witness: The time was 1¼ minutes.

Trial Examiner Hier: I had the time all right, 1¼ minutes. That is the time you used the stop watch for, that it took to do that operation. If you ran it again that particular girl might the second time drop her pencil, take a minute out to scratch an itch, or break a pencil point, and the time might be higher than 1¼.

The Witness: That is right.

Trial Examiner Hier: But what was lost there might be made up some place else, so the total down at the bottom you say would be about the same.

The Witness: That is right. That is my opinion. If you will go farther than that, if you are taking orders and you run across a page you will find that they are not anywhere near in proportion to the number of items handled. All I can say is that it did take that time. I didn't juggle figures. There is no reason for saying otherwise. I recognize those things, too, as I go along, but I am not going to say: Now, there are 50 items here and 25 items, and it will take longer for 25 items than 50. I had
906 better change that; I didn't do that. I took whatever the stop watch showed.

Trial Examiner Hier: In other words, on this sheet here it took three minutes or, in other words, twice as long to pick out six items as it did one?

The Witness; Yes; that is right. It is very likely to happen that way.

Trial Examiner Hier: Some girls are fast and some girls are slow on a particular operation.

The Witness: That is right.

By Mr. Mayer:

A. Am I correct in saying, then, Mr. Dreyer that a re-examination of these identical 17 orders would necessarily produce different results from those shown on the exhibit?

A. They would be approximately the same as they are shown here. I mean there would be slight variations due to the human element but, on the whole, I think the studies, or the time for each study, is fairly representative for the billing involved, the number of items involved.

Q. Well, speaking in particular on Respondent's Exhibit 18A for identification, and more particularly to the order No. 44576, is it your opinion that every $45.14 order billed by the C. E. Niehoff & Company would have 20 items shipped and six cancelled, and a total of 29 packages contained in the order?

907 A. No, if wouldn't, but it is because of these discrepancies or these variations in the billing and the costs that these graphs would be prepared. The graphs overcome that objection because if the time studies are fairly made and they are plotted, then the graph will show the correct valu[illegible]n on any particular situation, whereas the actual may be plus or minus the graph position by a number of percent.

In other words, there is no possibility of hitting the same thing on the head. That is one reason why in this work these graphs are made.

Mr. Sprowl: What graph are you talking about?

Trial Examiner Hier: That is 21B for identification.

The Witness: Yes, the number of items per order; you will see some of the numbers are quite a bit above the line and others below. But if you wanted to get something fairly representative for any number of items you could look up and see what the billings would probably be.

And the same applies to these others, say Exhibit 21C, the processing cost per dollar of net invoice. Now, you

could take any one of these studies and argue about it, some are above and some below the line, but for any fair comparison any figures taken from the graph, some figures would be actually more accurate for these studies than the actual studies themselves.

By Mr. Mayer:

908 Q. Your graphs are based on your observations or studies in Respondent's Exhibits 18, A, B, and C?

A. Yes.

Q. I will ask you again what in your opinion makes the $45.14 of the order No. 44576 a representative order of that amount which contained 20 shipped items, six cancelled items, and 29 packages upon one sheet.

A. The thing that I was interested in chiefly was the net billing and the cost of doing that work; the number of cancellations and the other items are part of the story but they are not, to me, the important part.

The important part is for any given billing, what was the net cost and that, I think, would be about the same under the same conditions. I doubt whether in a year's time you could get this exact, or duplicate it exactly.

Q. Then there isn't any assurance that this is any ways representative of a $45 order, is that correct?

A. The figures used—I think it is fairly—the conclusions are fairly representative.

Q. No; I asked about the order itself containing the number of orders, the packages, etc., not the conclusions you drew from the study.

A. I would say, so far as I know, that it is a fairly normal order and it would be about—

Q. How do you know that; that is what I want to know?

909 A. To pre-determine that would be almost impossible, but when you get through with a lot of orders and you get through with the drawing of your graphs and then if it comes fairly to that line, then you say it it a normal order.

Q. However, the graph you have drawn is based upon, in certain respects anyway, this particular $45 order, is that right?

A. That is one of the points on the graph, sure.

Q. How many orders of approximately $45 did you examine to determine whether or not this is a typical $45 order?

A. The only orders examined are the ones that are on the exhibit.

Trial Examiner Hier: The answer is, obviously, No. Mr. Dreyer, it would be impossible to determine the actual cost of filling the $45.14 order except by time clocking every order in that amount which came into that plant and was sent out; I mean determine it as a matter of actual fact.

The Witness: For any particular order it would be so with the exception that if you accept these graphs, which I think are right, you can get so close to the cost of processing that order that more time studies would not be necessary.

We use that procedure almost daily in our setting of wage incentive rates in plants. We could not make time studies of every job that goes through; they would be all out of line, but we do draw graphs and from those predetermined graphs we ascertain our time and the same applies to cost.

910 After a graph is established with the various subheadings you can get the net billing, etc. If you want to know what the total processing cost per dollar would be for a certain billing you can get it off the graph. In the long run it would be much more accurate than making another study.

Trial Examiner Hier: The direction and the pattern evidenced by the graph necessarily depends upon the 17 points through which that graph passes, is that right?

The Witness: They don't pass through it but they are close to it. In other words, you draw a median line through those points. Those points are all shown on the graph.

Trial Examiner Hier: But, for instance, in the case of 17 points, if 8 of those happened to be unusual orders where you had either stupid, lazy or some other kind of clerk, your graph would be necessarily influenced upwards or downwards in accordance therewith and would not accurately reflect that picture.

The Witness: If they were all off balance they would but normally the law of averages takes care of that. In other words, there would be just as many points above as below the line. In other words, in drawing a median line half way between or approximately, you do get the correct curve.

I don't say the curves for this thing or in your process-

ing they are correct 100% but I believe they are as
911 accurate as anybody can make them.

Trial Examiner Hier: They give an average, in your opinion?

The Witness: They give an average in my opinion and I think their value is far greater than the value taken from any particular study.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Mayer:

Q. Mr. Dreyer, directing your attention to Respondent's Exhibit 18B, and to orders which are numbered 44573 and 45945 I can't help noticing that they are similar in the number of sheets; there are 66 items of 44573 and 61 items on 45945; they both contain the same number of packages, 163, and yet the dollar amount of one is approximately $75 greater than of the other one.

Now, you would say, wouldn't you, that the figures then in the columns as they appear below both of those orders practically appear by happenstance, that you could substitute the headings on those two orders and it wouldn't make a bit of difference, so far as the chart was concerned?

A. Well, there are a number of charts, of course; whatever difference there is in these, I don't know where these differences come in; well, one took a lot longer to
912 type and another one took much longer to pack.

Now, some of these are the fault of the operator. Sometimes in packing an order, in raising the shelves over an aisle, sometimes there is considerable walking to do to get to the items; sometimes they have to reach up high to get to the orders. Whatever time they took, that is the time that is put down. Personally I didn't care whether it took five minutes or five hours to do the job; I put that down. Whatever it took, I put it down.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Mayer:

Q. Now, Mr. Dreyer, paying particular attention again to the same two orders, could you tell me what relationship there is, if any, between the numbers as they appear on the number of sheets column, the number of items column,

and the number of packages column, what relationship is there between those three columns and the net billing column?

A. First, I would like to have you go over that again.

Trial Examiner Hier: Repeat the question.

(The reporter read the question as follows:

"Question: Now, Mr. Dreyer, paying particular attention again to the same two orders, could you tell me what relationship there is, if any between the numbers as
913 they appear on the number of sheets column, the number of items column, and the number of packages column, what relationship is there between those three columns and the net billing column?")

Trial Examiner Hier: He wants to know if there is any particular relationship, upward, and the fourth item down.

The Witness: The differences, I think, are expressed better in the graphs than in any other way in which I can explain it.

Trial Examiner Hier: He didn't ask for differences now. He asked for relationship.

Mr. Sprowl: What items are we talking about?

Trial Examiner Hier: He wants to know the relationship between these items, the first three items reading down and the fourth item.

Mr. Sprowl: The number of sheets, items, and packages, as compared to the net billing?

Trial Examiner Hier: That is right.

The Witness: The number of sheets is affected in several of these steps, particularly in the typing, the checking, and the separating. The typing is affected by the number of items. The typing and the checking of the typing, the separating or the statistical, etc., are affected
in that respect. The number of packages, of course
914 that would affect the picking, checking the pickings and the packing.

As far as the totals go, as far as I know, it is a difference in the totals, themselves. I couldn't answer you definitely as to that without going into it deeply.

Trial Examiner Hier: Is there a relationship, in your opinion, between those first three items and the fourth item?

The Witness: Yes, I have expressed this not as a composite figure but I have expressed it here in Exhibit 21A,

for instance, the number of packages per order and the billing.

There is a straight line relationship between those factors according to the graph. In other words, the billing seems to be in direct proportion to the number of packages involved.

Trial Examiner Hier: All right; he has answered your question. There is a relationship, and that relationship is that the more the items, the more the packages, the more the picks, the greater the net billing; is that right, the straight line relationship, you said?

The Witness: That is right. The number of items is not a straight line. That is Exhibit 21B. That is a curve.

Take, for instance, for 40 items according to the graph, the net billing would be $200. For 80 items the net
915 billing would be $600.

There is a difference there, instead of being $400 which would be in direct proportion, it would be $600 and that is a large increase, an increase of 50% on the basis of 40 items. That is from this graph.

Trial Examiner Hier: Now, does that mean by shipments or items ordered?

The Witness: Items on the order.

By Mr. Mayer:

Q. Mr. Dreyer, as a matter of fact now, isn't it possible that the items appearing in the order 45945, i.e., the 3, the 56 shipped, the 5 cancelled, and 163, isn't it a fact that that could just as possibly have been over the total billing of $223.76?

A. You could have almost any combination depending on the value of each particular item. In other words, one item is a cheap item and another item is an expensive item which it doesn't cost any more to handle, and you could possibly have some combination like that.

Trial Examiner Hier: That doesn't seem to me to answer the question at all. Look at your graph there, 21A or 21B, whatever it is. Will you tell me what should a 66 item order be in net billing?

The Witness: A 66 item?

Mr. Schrup: To what are you referring?

916 Trial Examiner Hier: 21B.

The Witness: The 66 item, you say?

Trial Examiner Hier: Yes.

The Witness: That would be $430.

Trial Examiner Hier: It would be $430?

The Witness: Yes.

Trial Examiner Hier: Now, what should 163 packages item be in that billing of 21A?

The Witness: $260.

Trial Examiner Hier: Now, look at your 21B again, Mr. Dreyer, and tell me what a 61 item should be, in that billing? You figured 66 for me. Now, I am asking for a 61.

The Witness: $380.

By Mr. Mayer:

Q. Now, Mr. Dreyer, directing your attention to Respondent's Exhibit 18 and, in particular, to the net billing column which appears under order 45969, could you tell me from what source you got that net billing figure of $259.80?

A. I got it off the invoice; that is, the net invoice, after the deductions, after I imagine there was a 10% discount on that.

Q. Do you have the invoice with you?

A. I have not, no. All these net billings were taken directly off the typed invoice as soon as they were arrived at.

Q. Would you recall, Mr. Dreyer, whether or not 917 that might have been a total of two orders or—

A. In one combination there there were two orders shipped at the same time, but they were kept separate. The orders were not confused or not combined. The billing was for this one particular order.

Q. Were the orders combined, however, on the one invoice?

A. That I couldn't say, that is, as they were sent out. My recollection is that the two invoices were sent out separately but the two orders were stapled together. This might be the one. I don't remember.

They were shipped at the same time. One had been finished previously and the shipping clerk sent both of them in at the same time for typing but these were kept separate. I mean this amount, this net billing, applies to this particular order only.

Mr. Mayer: Can we have a little recess?

Trial Examiner Hier: Yes; we will take a short recess.

(A short recess was taken.)

Trial Examiner Hier: On the record.

By Mr. Mayer:

Q. Now, Mr. Dreyer, directing your attention to Respondent's Exhibit for identification 18A, B and C, I noticed that on each page, each Exhibit A, B and C sheet, the last two columns are headed: Totals and Averages, and I would like to ask you what was the purpose in
918 preparing the last columns on 18, A B and C?

A. Well—

Trial Examiner Hier: Are you talking about the horizontal or vertical columns?

Mr. Mayer: Vertical columns.

A. Well, for one thing they do provide a nice cross-check. In other words, you average the amounts for these different steps in a column and you total it up to a certain sum and you have the same for the totals for each order, and the total, and they check, and you have a nice cross-check of your additions.

By Mr. Mayer:

Q. Is that, then, the significance of those two columns, merely to check your totals?

A. There is no further use made of them that I can think of at the moment.

Q. Do you know if they are to be applied or used in any subsequent charts or studies that you might make?

A. Not unless I study the charts as called for. There are none that we have to present.

Q. There are none in the process of presentation either?

Mr. Sprowl: No. I thought I made it clear on the record. I meant to point out; I think the witness answered, these are just the projections of the totals and averages on each page and have no other purpose than the pur-
919 poses of his cross-checking.

By Mr. Mayer:

Q. Directing your attention to Respondent's Exhibit for identification 18A and in particular to your Step 1, which is described as opening mail, and then to the next two columns which are: Rate per minute and per hour, and the next two columns, the minutes and the amount.

Now, I note you used an hourly wage rate of $1.25 per hour. How many employees in the mailing room are there, Mr. Dreyer?

A. Well, I am a little vague on that. As I recall it, there were at that time four, but not all of them were involved in opening the mail.

Q. Then why did you use the figure of $1.25 per hour?

A. There was a certain average of the people involved in that. Ordinarily there were two girls at a low rate and another, a man, at a higher rate, one of two men.

The work was not too closely defined to any one person or persons,—the people who were available. Sometimes the manager opened the mail and sometimes he didn't. So $1.25 is about a fair average for the people who are involved in that work.

Q. And is that an averege of the four hourly wage rates of the employees in the mail room; is that the way you arrive at that?

920 A. I think Mr. Steele has the figures on that, in agreement with Mr. Ames; that figure was apparently changed after it was first established, from the looks of things here. I really don't have the figures.

Mr. Sprowl: Would it help you if you had your previous draft of this exhibit to look at?

The Witness: I don't think so. It might be so. It might have been changed a little bit. Yes, it was changed from $1.20 to $1.25. Mr. Steele and Mr. Ames averaged those rates of the people involved and they came to the conclusion that $1.25 was a better average.

By Mr. Mayer:

Q. Am I to understand that this rate of $1.25 on Respondent's Exhibit 18A is not yours?

A. It is mine to the extent that I was in at the conference. The figure that was first given to me was $1.20. When Mr. Steele and Mr. Ames checked those they found a discrepancy somewhere and it should have been $1.25.

Q. What was your basis of determining the $1.25 figure?

A. The $1.25 there was the average agreed upon by Mr. Steele and Mr. Ames in my presence. I answered that.

If the first figures as I mentioned before— The original figures were given to me either by the payroll department or the personnel department, or the office manager, in front, wherever I happened to be at the time; if I

921 had been at one place all the time, the figures would have been all the same, but I wasn't, so they weren't.

I accepted them. I probably should have checked them but I didn't, with the personnel manager; it didn't seem that there should be that much difference in the hands of different people. It so happened that there was. It didn't seem to be my fault exactly, but when they were checked by Mr. Steele and Ames they decided the figure should be $1.25. I was there and I accepted that the same as I did these other figures from the people who would know or should have known. They were all taken from some kind of a record.

Q. Now, Mr. Dreyer, it is my understanding then that the $1.25 rate is an average of the employees in the mail room?

A. It probably is, yes.

Q. Now, in your timing did you time all of the employees in the mail room or was one individual timed in the operation?

A. Well, in this particular operation there were probably three of them timed at different stages. In other words one opened the mail, some did some slitting, and another did the separating, etc. I don't believe that I put the names of the people down there.

Q. Directing your attention to Step 3, Mr. Dreyer, the credit approval step, I note that the rate per hour assigned to that step is $1.50. How did you arrive at the rate of $1.50 per hour?

922 A. We had quite a discussion. When I say "we", it was Mr. Steele, Mr. Ames, the personnel manager and myself on that particular thing. The man who actually does the work, and this was the one variation in the whole series of steps from the ordinary procedure, gets considerably more than that.

He is the office manager, but they weren't involved in the credit approval and it was estimated as being the minor part of his work, I mean under the conditions existing at Niehoff. On credit approval only he would not be getting the money he is getting at present and, between the three of us, my understanding is there was an agreement at $1.50 an hour would cover that particular phase of his work.

Q. Do you know what portion of his time was spent on credit approval?

A. The times I watched him they were probably less than half hour a day; there are times when he had to do considerable correspondence. I did not come in contact

with him while that was done, but his ordinary credit approval on current orders where it is mostly repeat work and the customer's credit is well established, amounts to initialing an order.

Q. All right, now, Mr. Dreyer, rather than Mr. Steele approving these particular amounts that we have been discussing, wasn't it a fact that he was rather there more on a basis of determining and checking the bases on which these figures were arrived at rather than saying that
923 these were the proper figures to be used in these instances?

A. Of course, he can answer that better himself but my opinion on that is that after the list was established, and between him and Mr. Ames, that he agreed that they were reasonable figures.

The fact of the matter is that even on the question of his credit approval if that office manager's higher rate had been used, it would make no difference in the comparative value of all these studies. It woud apply to every column and the difference wouldn't be there. The only difference is between these steps, between this particular step and some other step.

Q. We are attempting to determine just the basis at which you arrived at that $1.50 figure. I notice it was the same on the old exhibit as on the exhibit we identified this morning.

A. We did discuss it on the lines I mentioned and I thought it was accepted by Mr. Steele as being reasonably fair; I wouldn't say entirely accurate but reasonably fair.

Q. Mr. Dreyer, how many employees are there in the shipping office?

A. Well, there is a shipping clerk himself, and a typist, and there is another man who works on the shipping dock.

Q. And what are their wage rates?

A. Their wage rates, I wouldn't know offhand, any more. There have been changes in there. I think
924 the girl gets around 95 cents an hour; I think the man gets around, I believe it is $1.60. I am not sure about the figures. They were all listed and I haven't made any attempt to make a list of what the actual figures were.

Q. Does that represent an average; does that $1.26 represent an average of those three rates per hour?

A. I think it does, yes. There are either two or three involved there. I am not certain which; I think it is three.

Q. Now, did you use the average of the wage rates in Steps Nos. 9, 10, and 11?

A. Yes, 9 and 10 involved the weight base, and 11 are four male packers; their average rate was $1.

Q. These average rates were applied throughout the orders as they were processed and that is without regard to which individual employee was doing the particular work?

A. That is right; that is the only fair way of handling that.

Q. Now, directing your attention to the item: Perpetual inventory, on Respondent's Exhibit 18A and 18B and comparing the two orders, the last order on 18A, 44572 and the first order on 18B, 46162, do you have an explanation, Mr. Dreyer, for the comparatively large difference in the minutes column between the two orders?

A. No, I haven't; sometimes in that perpetual inventory she checked the number of files, and sometimes
925 she went through them once and sometimes several times because, in her mind, she seemed to think there should be something there.

That is one of those cases where I don't feel justified in using a stop watch. I mean it is part of her routine to be careful. It is part of her work. If it took that much time, it took that much time.

Q. It is entirely possible, then, isn't it, that the figures could be just reversed, the 6.55 minutes could be under 46162, and the 3.95 minutes could appear under 44572?

A. Yes, they could.

Q. Now, directing your attention to Respondent's Exhibit 18B and in particular to Step 5; Type sales order and invoice step, and in particular to the last two orders as they appear on that exhibit, i.e., 45945 and 46161, you will note a rather large discrepancy in the figures in the minutes column opposite the type: Sales order step of 10.80 minutes, under the order 45945 and only 5.60 minutes under order 46161. It there any particular explanation for that?

A. It just took that long in each case.

Q. And it is possible that the figures might just as well have been reversed, that the 10.80 might have been under the 46161 order?

A. No, there wouldn't be but one involved three sheets and the other one involved two sheets and there is a cer-
tain amount of handling in and out of the typewriter,
926 and that would be part of the whole picture.

Mr. Sprowl: Off the record.

Trial Examiner Hier: Off the record.
(Discussion off the record.)
Trial Examiner Hier: On the record.

By Mr. Mayer:

Q. Now, with regard to your last answer, Mr. Dreyer, I believe, however, in timing these people you weren't so much concerned with what should appear and how much time should be taken but were more concerned with the amount of time actually taken, is that right?

A. Actually that is right. For instance, in 10.80 the girl might have taken and made a number of typing errors and stopped to correct them. I consider that as part of the ordinary routine of her work and I wouldn't stop the watch unless it was something very, very flagrant where she ran away from her work for some time and then came back and corrected it.

Q. Directing your attention along the same line and comparing, however, this time, order 44573 and order 49545, is there any explanation that can be given for that apparent discrepancy?

A. Is that the same step?

Q. Yes, Step 5 in the minutes column.

A. No; there is no other explanation. Some op-
927 erators were fast, some were slow, some were accurate, and some made mistakes. All these factors came into that. I had no right to chop figures or change them because I could see whatever they took; whatever time they took I put down.

Q. However, in this particular instance it did take less time in one instance than it did in the other to type this sales order and invoice between the two orders?

A. There was quite a bit of difference between the girls involved. I don't think any of them earn enough. Some are much more rapid than others. Some are accurate and some aren't.

Q. These various figures, then, and the differences in time were due largely to the individual employee, is that correct, in the handling and packing?

A. Very often.

Q. Later, however, are these figures going to be considered in any basis which you are attempting to establish to relate various relationships or some type of relationship between the net billing part of an order and

the number of items contained in it, or the number of packages contained in it?

A. Only so far as these graphs are concerned, which you have already seen.

Q. These graphs, however, are not quite only in so far —but they are in so far as you are attempting to establish the relationship between that billing and the number 928 of packages and the number of items, is that right?

A. I am afraid you would have to repeat that. I am not trying to evade it. What I mean to say is there are no other figures that are to be offered which include any of these excepting the figures on the graph itself and those are mostly totals and averages of the complete orders and are not individual operations.

Q. But these figures which appear on Respondent's Exhibit 18B are figures which you are taking into consideration in determining the averages, are they not?

A. Inasmuch as they affect the totals, yes.

Q. In other words, then, under order 44573 the figure we have just been talking about, 7.50 minutes, might just as well have been 10.80 minutes, is that correct?

A. It could be. The law of averages again comes in there when you have 21 steps involved.

Q. Now, directing your attention to the back order column, No. 11, the same two orders, 44573 and order 45945 on Respondent's Exhibit 18B for identification, in the Minutes column, similar to our last comparison, could you explain the difference there with the 23 minutes and the 36.50 minutes?

A. No, I cant. The packing, again, is something where the individual operator comes there and he may have taken more cases, more boxes to fill. He may have packed them and readjusted. I don't know. That is part of their routine work.

929 Q. You must have considered it routine or representative?

A. Yes; I figured in those cases those were the times the operator gave me and those were the times he did actually use.

Q. These times, however, as I understand it, weren't given in by the operator. You did it yourself.

A. What I mean by giving them to me, I did it then, in that respect.

Q. It is possible that the 36.50 could have just as well

appeared under 44573 and 23.0 under 45945, as the way they appear on the chart, is that correct?

A. Well, with some due respect to the proportion of the items shipped and the number of the packages, I would say yes.

Q. Well, the number of packages on these particular orders happen to be the same, don't they?

A. Yes.

Q. Actually, then, there isn't any particular reason why the two figures couldn't be just reversed, isn't that true?

A. That is true of many instances.

Q. Directing your attention to Respondent's Exhibit for identification 18C and, in particular, to your Step 14 and 15, assign invoice number, and type invoice, and with relation to invoice 45301 and 45079, more particularly to the minutes column under that heading, could you explain any reason for that apparent discrepancy?

A. Well, the typing of the invoice was probably
930 the most important factor and one involved five sheets and the other one, 45079, involved four sheets.

The number of items typed in one case, 45301, was 120 and in the case of 45079 it was 122, which would be about the same. The chief discrepancy there was in the number of sheets. Why it took five sheets in one and four in another, I cannot explain and the other discrepancy would be in the skill of the operator. That varied quite a bit.

Trial Examiner Hier: When you say discrepancy you mean variation?

The Witness: Yes.

Trial Examiner Hier: Discrepancy has the connotation of an error. But you mean the time in action?

The Witness: Yes.

By Mr. Mayer:

Q. These billing girls, the girls who assigned invoice numbers and typed the invoice are paid the same rate, isn't that true?

A. Yes, they are all paid the same.

Q. Now, directing your attention, Mr. Dreyer, to Respondent's Exhibit 18C for identification and more particularly to the two orders headed 45078 and 45301, looking at the headings I find that the 45078 is the smaller order in all respects, four sheets as opposed to 5, 81

shipped as opposed to 101 shipped, 334 packages as compared to 623 packages, net billing of $523.22 as compared with net billing of $785.80.

931 Now, directing your attention to the typing of the sales order and the invoice column and with particular regard to the minutes column under the two orders, I wonder if you could explain that for me where the one figure shows 24.50 minutes and the other shows 20 minutes.

A. Typing invoices? In our shipping account there is a big difference in the girls involved, the way they did it, the erasures they made, etc. There is no explanation except that that is the time it would take.

Q. Would that also apply to the figures just above those in the Step 4, Perpetual inventory column, where it shows 10.95 under the order 45078 as opposed to the 9 minutes in the column under the order 45301?

A. Yes, it would.

Q. Now, does the same girl keep the perpetual inventory at all times?

A. There is a girl in charge and she has several assistants. In one instance one of the assistants helped here and I don't know what instance that was any more. It didn't amount to anything.

Q. That would be the only one instance of all these?

A. Yes.

Q. However, in the other 16, one girl did them all?

A. Yes. She is one of the most capable girls in the entire organization, too. Still her time is not consistent.

932 Trial Examiner Hier: Discussion off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Mayer:

Q. Now, Mr. Dreyer, directing your attention to Respondent's Exhibit for identification No. 19, those particular documents do not disclose the net billing, do they?

A. They do not.

Q. And where were the net billing figures obtained that you have used through the Respondent's Exhibit 18, A, B & C?

A. They were obtained from the invoices which were typed at Step 15. In other words, this same form was used, rather a number of copies taken from the file, inserted in the machine, and the price per item, and the total

for that item extended, and the total for the entire order might be three sheets down, and that was written over here with any discount, and the net billing, and I took the net billing.

Trial Examiner Hier: Respondent's Exhibit 19 comes from Step 5, doesn't it?

The Witness: Yes; that is where it comes from.

Trial Examiner Hier: And the net billing came out of step 15?

The Witness: Yes, but there are enough copies made of Step 5 to use in Step 15.

By Mr. Mayer:

933 Q. What was your purpose in preparing Respondent's Exhibit 19?

A. To check the quantities and the number of items, chiefly.

Q. Was there any reason for not submitting the invoice that showed the net billing prices of the items involved?

A. No; I thought the figures taken from the invoice itself would be sufficient. They are on file. I mean, they are all available so far as that goes.

Q. Now, Mr. Dreyer, directing your attention to Respondent's Exhibit for identification 21A, would you describe for us in detail the steps which you went through in the preparation of this exhibit?

A. The number of packages for every sales order was obtained from Niehoff records, I believe chiefly distributors price list which shows the number of items per package, and the number of packages for each order then was determined by adding the number of the packages needed for each item, and the total number of packages was then recorded in the third column of this Exhibit 21A.

The net billing was obtained from 18, A, B and C, as were the sales order numbers. Now, each point for the net billing and the corresponding number of packages is shown on the graph itself and after all the points were in, a median line was drawn.

Trial Examiner Hier: Off the record.

934 (Discussion off the record.)

Trial Examiner Hier: On the record.

The Witness: At any rate, the points as determined by these figures indicate that the line should be where it is shown on the chart.

By Mr. Mayer:

Q. Now, would you go through and describe for me in terms of net billing the median that you selected or how it was arrived at, to determine that your line should be as it appears on this chart?

A. Each point was determined by actual plotting. After all the points were on the sheet by visual examination the location of the median line was determined.

Q. This was just a visual determination of the median line?

A. Yes.

Q. It is not a result, then, of any calculation, really, a mathematical determination?

A. I wouldn't know about it, either, Mr. Mayer, if you tried it. I know something about the equations for straight lines and everything like that and the determination of the angles, etc.; I don't know how it could be applied here excepting by visual determination.

Q. Now, directing your attention to what appears to be the last dot furthest right on my exhibit which appears about 625 packages, about, and about $795, does that show up on yours?

935 A. Yes.

Q. Now, drawing the visual line, is the course of that line as it appears immediately above that dot, dependent upon the location of that dot?

A. Partly; there is also, you will notice here, for a valuation of $846, and 469 packages; there is a point quite a bit above the line.

Trial Examiner Hier: You mean to the left?

The Witness: Above and to the left. There are others again all the way down, some are above and some are below. Well, in trying to draw a fair median line in between it is determined by the location of those points, and I really think if you had 20 or 30 more points, the location of your line would not vary to any worth-while extent.

By Mr. Mayer:

Q. That is a matter of your own opinion?

A. It is a conservative opinion on my part.

Q. The last dot you spoke of, the $846 item, is that being compared to any other item as it appears upon this graph?

A. I am afraid I don't understand you.

Q. The line, as I understand it, is a median drawn between several points, is that not correct?

A. Yes.

Q. What is the relationship between the $846 net billing item and the $785 net billing item which deter-
936 mines that this line should proceed approximately 50% of the way between each of them.

A. I don't know that there is any definite relation. These lines are determined, as I explained before, all of the points are plotted and then, visually, with a certain amount of care the line is plotted. We try to get the pluses and minuses below the line to average out.

Q. In drawing this visual line, this median line, as you described it, does not depend for its accuracy, its authenticity, upon the fact that these dots as you have them located upon this chart represent representative orders of the C. E. Niehoff Company?

A. That is approximately right, yes. The reason for drawing any graphs is that no matter how representative an order may be, there will still be variations and it is to eliminate any discussion of those variations that these graphs are used.

Q. Now, Mr. Dreyer, according to this graph in explanation of it, I wish you would please tell me what would be the normal number of packages according to your graph, for an order of $850?

A. 550.

Q. It would be 550 packages?

A. Yes.

Q. Now, personal selection of the representative
937 order of the Niehoff Company, how many packages in fact did you find for an order of approximately $850?

A. The records show about 470, 469.

Q. In other words, you are coming to an average or a figure by use of this graph which is denied by the representative order which you selected from the Niehoff Company, is that correct?

A. If you take one example of that nature, yes, but if you take several examples you will find that they are positive in one case and negative in another.

Q. How many examples did you take, Mr. Dreyer, of orders of $846 from the Niehoff Company to determine the representative number of packages in these orders?

A. Well, for that purpose there were none taken, so far as I know. There were none taken for that particular

purpose but it did turn out that in an order for $846 there were 469 packages involved.

Q. I can't help but note that the visual line as you have conceived it is a progressive one from zero to 650 up to 1,009 of net billing. However, on your net billing columns for the orders which you examined, they are not progressive in all instances.

Can you tell me how the line as you have it drawn here on the graph takes care of that particular situation when the number of packages is not progressively greater
938 as the orders increase?

A. Well, there is a certain amount of mathematical theory involved in that and that is the equation for a line is, I don't know whether you are familiar with it: x = mx plus b, where m is the slope of a line which is determined by dividing the distance above the line by the corresponding distance horizontally and b is the distance where it cuts the vertical axis over the zero zero point which, in this particular case, would not exist, but the very nature of these things where all of the first equation would determine that that graph no matter who drew it, would be a straight line.

In other words, where you get two different factors, where you get into squares, then you would get an ellipse or a circle or some other thing involved, the higher denomination of a number. Do you see what I mean? From the nature of a number of things involved it would still be a straight line.

Q. Why, in this instance, did you use the visual median method instead of any of the other methods you listed? I take it you didn't use any of the other methods you just enumerated?

A. No; you would have to get into quite a bit of calculation to do that. In other words, if you take all these points, say, up to 350 packages and did it that way, there can't be much argument about a straight line there.

939 Q. But did you do that? Did you make the calculation?

A. It was not a question of calculating. In other words, I could have taken that line and then determined the slope as long as the line would be continued anyway. A straight line always is in just one direction; there wouldn't be anything else to that.

Q. Would it be fair to say, Mr. Dreyer, that this chart

reflects that none of the orders which you selected from the Niehoff Company was an average order with relation to the number of packages when they are related to the net billings? Would it be fair to say that?

A. You can put it this way, that none of these points fall exactly on the line which would be equivalent to your question, I would say Yes.

Q. You would say Yes to my question, then?

A. None of the points fall exactly on the line; some fall close to it.

Trial Examiner Hier: I didn't hear the answer to the question.

The Witness: As I understand it, the question was whether or not the values used in these studies were the same as on the graph.

Trial Examiner Hier: Do you mean average in the sense of representative?

Mr. Mayer: Yes.

940 The Witness: I think they do show they were representative for the simple reason if they weren't the curve wouldn't have developed as it did. This curve is a straight line.

Trial Examiner Hier: It is a straight line.

The Witness: It is a straight line. They call a straight line a curve, too.

By Mr. Mayer:

Q. In view of that answer, directing your attention to the orders numbered 46162, as it shows on Respondent's Exhibit for identification 21A and the order numbered 44577, which are comparatively the same in that billing, how do you express the relationship of the number of packages in that? What would the chart show with relation to that?

A. The chart would show that one of those was certainly not too close to the line. The purpose of making a graph of this nature is just to overcome the differences in the analysis of a series of orders.

In other words, if you used any other of these number of packages against the net billing in arriving at some further step you would not be likely to represent as close to an average condition as if you used a graph which is the median line of the various orders studied.

Trial Examiner Hier: Is this a fair statement: The

farther away a dot is on any of these graphs from the
941 line, the less representative it is, in your opinion?

The Witness: Well, it would be less representative to the extent that I would not want to use it to further any other analysis. In other words, again I would like to say that the main purpose of a line graph of this nature is to just avoid the variances that come in through these studies where one element or a combination of elements might throw the point quite a distance off the line.

In other words, it would be fairer, in my estimation, if you wanted to consider the fair net billing in the Niehoff Company for 500 packages, to use the point opposite the 500 packages, than it would to take the closest figure to 500 packages here and pro-rate it.

Trial Examiner Hier: That is the next question I was coming to. This median line on 21A is more valid and more clearly supported by the orders, or, stating it otherwise, the orders are more representative up to that point where the coordinates are 540 for net billing and 350 for the number of packages, than it is beyond that.

The Witness: It is more closely supported, yes.

Trial Examiner Hier: And, e.g., it follows that the orders above that as to the number of packages are less representative, is that correct?

The Witness: It could be, in relation to this graph,
yes. But the differences still would be compensating,
942 in that the number above or the number below would sort of balance one another.

Trial Examiner Hier: On that point, let me ask you this, while I already have interrupted your examination. When you get up here to where the coordinates are 540, horizontally, and 800, vertically, you have there three dots, one to the left of the line and two to the right of the line.

The Witness: That is right.

Trial Examiner Hier: Now, did you weigh—the fact that there are two dots to the right of the line, did that swing the line to the right; did you give additional weight to the direction because of those two?

The Witness: A little bit. One naturally would. The weighted results of having more below the line would tend to swing the line downward.

Trial Examiner Hier: Is this a fair statement: that the distance of the line from the dot to the left is, so far as you could make it, the distance from the line to the median point between the two dots to the right?

The Witness: It is about right, yes.

By Mr. Mayer:

Q. I didn't quite understand that, Mr. Dreyer; I understood that this was done visually, not by measuring the distance between the two dots.

A. It was not by eye measurements, whether you
943 use a scale on them or the eye, I don't think the points would be any appreciable distances apart.

Q. The point is I am trying to establish, for accuracy's sake, how actually it was done. Did you do it visually?

A. It was done visually and then checked, put it that way.

Q. Now, directing your attention to Respondent's Exhibit for identification 21B, now, would you describe for me the steps through which you went to arrive at this particular chart?

A. Yes, the number of items again there, were obtained from Niehoff records, and they are shown on the exhibit. They are also shown on the 18A, B and C, and they were plotted against the net billing, the dots as obtained from 18A, B and C, and again a medial line was drawn. In this case it was not a straight line. It was a curve.

Mr. Mayer: Mr. Examiner, may we be off the record?

Trial Examner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Mayer:

Q. Now, Mr. Dreyer, just how was this line drawn on the graph, is this another visual one?

A. Most graphs are visual graphs, and in my experience a large percentage of them in this type of work are visual graphs.

Q. You mean the distances were determined by visual approximation?

944 A. In other words, your says here: Your line should be about here (indicating on paper). After the line is drawn, you check and see whether it shouldn't be a little bit up or down and that is what I mean by visual determination.

Q. Is it possible, then, that if anyone else drew this chart with the same basis drawing it visually he might have drawn a line a little bit off one way or the other?

A. Absolutely.

Q. What would be the variation that might be made?

A. I think if an engineer with a training like my own it would be probably the same. People with different training it would be quite a bit different. I think from an engineer-viewpoint, I think most engineers with experience would get very close to this line in working the way I did.

Trial Examiner Hier: In any events the dots are on the graph and anybody can work from those dots.

The Witness: That is right.

By Mr. Mayer:

Q. Now, I believe you mentioned a moment ago that several times the dots came right on the line. I don't seem to find any on my chart.

A. There might be on some others. There might not be any on this chart.

Trial Examiner Hier: I was speaking of 21C.

By Mr. Mayer:

945 Q. Now, Mr. Dreyer, directing your attention to the sales order 45301 with a net billing of $785.80, now, according to the terms of this chart which you have drawn for us, how many items should have been contained in a $785.80 order?

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

A. About 93.

By Mr. Mayer:

Q. And how do you explain that the dot when it shows an actual $785 shows a number of items of 101?

A. It is the same matter of variance in the composite composition of the billing. The errors are plus or minus the differences in the handling, and the various other factors that come in there.

It is for that reason I would like to emphasize again that these graphs are drawn for any specific comparison that is to be made as to the number of items per order and the net billing. It is fairer to use a graph of this type than it is to use any figures which contain variances due to personal abilities, etc., and to pro rate them. It is much simpler to use a graph than to use that other method.

Q. The number of items per order would have nothing to do with personal efficiency?

A. No, but the net billing, which is the other factor, would.

946 Q. Is the net billing made according to the personal efficiencies of the personnel which handle the order?

A. Yes; naturally the personal efficiencies come into all of the 21 steps. No, that is the net billing, isn't it? I was thinking of the cost. No, the number of items worked in there, the reason why these things change is that in the larger orders, why this is a curve instead of a straight line that a larger customer, he will order not only more items but pack a larger quantity of the same item.

Q. That is the very point. Is that your conclusion from a study of the Niehoff records or your timing service in the Niehoff plant, or is that the conclusion you are attempting to draw from this particular chart?

A. No, I think that is from a rough analysis of the orders sent in.

Q. The 17 orders?

A. Yes. I have no definite figures to substantiate that, but that can be obtained.

Trial Examiner Hier: I don't think that question has been answered. Personal efficiency has nothing to do with Respondent's Exhibit 21B and variances thereon?

The Witness: That is right.

By Mr. Mayer:

Q. The only efficiency would be the drawing of the line which you say can be drawn by any competent engineer?

A. That is right.

947 Trial Examiner Hier: Personal efficiency and the 21 steps.

By Mr. Mayer:

Q. Am I proper in this connection in thinking that the $785 order of 45301 which contains the 101 items was an extraordinary order?

A. Well, there was something in the order which I certainly cannot explain to you where the number of items, the value of the number of items certainly was not the same as for any other combination; there might be any combination of 101 items which might have a valuation of $800 or something like that.

Q. It also might have a valuation of $200, might it not?

A. It could be, but I mean on an average,—that again

is why a curve of this nature is more valuable than an analysis because if you take enough studies, and I think 17 were fairly representative, then a curve of this nature would give you a much clearer picture than a pro rated analysis of any given study.

Q. As it turned out, however, the $785 order was or was it not in your opinion an extraordinary order with regard to the number of items which it was included in?

A. It certainly did not hit the curve. It varied from the curve quite a bit, yes.

948 Q. It was that variance from the curve which really determined that the curve should go where it did, is that correct?

A. It helped. That is one of the points, naturally.

Q. Then, wouldn't it be essential that a determination be made that the 17 orders be selected to represent the representative sized order with the number of items in it in order to draw a graph of this kind?

A. If you have 50 items the curve in all probability would be very close, in the same position.

Q. That is your opinion, from only the selection of 17 orders?

A. That is right.

Q. Now, just by way of reducing it down, supposing all these net billing orders here had been one item, what kind of a graph would you have made for that particular selection of 17 orders?

A. I probably would not have made any.

Q. It would have been a dot. But the graph is attempting to express a relation, is it not, between a number of items and net billing when it is based upon a selection of invoices which were selected at random by yourself, is that correct, with Mr. Geyer?

A. Yes.

Q. In your original selection was there any attempt to select the number of items in some relationship to the net billing?

949 A. There was no way I could have done it because I had no knowledge of the value.

Q. You did discuss this with Mr. Geyer about the selection?

A. I always started by telling him I would like to have an order in a certain priced group and he would give me an order which he thought was in that price group and he hit it pretty well.

Q. That is, from your analysis of the 17 he seemed to have hit it pretty well?

A. That is right. That is all I can judge by.

Q. Did you tell him to eliminate the orders which had these service cabnets in them and the various stocks?

A. In the preliminary discussions as to what was to be done. In other words, if you take one order with a service cabinet and try to compare it with another order which hasn't a service cabinet and take another customer who takes a service cabinet once, and then doesn't, it throws the picture out of kilter.

Q. You did mention to him that you wanted that type of order?

A. I don't remember mentioning it to him but if he had given one of those to me I would have asked him why. I don't remember whether it was brought up. But, personally, I didn't think it was a thing which fitted into the picture. It was one of these things that throw one off
950 rather than help in the analysis.

Trial Examiner Hier: You said that before; now you said throw things off, and once before you said throw the picture out of kilter. What do you mean by that, that you were trying to get a picture here, or do you mean to imply that the order of these service cabinets was so rare per customer or so incidental that orders containing service cabinets as to that customer was not in a normal order of business?

The Witness: They were not in the normal order of business because in all probability they would not be repeated. A cabinet lasts a very long time and all the customer does is have it rebuilt. As he sells the items out of the cabinet, but he re-orders, but he doesn't want a new cabinet, unless he expands his cabinet.

Trial Examiner Hier: As I understand the question, the 17 orders which are basis for these exhibits contained in no instance any service cabinet.

The Witness: Not that I recall.

Trial Examiner Hier: Secondly, were service cabinet orders or orders containing service cabinets excluded from the sales of the 17.

The Witness: They were not used. As I said, I am not sure in my mind whether or not Mr. Geyer and I discussed it, but if he had offered me some, I would have
951 told him I preferred one without.

Trial Examiner Hier: You would have thrown that out?

The Witness: Yes, I would. Because that would not have been in line with the other studies and they would certainly lead nowhere.

Trial Examiner Hier: While I have you here, let me ask you this: Supposing these dots when you put them on the paper here had been as much as 1½ or 2½ inches apart from where you thought the line should go, would you then have determined that the orders that had been selected, as you say, by random, would be so unrepresentative that they would not have presented a good picture?

The Witness: I would have said that there was no relation between the number of items per net order, had that been the case.

Trial Examiner Hier: Would you say the further the dot is from the line the less representative it is?

The Witness: In most cases I would say yes.

By Mr. Mayer:

Q. Then, Mr. Dreyer, in making the explanations to Mr. Geyer such as the throwing things out of kilter did you have any pre-determined ideas as to what results you wanted to accomplish?

A. No idea at all. I just went at it step by step. In other words, when I began to plot this I saw how it
952 was working out. If it had worked out as Mr. Hier mentioned, a miscellaneous group of the dots like one of the nebulae or something like that, I would have said there was no relation between the number of items per order and that billing, but the location of dots would seem to indicate there was.

Q. In relation to order 45301 what does the chart show with regard to that order? What is your deduction with regard to the number of items as contained in that order?

A. I think we went over that. It seems to me it was 93. Wasn't it about 93?

Q. Do you have any particular reasons why in this instance it was 101 in the actual order?

A. It was chiefly a question of the value of the different items. In other words, one item in one category, one order may be 20 cents apiece and in another one it might be a nickel apiece.

These were the ties-in again with some of the others and where the ratio is fairly definite, the packages per order, for instance; it is a building up step by step of these graphs where their value comes in.

Q. Is it your opinion that 101 items for a $785 order was considerably over the average, then, of items for that building that should have been contained in a billing of $785?

A. Yes, it should have been around 93.

953 Q. Do you have any representative orders of the Niehoff Company that shows in actuality that, running at about $785, they run about 93 items?

A. I have not, no.

Q. Did you make any attempt to determine from the orders?

A. No.

Trial Examiner Hier: These two exhibits upon which counsel has been examining you, 21A and 21B for identification, strike me this way that the direction of the line of the graph seems in each instance to be determined not definitely by the smaller orders, that is, that there is more distance from the line in the larger orders than there is in the smaller orders and, therefore, the larger orders will probably be less representative than the smaller orders. Is that a fair conclusion?

The Witness: No, I don't think that that is it, exactly. I think it was just a question that there were quite a few more orders studied in this smaller group. In other words, between nothing and, say, $350, there were 12 orders.

Trial Examiner Hier: I have this here, four orders, $1 to $100; 2 at $100 to $200; 2 at $200 to $300; 2 at $300 to $400 and from then on you don't run more than 1, except in one instance, 2 in $100 brackets.

The Witness: That is right.

Trial Examiner Hier: Well, are you satisfied in
954 your own mind that if there had been more of the larger amounts studied with reference to these two graphs here, that the line would be exactly where it is now?

The Witness: There might be a slight variation but approximately the way it is. I don't believe the variation would amount to more than a little bit either way.

By Mr. Mayer:

Q. All right, now, Mr. Dreyer, directing your attention to Respondent's Exhibit 21C, would you tell us what steps you went through in making this chart?

A. Well, the net billing and the sales order number and

the total processing cost per dollar of invoice were all taken from Exhibit 18, and there was entered each sales order and the net billing and the total processing cost per dollar net invoice was recorded, and the net billing was found and the total processing cost per net invoice was shown on the chart.

Q. Would you express mechanically how you drew the line which appears on the graph?

A. Again there is a question of the dots. Here is one, at the extreme right end of the graph which coincides with the line.

Trial Examiner Hier: That is that $12 order.

The Witness: Yes, and there is a $37 dollar order which necessarily coincides with the line. All the others were shown and again they were drawn visually and
955 then they were checked and there might have been slight refinements from the original. I don't recall that. Probably there were.

By Mr. Mayer:

Q. Mr. Dreyer, would you explain to us how you determined visually why the curve should run as it does between the 2 cents and the 6 cents, where it appears that the majority of the orders are below the visual line?

A. Well, it seemed to me when they were drawing that, that in the first place when a curve is drawn there is practically no curve which goes in a zig-zag fashion unless you get production z-curves.

The curves of this nature are practically smooth-flowing curves and that was taken into consideration when that particular curve was drawn. In other words, you will see that quite a number of the dots are to the left and below the line. The number exceeds those that are above and to the right of the line.

An attempt was made to average up those spaces. It could be that someone else might possibly shift the line a little bit one way or the other. This is my opinion as to where the line belongs.

Trial Examiner Hier: While we are right on that point there, except for the terminal point of $846.66 order, I see nothing to the left of the line until you get down to $275 whereas I see five dots to the right of the line
956 and some of them considerably to the right of the line?

The Witness: Yes.

Trial Examiner Hier: Why is it that the line starts where it does, at $846.66? Why is that regarded as so representative as to determine the starting of the line rather than the next lower order $811.57?

The Witness: It is not. The $846.66 is still to the right of the line.

Trial Examiner Hier: Why is the line to the left? I don't see any dot to the left.

The Witness: That is right. It is because the weight of the dots to the left and below pull it that way. It is sort of a pull arrangement. Now, some one else drawing a line might have possibly drawn it a little bit more at the top of the line a little bit more to the right.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Mayer:

Q. You used a moment ago the term, a little bit this way and a little bit that way, and I was wondering in describing this particular line in Respondent's Exhibit 21C how much a little bit would be, whether you would move it over—

A. About a half a space, half a square or something like that. I don't think it would be more than that.

957 Trial Examiner Hier: You are referring to one of these smaller squares?

The Witness: Yes, one of these smaller squares. The uniformity of the degree of slope always comes into this kind of curve.

Trial Examiner Hier: You try to keep your curves or slopes parabolic rather than annular?

The Witness: That is right. We actually do because that seems to be more in the nature of things.

By Mr. Dreyer:

Q. Now, Mr. Dreyer, am I correct in saying that this chart is an attempt to show a relationship between the net billing of the sales orders which you analyzed and the total process cost per dollar of the net invoice?

A. That is right.

Q. Now, in this total processing cost per dollar of net invoice it also includes, doesn't it, the efficiency of inefficiency of the various operators and so forth within the plant itself, is that right?

A. Yes, that is how I confused it before when the point came up.

Q. Aren't we actually then comparing in this particular chart the total processing cost which includes the various variances in the different operators, the different workers as you timed them, in declaring a relationship between
958 the efficiencies and inefficiencies to the net billing of the invoices involved?

A. It is part of the picture.

Q. But isn't it being compared in this case to the net billing of these 17 orders which you selected?

A. Not necessarily because I know the law of average comes in there. These total processing costs per dollar of net invoice include 21 steps and again there some are good and some are bad, and some are indifferent, but they average out as far as the total picture is concerned. They average out approximately. That is why I say again a curve sort of irons out these inequalities, these inefficiencies for any further use.

I mean, if you want to use this sort of comparison it is better to use a curve than it is to use these actual study figures because of those inequalities due to inefficiency or whatever other factors you want to mention.

Q. The curve you are drawing, however, is based upon your individual studies?

A. On the 21 steps, yes.

Q. I cannot help noticing that the $12 item involves the line, and I was wondering why the other terminal isn't on the line, the $846 item?

A. Naturally you get the next lower step is a little bit above the line and again you would have this drawn somewhere in between there and it might possibly, if
959 you had a dozen more studies it might be a little bit above or below the point determined by this graph; on a $12 item, it wouldn't be very far off.

Q. By very far off, you mean what?

A. It would almost be the same if any new graph were superimposed on this one.

Q. That is true of the 17 orders?

A. Yes.

Trial Examiner Hier: Are you through with this exhibit?

Mr. Mayer: Yes.

Trial Examiner Hier: I think we will quit, then, and come back tomorrow. It is about ten minutes to five.

(Whereupon, at 4:50 p.m., November 5, 1951, the hearing the above-entitled matter was adjourned.)

960 Room 1600, 173 W. Madison St.,
Chicago, Illinois,
Monday, November 6, 1951.

Met, pursuant to adjournment, at 10:00 a. m.

Before Frank Hier, Trial Examiner.

Appearances:

E. P. Schrup and Francis G. Mayer, Attorneys for the Federal Trade Commission.

Charles R. Sprowl, 134 South La Salle Street, Chicago, Illinois, Attorney for the Respondent.

961 Proceedings.

Trial Examiner Hier: Go ahead.

LOUIS DREYER resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Mayer.

Q. Directing your attention to Respondent's Exhibit No. 21-C, is it not so that if all the invoices and sales orders had been tabulated, or a representative number of samples of the total number of sales orders of the C. E. Niehoff Company, would not the exhibit reflect the situation where as many dots would appear above the line as appear below the line?

A. It is not so much the number above or below as it is their spacing; and I think if you had increased or doubled the number of exhibits, the shape, position and location of the curve would still be the same.

Q. That is based on your observation of these seventeen orders?

A. That's right.

Q. Would you, in the visual process, pay no attention to the number of dots which are going to fall above or below the line?

A. The graphs are drawn visually and then they are checked. These final graphs may be the result of several

preliminary graphs, and the final graph would make the spacing about in an average location.

962 Q. If I understand this correctly, there is no regard placed as to the number of dots above the line. The intent is to get a median located curve in the final analysis, so that the spacing of the curve would be uniform.

A. There might be more dots below the line than above or vice versa.

Q. How do you determine the median taken?

A. Through visual analysis, if you want to call it that. In other words, you see where the dots are located and you try to draw a line not exactly half way, but somewhere half way between. I mean that the dots are so located that the relation between the dots below and above the line would be an average. In all cases, it doesn't work out that they come out to exactly half, because that would be sort of a mathematical miracle; but you do try to get them somewhere near that.

Q. In establishing the curve on the basis which you estimated it, if every invoice would have been selected, it would have resulted in an even number of dots above and below the curve, would it not?

A. Not necessarily, because of the nature of the billing. C. E. Niehoff & Company is unique in the respect that the billing is more closely in proportion to the number of items than are any other companies. However, there is still a slight variation because of the pricing of the article, etc., which would effect the total process and cost per dollar, and which would effect the total proc-

963 ess and cost per dollar, and which would probably result in either more dots above or below the line.

Q. I believe in your last statement, Mr. Dreyer, you mentioned that C. E. Niehoff & Company has a closer relationship between its net billing and the number of items per order than other companies. I want to know your basis for making that statement?

A. It begins, of course, with the number of packages per order, and the Niehoff Company is rather unique in this respect, in that the packages are rather uniform in size and within a fairly normal price range per package. This is not true in every instance, but nearly always. Take, for instance, in the factory billing or in the machine shop, they might have one package per order, involving a few cents; and one package per order that might involve thou-

sands of dollars; and you might have any combination of prices, and, therefore, a close relation between the billing and the number of items per order could not be made for that particular company. In some cases, you might have a package containing some kind of fertilizer that sells for a high price, or you might have a bale of straw that sells for seventy-five cents or a dollar, and you try to make a comparison in a company handling things of that sort, and you would get nowhere. But with Niehoff & Company, most of the packages are three inches in cross section, and nine inches long, approximately, and you go down from
that to zero; and most of the packages of the orders
964 that are sold here are of that nature; so because of
that factor, you can develop curves of this type. There are other companies in which you simply cannot do it.

Q. Mr. Dreyer, I understand that the initial study was based upon the total cost of processing an order; and that that cost would be determined by you, regardless of the size of the order or the number of items or packages involved in the ultimate processing of that order, is that correct, sir?

A. Let me ask you to repeat that.

Q. I understand that your initial study was based upon the total cost of processing an order; and that the cost would be determined by you, regardless of the size of the order or the number of items or packages involved in the ultimate processing of that order, is that correct?

A. The studies were made on that basis, yes. The orders were taken as they came—I mean in the price ranges—and the studies were made, regardless of any other considerations, that is true enough.

Q. And in selecting the orders, together with Mr. Geyer, no consideration was paid to the number of items taken, or the number of packages which would be necessary in completing a particular order, is that correct?

A. The basis on which I asked for orders to be given to me was the price range; and that, normally, would
mean the higher the price range, the higher the ulti-
965 mate cost of processing the order, and the more packages involved; that is normal.

Q. Well, how do you know that is normal for C. E. Niehoff & Company? What is your basis for that statement?

A. Examination of many orders.

Q. I thought this cost study was more or less confined to the processing cost of only seventeen orders?

A. That's true, but in going through the factory, and in my familiarity with it, I saw many, many orders, constantly, every day, and they were pretty much the same day after day.

Q. What do you mean, that they were about the same thing, day after day?

A. I mean in looking over the size of the orders and the number of items involved and the number of packages for each item, and the quantities ordered of each item, in looking over them, you see about the same picture, constantly.

Q. Did you examine the invoices to determine the various number of items and packages that would be contained in a whole order, and also determine the cost of it, to make the statement you are making about the relationship between the billing and the number of items etc.?

A. I did in the study—

Q. No, I mean the ones you mentioned outside of the seventeen orders.

A. No, sir, I didn't; at that time they were not analyzed.

Q. Do you have any idea concerning the prices?

966 A. The prices in what?

Q. In later making the statement that Niehoff & Company has a closer relation between the billing and the number of items than most other companies?

A. That was based on the seventeen orders.

Q. In other words, your statement is limited to the seventeen orders you processed yourself in this analysis?

A. That is true as far as any definite analysis is concerned.

Trial Examiner Hier: Mr. Dreyer, have you made manufacturing cost studies for Niehoff & Company?

The Witness: Oh, yes, many of them.

Trial Examiner Hier: Have they been limited to seventeen orders?

The Witness: No, there have been very, very many studies made.

Trial Examiner Hier: I mean if you made a study for Niehoff & Company on manufacturing costs of a given item, you would not limit it to seventeen orders, or would you?

The Witness: No, there is no particular limit. In

some cases, you can establish the cost in a few studies; and sometimes, it takes more. Ordinarily, the cost is arrived at through standards. In other words, the various steps are broken down into elements and from those can be made either tables or curves, and these cost curves are used to set up standards, and from those, the manu-
967 facturing cost of almost any item can be determined.

Trial Examiner Hier: How many instances have you studied to determine such a curve?

The Witness: I am sorry, I didn't get that.

Trial Examiner Hier: How many instances have you studied to determine such a curve?

The Witness: Sometimes it takes very few; sometimes very many.

Trial Examiner Hier: What do you mean by few—three or four?

The Witness: Take for instance a punch press, where you have so many strokes per minute, a curve on that would take very little time to determine; but you take some other indirect operation where such depends on handling, and more studies would be involved.

Trial Examiner Hier: More studies or more curves?

The Witness: Both.

By Mr. Mayer:

Q. Mr. Dreyer, in these other cost studies you have made, I believe you said it would take more studies in the items which included many steps, and I guess involving personnel, rather than something like an automatic punch press, now, how many studies would you consider adequate in that type of study?

A. There is no limit; there is no fixed number that you can state in a case like that. Some would require
968 protracted studies and you would have to come back again and again; and others, you could probably finish in a few studies. There is no fixed rule or way of determining that. It is a question of the judgment and experience of the man doing the study, the time study work, and the knowledge of the operation being performed.

Q. What type of study would you consider as one in which you had to come back again and again to do it?

A. One in which the operator has to go through many different motions.

Q. How about twenty-one different motions, would that be a representative number of one which very possibly might have to be run again or studied?

A. Yes, a number of studies would be decided on and by the results attained with those studies, the knowledge attained from them, you could with a few such studies make a standard.

Q. If, initially, you got one result, how many studies would you have to run to get some standard?

A. I wouldn't know.

Q. Would you have to run it more than once to determine if there was any standard to be used?

A. Yes, you probably would.

Trial Examiner Hier: This is speculative, Mr. Dreyer, and I merely want your opinion as an expert. Assuming that C. E. Niehoff & Company was just now starting
969 in business and had no set price policy, and was attempting to set a price policy, would you regard these studies that you have made sufficiently broad and sufficiently detailed and based on a sufficient number of instances to guarantee to Niehoff & Company that they can safely rely upon for a fixed price policy in any ensuing year—would you so recommend to Mr. Niehoff?

The Witness: It is a rather difficult question but I think I would. For this reason, that in the experience I have had in drawing curves—and I have drawn very, very many of them—when you get to the upper limits and the lower limits, and you find you have points which show the direction of the line and the location of the curve, it is futile to go much further in it. There might be refinements in it—in most cases, there are slight refinements, but the final location of that line with relation to the curve would probably not be influenced by a great many more studies.

By Mr. Mayer:

Q. Mr. Dreyer, returning to Respondent's Exhibit 21-C, does the location—or is the location of the line which appears on that curve a matter of personal judgment of your's?

A. The location of any line or any curve would be the personal judgment of any competent engineer; in other words, I believe, myself, if you had some other engineer take these points, without any curve drawn in them, and ask him to draw the curve to represent the relationship

between any item and the total processing cost per
970 dollar on that invoice, and his curve would be as close to my own as you could expect; in other words, it would be just about superimposed.

Q. Did you submit this curve to any other industrial engineer to find out if that would be so?

A. No, but I have had that experience in other plants in the line of setting standards from curves and points and it does work out that way.

Q. This curve, however, is not setting any standard?

A. No, it isn't.

Q. This is a matter of interpretation of what the various locations of dots mean in reference to the locations of other dots?

A. That's it.

Q. In that, it probably differs in the amount of judgment contained as compared to the curves that is setting a standard, isn't that so?

A. I wouldn't say it that way. We try to be just as careful in work of this nature as we are in anything else. In other words, I believe that this work requires just as much judgment as the setting of final standards on any particular operation.

Q. Returning to the curve which is indicated on Respondent's Exhibit 21-C, if the sales orders which were examined, the basic data, had indicated that a straight line would have been the result of this study, would you have rejected that?

971 A. No, I wouldn't. I was looking for basic facts, and the fact of this matter is that it is a curve, and personally, I have no interest in whether it is a straight line or a curve or what have you; and the fact is that after the dots were plotted, they indicated a curve, therefore, a curve was drawn, and a curve that should be located in a certain place.

Trial Examiner Hier: On that point, Mr. Dreyer, you plotted four relationships. Did you attempt to plot any other relationships?

The Witness: No, I did not; no other curves of that nature.

By Mr. Mayer:

Q. Would it be possible that an examination of seventeen other orders of Niehoff & Company, Mr. Dreyer,

would result in instead of a curve as shown on Respondent's Exhibit 21-C, that a straight line might be indicated?

A. No, sir, I don't think it would. I don't think it is at all probable.

Q. Is that based on your examination of only these seventeen orders?

A. Yes, if you say that with your knowledge of the estimates of curves in many other cases; not from these same bases, but many other types of curves.

Q. Would it have been possible for this curve to have been a straight line curve rather than a curve?

972 A. I don't believe so.

Q. Now, sir, directing your attention to Respondent's Exhibit 21-D, would you explain to me where you got the information which appears on that curve, and how it was drawn?

A. Yes, sir. The purpose of any curve is, of course, to eliminate the jogs which would be apparent if you connected the individual dots; in other words, to smooth out the relationship between, say, the net billing and the total processing cost per dollar of net invoice; one set has been established, and you can take any point you want, and from the net billing, and from the curves, determine the total processing cost per dollar of the net invoice as shown on that curve; and that is done by Respondent's Exhibit 21-D; in other words, it ranged from 20 net billing up to 800 net billing, and right across the line to the curve, and then went down to the bottom of the page where the total processing cost per dollar of net invoice is shown.

Trial Examiner Hier: That is on 21-D?

Mr. Mayer: No, not on 2-D. The actual figure was established.

The Witness: The net billing and the total price cost as established from 21-C and then multiplying A times B; then the total processing cost per order is established for each item of net billing.

Trial Examiner Hier: 21-D, necessarily, rest on 21-C for its validity?

973 The Witness: Yes, sir.

Trial Examiner Hier: And that accounts for the fact, does it not, that the dots on 21-D vary very slightly from the curve?

The Witness: That's right.

Trial Examiner Hier: In other words, the figures on 21-D are average or at least derived computations?

The Witness: That's right.
Trial Examiner Hier: Go ahead.

By Mr. Mayer:

Q. Mr. Dreyer, as I understand it, Respondent's Exhibit 21-D depends for its basic information upon 21-C, is that correct?

A. Yes, sir.

Q. I wonder why the same curve does not show on the curve in 21-D as is shown on 21-C?

A. Well, the minute you begin to multiply two figures together and they are not in the same multiplicand, and the multipliers are both different, you are going to get a different arrangement in the final result; I mean that they will not be in the same proportion; that is just a plain rule of arithmetic. When I started to establish this curve, I had no idea of what kind of a curve it was going to be; I wasn't interested. In other words, what I wanted to find out: what was the total processing cost per order on the basis of the net billing, and the basic procedure was sound, therefore, the results ought to be sound. If it showed 974 a curve of this nature, all right; and if it showed a concave instead of a convex curve, it was all right with me.

Q. If you plotted the net billing as 12.37 and 45.14 on Respondent's Exhibit 21-D would it result in the same type of curve?

A. No, it wouldn't—maybe the same type, but even that is problematical. I would have to work that out. In other words, these are the results of actual multiplications. I don't know just how it would work out. It might work out in some sort of a zig-zag shape.

Q. Would that type of chart, normally, based on net billings, such as those you actually worked with on Niehoff & Company, would that chart reflect more accurately the cost which you determined as the total processing cost per order than the curve would which you have drawn on 21-D?

A. I don't believe so. I think this curve shows the conditions more accurately than any other type of curve would show them.

Q. In spite of the fact that the billing which you have actually worked with, and from which your figures are taken in making up 21-D, would, if actually used, give a curve, probably very different from the curve on 21-D?

A. No, you could use those figures, but I think it would be a lot more complicated. For instance, if you take
975 any one of these figures, like, 134.47 shown on 21-C, in the Sales, you could work it out on that basis, and you would get the same curve, but it would be very complicated; it would be very hard to arrive at that. If I said, no, before, I will retract it; you could take any of those figures and get the same results, but it would be very intricate work to arrive at the total processing cost as shown on the curve on 21-C, and it is much simpler to do it the way I did: take the net billings in steps of 20's by 100; 50's by 400; 100's by 800; and it simplifies it considerably.

Q. Did I understand you correctly when you said that you used the actual net billings on seventeen orders which you processed and made a curve similar to the manner in which you made the curve on Respondent's Exhibit 21-D—did I understand you correctly to say that you would come out with the identical curve that you did on 21-D?

A. Yes, you should if you used the figures on the chart. In other words, if you run across to that one I mentioned, 134.47—in the first place, it would be rather difficult to locate a figure on the curve—and then you read across, down below here, and get another figure, which would be somewhere around .038 something, and then multiply those together, and you should get to a point about like that on the curve on 21-D.

Q. Now, is the answer to that last question, yes or no?

Mr. Sprowl: I submit there is no rule of law which
976 requires the witness to answer yes or no.

Trial Examiner Hier: I think the Examiner is entitled to a yes or no answer if the witness can honestly give one but if you can't give a yes or no answer that tells the whole truth, then you may explain.

Mr. Schrup: But I think we are entitled to an answer.

The Witness: There would be very little change, if any on that; it should come out about the same. The only reason I used it, it was easier to handle.

By Mr. Mayer:

Q. Mr. Dreyer, isn't the basis for 21-D, where you determine that the cost is nine cents, total processing cost, per dollar net billing, isn't that nine cents taken from your curve as it appears on Respondent's Exhibit 21-C?

A. That's right.

Q. For the 800 billing, isn't it taken from Respondent's Exhibit 21-C?

A. Yes, it is. For that reason, I think if you take any figures from 21-C and run it across the curve, they would still come out on that line.

Q. Yes, sir, but the time study, doesn't that indicate 1.9 per dollar net billing?

A. Yes, if those are the figures.

Q. I am asking you, if you plotted the actual figures of your net billings on 21-D, your total processing cost
977 per net invoice dollar on 21-D, would you come out with a different curve than you have on Exhibit 21-C?

A. If you followed the net billing on 21-C, the total processing cost per dollar as shown on 21-C, is that what you mean?

Q. No, sir, not as shown by the curve; but as shown by the actual time study?

A. You would have this curve here, 21-C.

Trial Examiner Hier: I think you are getting it confused. You take the net billing shown on 21-C in actual dollars and cents and substitute that for the Column A on 21-B and then you take your actual total processing cost per dollar from 21-C and substitute it for the column B on 21-D, and go through the same multiplying process, resulting, of course, in different sums at the third column, and the question is: Would the curve shown on 21-D assume the same direction?

The Witness: No, it would be somewhere near the same—

Trial Examiner Hier: No, would it assume the direction of 21-D?

The Witness: It would but it would not superimpose.

Trial Examiner Hier: That's what I thought. You were balled up.

By Mr. Mayer:

Q. It would run in the same direction?

A. It would have the same general form but it
978 wouldn't be the same identical curve; you would not be able to superimpose one upon the other and come out the same.

Trial Examiner Hier: The general conclusion to be drawn, would it or would it not be the same?

The Witness: It would not be the same curve.

Trial Examiner Hier: No, I said the conclusion to

be drawn from the curve, would it or would it not be the same?

The Witness: I think the conclusion would be approximately the same.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Mayer:

Q. Mr. Dreyer, isn't it possible that the seventeen orders which were selected by yourself and Mr. Geyer might not be representative of the Niehoff & Company's orders?

A. Anything is possible; but I don't think it is very probable though.

Q. If we could assume that the seventeen orders were not representative orders, would not the curves then disclose an inaccurate picture?

A. If they were all very inaccurate, all very off balance, they would, naturally.

Q. The curves then depend upon the basis of the seventeen orders examined?

979 A. The curves were based on the seventeen orders examined, yes, sir.

Q. Now, Mr. Dreyer, directing your attention to Respondent's Exhibit 22, could you tell us, Mr. Dreyer, in the columns headed up, Number of Sales, and Average Amount per Sale, where that information was obtained?

A. From Respondent's Exhibit No. 6.

Q. Mr. Dreyer, the information contained in Respondent's Exhibit 6 pertains to what year?

A. 1949.

Q. Now, the columns: Orders Processing Cost per Dollar and the column, Order Processing Cost-Actual—what years do those two columns apply to?

A. The current year, 1951.

Q. Mr. Dreyer, in determining Column B as it appears on Respondent's Exhibit for identification 22, Order Processing Cost per Dollar, how many transactions between C. E. Niehoff & Company and Stratton Warren Company of Memphis were examined to determine the order processing cost to that particular customer?

A. It was determined from 21-C entirely.

Q. In other words, no transactions between C. E. Niehoff and Company were examined to determine that?

A. The average amount per sale was used.

Q. In the A x B column, the order processing cost-actual, wouldn't it be more correct to say the order processing cost-computed, rather than actual?

980 A. You mean because of the difference in the years?

Q. Not only the difference in the years but the fact that no transactions were examined between the C. E. Niehoff & Company and this particular customer?

Trial Examiner Hier: You mean for the time study?

Mr. Mayer: Yes.

The Witness: Repeat your question.

Trial Examiner Hier: The figure, .015 in column B was taken from Respondent's 21-C and is a derived or computed figure, is it not?

The Witness: Yes.

Trial Examiner Hier: Mr. Mayer's question is since you are using a derived of computed figure, unsupported by any time studies and the Stratton Warren Company orders as the multiplicand, that the column, headed A x B instead of having the word, actual, should have the word, computed?

The Witness: I think that is right. We don't know what the actual cost was; it is a computed cost.

Trial Examiner Hier: Would that also apply to the two items which appear directly under Stratton Warren on Respondent's Exhibit 22 for identification, where it says, actual cost at Stratton Warren rate?

The Witness: They are based on curves; therefore, they probably would be computed rather than actual.

Trial Examiner Hier: All right.

981 By Mr. Mayer:

Q. Now, Mr. Dreyer, in making use of the charts that you have drawn or in applying the charts you have drawn for any individual company and its transactions with C. E. Niehoff & Company, isn't it necessary that the transaction to which the chart is being applied be on the same basis of the transactions from which you drew the charts?

A. I don't believe so, not necessarily. I don't believe there is enough difference in the methods of procedures used in 1949 and in 1951; the steps, for instance, that they used in processing in 1949 may have varied a little bit but I think the orders will run through in the same general manner, and with the result, I think these figures, even if

they were derived from graphs made from studies in 1951, would still apply to sales in 1949 for all practical purposes.

Trial Examiner Hier: What you mean, Mr. Mayer, the two figures used in Column B, respondent's Exhibit 22 for identification all come from Respondent's Exhibit 21-C and being derived figures from the curve should have been arrived at by time studies on Stratton Warren and Union Electric orders, made in the same manner, and using the same procedures as the witness has described and represented on Respondent's Exhibits 18, A; B, and C?

Mr. Mayer: That's right, yes.

The Witness: As far as I know, there were no such 982 orders available at the time.

By Mr. Mayer:

Q. Mr. Dreyer, if the object of your work for Mr. Niehoff had been to justify or explain, for example, a price difference between Stratton Warren Company of Memphis and the Union Electric Company, wouldn't you have examined those two individual accounts to arrive at that conclusion?

A. Not necessarily. The selections that have been developed are of general application and apply to any one of the orders that ordinarily are passed through C. E. Niehoff & Company.

Trial Examiner Hier: I am wondering about this, Mr. Dreyer. Is it safe to divide the total annual sales of $2,189,586.00 by the number of sales and get the average amount of sales in this type of business which has appeared on several other exhibits, and I have had the same idea, if that is safe, at least in the sense of accuracy?

The Witness: I think it is. I am not sure I can answer the question definitely but ordinarily, the cards are checked, the accounts receivable are checked, and it is pretty well known if there is any minor thing involved in the total number of sales used; but, in general, I think it could be used; I think it is fairly applicable; and the only variation, I can see is that in some particular case, the customer might send in a very small order and throw the average off balance, or send in a very large order, doing the same thing; but I think as a general rule, these 983 averages can be obtained as they were in the case of C. E. Niehoff & Company.

Q. Now, Mr. Dreyer, the amount in the Net Proceeds —C. E. Niehoff Company, as I understand it, you took it from Mr. Steele's exhibit?

A. Yes.

Q. Now, in the Net Proceeds to C. E. Niehoff & Company, isn't it true that the figure is the figure after the volume rebate, for example, had been deducted from the net billing?

A. Yes.

Q. In the preparation of your charts and the examination of these orders, isn't it very likely that several of those orders on the basis of that billing were subject to a volume rebate at the end of the year?

A. It is probable because anything there would be—if those were not included, any change in those figures would be to the disadvantage of the Niehoff Company.

Q. We are not worried about advantages or disadvantages, but just the normal process of applying the time study, wouldn't it be applied on the same basis?

A. Unless you had all the details, it would be rather hard in this case. It was a question of leaning backwards—you have to get a complete analysis of rebates or anything of that nature. I don't think it would show anything excepting a larger spread, and I don't think there should be any objection on your part to using a figure 984 which might do that.

Trial Examiner Hier: Suspend for four or five minutes.

(A short recess was taken.)

Trial Examiner Hier: Come to order.

By Mr. Mayer:

Q. Mr. Dreyer, just in the interests of accuracy, as far as Respondent's Exhibit for identification 22 is concerned, it shows, does it not, the net proceeds to C. E. Niehoff & Company from these two customers which would be devoid of any volume rebate which in one of these customers might be earned?

A. That's right.

Q. And the study which you made in preparation for your curve which you have applied on this exhibit, those studies were made on the net billing, which did not take into consideration whether any volume rebate would be paid or not?

A. That's right.

Q. Now, directing your attention to Respondent's Exhibit for identification 23, and referring back to Respondent's Exhibit for identification 22, at the same time I

notice on both exhibits you have a column headed, Number of Sales—now, from what source on Respondent's Exhibit for identification 23 were the figures, opposite Greiner and the 8 opposite Auto Wholesalers taken?

A. Respondent's Exhibit 5.

Q. Did you, personally, check the basic data in the preparation of Respondent's Exhibits 5 and 6 to determine the actual number of sales to these customers?

985

A. I did not.

Q. Now, sir, similarly to Respondent's Exhibit for identification 22, referring to the last column on Respondent's for identification 23, the A x B column, would it not be more proper to head that column, Order Processing Cost projected with some dissimilar term rather than the word, actual?

A. Because of the fact that two different years are involved, it could be and probably it is.

Q. It would be more of a projection than actual order processing cost?

A. Yes.

Q. In the preparation of Respondent's Exhibit 23, were any transactions between the Greiner Company and the Auto Wholesalers Company and the C. E. Niehoff Company examined to determine the order processing cost in sales to either one of these two customers?

A. No.

Q. And similarly, Respondent's Exhibit 22 which discloses as Respondent's Exhibit for identification 23, the net proceeds to C. E. Niehoff & Company, that column of figures is based on figures which includes in one instance a volume rebate which was paid by C. E. Niehoff whereas the basic documents from which you prepared your charts did not take volume rebates into consideration?

986

A. That's right.

Mr. Mayer: All right, sir. That is all we have from Mr. Dreyer.

Oh, one more Respondent's Exhibit for identification, 20, is a rather lengthy exhibit, involving the time studies and the basic documents on which Mr. Dreyer recorded his actual timing of the employees, and it is rather hard to examine it in such a short time, and I would like to request an opportunity to examine that, and reserve the right to examine Mr. Dreyer on a later date, if it is necessary.

Trial Examiner Hier: Any objection?

Mr. Sprowl: I have no objection. I haven't had time to number it. If you want to take over the job of putting the Bates numbering machine on it, you can take it right now.

Trial Examiner Hier: That exhibit is not in evidence yet, and we will wait until the end of the hearing to make the proper disposition of it.

Mr. Mayer: May we go off the record a moment?

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

You are through with the witness on cross-examination?

Mr. Mayer: Yes.

Mr. Sprowl: May I ask a few questions on redirect examination?

987 *Redirect Examination by Mr. Sprowl.*

Q. Mr. Dreyer, I would like to turn for a moment to the manner in which the seventeen orders were selected and turned over to you by Mr. Geyer, were they all selected on the same day?

A. No, they were selected on the day in which the studies were made in each case. In other words, on any particular day, I would go into Mr. Geyer, and I would say, "I would like an order in the $100.00 class," and he would take the orders that had been received on that day and go through them, and say, "This one looks like it," and I would take it.

Q. How long would that whole transaction require in point of time?

A. Ordinarily, less than five minutes.

Q. What would Mr. Geyer make his selection from—orders in the form in which they were actually received from the customer?

A. Yes, as received from the customer, and with his knowledge of the prices, which I didn't possess, he could look at an order and say, "This is in the category of the prices you desire."

Q. And this is before the order had been retyped?

A. From the original order.

Q. And then you would go away and work on the order for several days?

988 A. Yes, and usually take two or three days.

Q. And then when you had exhausted that order, you would go back and ask for a new order?

A. That's right.

Q. And that would be out of the then current supply of new orders on Mr. Geyer's desk?

A. Yes, ordinarily, the orders do not go through the plant directly; there is always a lag of a day or two, in the shipping and billing.

Q. Directing your attention to the service stocks, would you explain to me in more detail why service stocks would not have been a typical type of transaction to have included in one of these orders?

A. Well, in the first place the service stock includes a cabinet which contains, or will contain, a selected quantity of the various Niehoff products. These cabinets come already packaged, and so far as the processing is concerned, it generally means taking off the wrapping, and stencilling the customer's name on it, and shipping it.

Q. Does that mean the empty cabinet?

A. Empty cabinet.

Q. What about the service stock that goes into the cabinet?

A. That is ordinarily made up ahead of time, and follows the same steps: the order pickers brings them over and some one lays them out and selects the various 989 things, and the packer takes them and packs them into cartons as ordinary sales transactions, and then they are sent to the customer.

Q. In other words, the merchandise that goes into the service stock as already been prepicked and prepacked and set aside?

A. Usually.

Q. So, if you had service stock on order, this prepicked and prepacked merchandise, it would not give a true picture because it would short circuit the time required to pick and pack it?

A. That's right.

Q. I assume if one of those had been included in an order, you would have had to make a separate time study on some one picking and packing the service stock?

Trial Examiner Hier: Mr. Dreyer, if I may interrupt, I think yesterday you said another reason why they were excluded is the fact that the customer, ordinarily, didn't order just the one?

The Witness: That's right, he orders a cabinet plus the order that goes in it; and the cabinet is his permanent

possession and as he sells these items out of it, he replenishes them.

Trial Examiner Hier: I can see how that would be a valid statement. A garage, for instance, would re-sell these items, and then he would re-order?

990 The Witness: I believe, ordinarily, the distributor receives the order.

Trial Examiner Hier: I mean, it would seem to me that the wholesale distributor might order quite a few of these service cabinets, depending on the locality, and whether he gets new accounts?

The Witness: I can't answer that accurately.

By Mr. Sprowl:

Q. Turning to your Exhibit for identification, 18 A, B, and C, this is actually a revised part of your original work, is it not?

A. Yes, it is.

Q. The editions occur in the hourly rate that appears under the heading, Rate per Hour, on that exhibit?

A. Yes.

Q. What editions were there or are there between the particular graph that has been marked for identification and the one which you first prepared?

A. The corrections?

Q. No, in the rates per hour on Exhibit 18, A, B, and C?

A. They varied a little bit, up and down; and they were gone over carefully by Mr. Steele and Mr. Ames, the personnel manager, in my presence, and the ones that are shown on Exhibit 18 are the ones that were agreed upon.

Q. Could you, if I handed you a copy of your
991 original preparation of this exhibit tell me the changes in the hourly rates and what they amounted to in pennies per hour?

Mr. Schrup: May we go off the record for a moment?

Hearing Examiner Hier: Yes.

(Discussion off the record.)

Hearing Examiner Hier: On the record.

It is agreed between counsel on both sides that Respondent's Exhibits 18-A, B, and C for identification are substantially correct for the purpose of these proceedings as to the hourly and minute wage rates. Is that right?

Mr. Mayer: Yes.

Mr. Sprowl: That's right.

By Mr. Sprowl:

Q. Mr. Dreyer, you have testified you processed seventeen orders in your time studies?

A. Yes.

Q. Actually, as I understand it, you made separate time studies as to each of the 21 steps that those orders went through, am I correct?

A. Yes.

Q. So that actually you have made in time studies, 17 x 21?

A. Well, not exactly. For instance, step 1, is opening the mail and the rate was determined on that by a few studies, not seventeen, and an average was taken, so that the total number of studies would not be 17 x 21, but slightly less.

992 Q. Well, 17 x 21 as I have just multiplied it out is 357, and you say it would be slightly less than 357?

A. Somewhere between 300 and 325, I would say.

Q. The first three steps are those on which you do not make a separate time study for each order?

A. Yes.

Q. Are there any other steps after the first three where you did not make a separate time study for each order?

A. Separating invoices, step 18, which because of the nature of the work, simply tearing the sheets apart, and the amount of the work was about the same, and there was no logic in making a great number of time studies on the very simple operation of separating the sheets.

Q. How many times studies were made on steps, 1, 2, 3, and 18?

A. It varied. I think in the opening of the mail, I made about four and averaged them up; and in some of the others, it varied, but I made enough to get a fair average.

Q. Actually as to the other remaining steps, you have 17 time studies for each step, as a guide?

A. That's right.

Q. When did you start these time studies?

A. Late in May, around May 20th.

Q. When did you conclude the final work of making your time studies?

A. Somewhere in July. I have forgotten the exact 993 date, early in July, before the middle of the month; I don't know the exact date.

Q. That was actual stop watch work?

A. That's right.

Q. So the final clocking of these things took approximately sixty days?

A. Very close to it.

Q. So, would it be fair to say that when you spoke of—in a large sense—seventeen time studies, that is compressing your work pretty much is it not?

A. Yes, it really is.

Q. Because you made all these separate studies on each one?

A. That's it.

Q. Now, the separate studies which you made respecting each step which you made in regard to each of these seventeen orders were sufficient to give a reliable result?

A. Yes, I think they were sufficient.

Q. Now, Mr. Mayer called your attention with respect to the time studies on 18-A, B, and C in comparison with the time required for a certain step with respect to one order as opposed to a second order, and that frequently the order with the smallest dollar amount would require the larger amount of time, which you explained in some way as an overage in favor of the smaller dollar order. Now, are there other discrepancies other ways in those studies?

994 A. There are discrepancies both ways.

Trial Examiner Hier: I don't believe the word, discrepancy, is going to show up what is meant here. The word, discrepancy, in my mind, means to notice mistakes—

Mr. Sprowl: I want to make my dictionary on this. When I say the word, discrepancy, I mean variation—do you mean the same thing?

The Witness: The same.

Trial Examiner Hier: All right.

By Mr. Sprowl:

Q. Turning to Exhibits 18-A, B, and C, it is the clock time at the bottom of the column that is the guide that you are seeking rather than any isolated figure that goes into the column, is that right?

A. That's right.

Mr. Sprowl: That is all I have.

Recross Examination by Mr. Mayer.

Q. Mr. Dreyer, I am still not quite clear upon the limitations which you gave to Mr. Geyer as to how he should select these orders. Now, orginally, I understood that the only limitation was that the order be in a certain price class or price range, and on direct examination or cross examination, it was brought out that the service stocks were excluded because they would not be, you considered, a normal order. Now what other limita-
995 tions, did you give Mr. Geyer on the selection of these orders?

Trial Examiner Hier: Or were there any other exclusions?

The Witness: No other exclusions. The only reason the service stocks were excluded was because it would be a very lengthy and difficult matter to make an accurate study because of the way the general proceeding of the plant was; and in the second place, because the empty cabinet insofar as the customer was concerned was a one time thing, and the other orders were in the line of normal processing so there was no object in making time studies on the cabinets.

By Mr. Mayer:

Q. During the 60 days you made these time studies, were the clerks also engaged in making cabinet stocks?

A. Yes, they were putting them in the boxes and putting them aside, and when you begin to try to split up a time study on anything of that nature, you have something that is difficult—or rather, it is not the difficulty of it, but I don't think it would be enlightening.

Q. It would not be representative?

A. That's right.

Q. Was there anything asked about the number of packages?

A. Of Mr. Geyer?

Q. Yes.

996 A. All I asked was for orders within a certain price group: $50.00 orders and $100.00 orders—

Q. Except that you wanted to exclude the cabinets?

A. Yes, that was the one exclusion and I think it was a normal one.

Q. That is the only one?

A. That is the only one I recall.

Q. During the sixty days you required in the time study work, were you preparing any other charts or analyses for C. E. Niehoff & Company?

A. No, I did not do work every day for them. In other words, it was left entirely to me whether I showed up there five days or three days or four days; and in the meantime, I did do some other small work for them, chiefly in a consulting capacity, checking over time studies and various procedures, but it took very little of my time.

Q. Are you employed with Niehoff & Company now?

A. I am not on their payroll. I was going there several days a week checking.

Q. You are doing that presently?

A. Yes.

Q. Mr. Dreyer, one further question about Respondent's Exhibit for identification, 18-A, B and C, I couldn't help noticing that the credit approval of it shows a constant picture: there are the first two sheets, and it is
997 a constant factor on the last sheet, but the two factors are different, one being .50 and the other being .75?

A. That is true, the little hesitancy is the .15 of a minute involved and it doesn't amount to very much; but the credit manager, all he practically had to do so far as the very large customers are concerned is to get out his pencil and look over the order and O.K. it; and the others, they took a little bit more time, and it is reflected in that very small fraction of a minute.

Q. Are there any large customers appearing on the first two sheets of that exhibit?

A. So far as the extent of the order is concerned, I really don't know offhand but the difference in that is rather trivial. You still have to go over a small order a little more carefully than the big order.

Q. But you have no basis of knowing whether large orders are contained on sheets two and three?

A. No, but my recollection of it is that in the first sheets, are the small customers; and the second sheets, the larger customers.

Q. How did you know if the customers were large or small from your examination of these 17 orders—how did you know whether the customers appearing on the first sheets were smaller in volume than the customers appearing on the last sheet?

A. I didn't know except in a few instances where
998 I recognized the names of the customers. I certainly didn't know them all and I didn't want to know them

all. I figured on this and there was a little hair-splitting in the long run—for these smaller orders, it took about half a minute to look those over. The large orders didn't take so much time. In other words, on a small order, he would go over it a little more carefully than he would a large order or an order that involved several orders.

Trial Examiner Hier: The point I think Mr. Mayer wants to make—and whether he does or not, it is one that I would like to know, and that is, at the time you clocked these orders in making the credit approval on the orders, you didn't know the amount of the order—whether it was large or small?

The Witness: I didn't clock the credit approval on each one of these orders; in other words, there were groups of orders, and I clocked him on these, and struck an average, and as I remember on several different groups of orders, in one case they were mostly smaller orders; and in the other case, mostly larger orders; and he went over the larger orders faster than the smaller orders.

Trial Examiner Hier: Where was the dividing line between the large order and the small order?

The Witness: About $300.00, I would say offhand. I didn't pay too much attention to the generous sized orders —all he had to do was to look and see who it was and 999 generally O.K. it, but on the other ones in the smaller group, they had to have a more careful inspection.

By Mr. Mayer:

Q. Mr. Dreyer, will you point out from the orders on Charts, A, B and C the ones on which you recognized the size of the customer?

A. No, I can't except in the case of where I took two or three of the largest ones.

Q. Isn't it so that the credit approval would be based on the name of the customer rather than the size of the order?

A. It seemed to run hand in hand. Naturally, if a very small customer suddenly came in with a very large order, he would be more careful about checking that than he would in the reverse case.

Q. Would that show up or be reflected in these seventeen studies?

A. It could be.

Q. Well, was it?

A. Not so far as I know.

Q. I didn't quite get your answer to one question. Did you say you didn't know the names of any of these particular customers that you worked on?

A. I saw the names on the orders but I mean I didn't know them from any other customers so far as their rating and rank went. Later on, I did get to know them
1000 but not at the start or at any time when the studies were being made. I wasn't very much interested.

Q. In making this study of the credit approval portion of the time, was it your opinion in drawing up this chart that the larger customers purchased in larger amounts than the amounts purchased by the smaller customers?

A. No, not necessarily. I mean the large customer might send in a very small order but it didn't very often happen in the reverse. I mean you would normally expect if an order came in for, say, $800.00, and some of these were, that it came from a large customer.

Q. And was that your information from which you drew up these studies or made up these studies?

A. I gave them no thought at all. As far as I was concerned, it was an $800.00 order, and I didn't care whether it was from a small or large customer.

Q. Well, just exactly, if you can tell us, Mr. Dreyer, what happened during this study by which you became acquainted with the name of the customer and his comparative size?

A. I can't answer that because I do not know.

Q. Is it safe to say it was somewhere within the course of the study rather than after the completion of the study?

A. Somewhere during the course of the study. Take, for instance, in some of the billing, they have various classifications of orders that would be typed on, and I
1001-2 could recognize from the symbol on the order what category the customer came in; it didn't mean anything to me, but I could recognize it.

Q. Mr. Dreyer, in conducting this time study, I realize there are a great number of steps in each order as you processed it, but nevertheless on an over-all basis, there were still only seventeen orders which were examined, regardless of the number of steps involved?

A. That's all.

Mr. Mayer: That is all I have.

Trial Examiner Hier: Anything further?

(No response.)

Trial Examiner Hier: The next witness is not going to show up until 2 o'clock. We will recess until 2 o'clock.

(Whereupon, at 11:45 a. m., a recess was taken until 2 o'clock p. m., this day.)

1003 Afternoon Session.

2:00 p. m.

Trial Examiner Hier: Come to order.

Let the record show that Mr. M. F. Eldridge resumes the stand, having been previously sworn, and having testified on direct examination as a witness for the Respondents.

M. F. ELDRIDGE resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Sprowl.

Q. Mr. Eldridge, since the last hearing in this matter, have you had occasion to go over your underlying work sheets respecting some of the papers you identified at the last hearing with Mr. Steele?

A. Yes, I have.

Q. Did you have your work sheets typed up in the meantime?

A. Yes.

Mr. Sprowl: I should like to have these documents identified as Respondent's Exhibit 24-A and B.

By Mr. Sprowl:

Q. Mr. Witness, would A and B be enough to identify those work sheets?

A. That's right.

Trial Examiner Hier: Just the two?

The Witness: No, I think the four.

1004 Trial Examiner Hier: Let the record show that there is marked for identification as Respondent's Exhibit 24-A, a comparative P & L statement, 1949, and the basis of the various sales volume rebates of the Respondent; and as Respondent's Exhibit 24-B, a sheet headed, Work Papers for Exhibit A and B, showing advertising and general administrative expense, allowed discounts and other income; and as Respondent's Exhibit

24-C, another sheet, headed Work Papers, showing the net sales, factory expenses and selling expenses; and as Respondent's Exhibit 24-D, a sheet headed, Estimated Loss Statement, based on 1949 volume of business, by allowing 10% over-all rebates.

(The documents referred to were marked Respondent's Exhibit 24-A, B, C and D for identification.)

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Sprowl:

Q. Now, you have before you, Mr. Eldridge, the comparative Profit and Loss statement that you identified at the last hearing as Respondent's Exhibit 17-A?

A. Yes.

Q. Can you tell me whether or not any of the work papers that have just been identified relate to all, or any part, of this Exhibit, 17-A?

A. All four copies relate to it.

Trial Examiner Hier: By all four copies, you 1005 mean Respondent's Exhibit 24-A through D?

The Witness: That's right.

By Mr. Sprowl:

Q. Will you explain, if you will, how these work papers tie into the figures that appear in the first column of Exhibit 17-A, which is headed, Actual—1949?

A. Exhibit 17-A shows the condensed figures of net sales costs with selling expenses, advertising expense, general administrative expense, and the net profit before taxes.

Exhibit 24-A shows the tracking down of the cost of sales of $1,594,800.00 in two separate break-downs. One is called: Direct-Materials in the amount of $1,223,200.00; and Direct-Labor in the amount of $97,000.00 plus fixed factory expense of $53,160.00, and variable factory expense.

Mr. Schrup: Just a minute, that exhibit is going to speak for itself. I think if the exhibit is received in evidence, then, I think it would be proper to examine on that point.

Trial Examiner Hier: I think it would be sufficient to just omit the amount.

The Witness: All right, the total figure shown in 17-A is explained in Exhibit 24-A, B, C and D.

By Mr. Sprowl:

Q. I notice that on 17-A, there are four columns: one headed Actual—1949; and then there is a column for
1006 $2,000,000.00 sales volume; and a column for $1,800,000.00 sales volume; and a column with $1,725,000.00 sales volume, does the Exhibit 24-A, B, C and D for identification contain your detailed work sheets with respect to each of the four columns I have described in 17-A?

A. They do.

Q. Now, directing your attention to Respondent's Exhibit 17A for identification, do any of these work sheets which you have just identified contain the details relating to Exhibit 17-B?

A. They do.

Q. Which ones?

A. 24-B, C and D.

Q. Now, calling your attention to 24-B, I see in the extreme right hand vertical column on that exhibit, there is a heading, Exhibit B-Volume, $1,300,000.00, that is the detail which relates to Respondent's Exhibit 17-B?

A. That's right.

Q. And similarly, on Respondent's Exhibit 24-C for identification, the extreme, righthand vertical column, headed, $1,300,000.00, is that part of the detail that relates to Respondent's Exhibit 17-B for identification?

A. That's right, it does.

Q. Now, on 24-D, what proportion of that detail relates to Respondent's Exhibit 17-B?

1007 A. The first column.

Q. On the right or left?

A. The left.

Q. Now, will you address your attention to Respondent's Exhibit 17-C for identification, do you have that before you? Now, there are no work sheets relating to that exhibit, are there?

A. No, there are not.

Q. That is, the computation appears on its face?

A. It purports to be self-explanatory.

Mr. Sprowl: I believe that is all on direct examination.

Cross-Examination by Mr. Schrup.

Q. Mr. Eldridge, in your direct testimony, you described yourself as a Federal tax consultant and accountant—Mr. Sprowl did not ask the question, but I assume I am correct in assuming that you are a CPA—are you not?

A. No, I am not.

Q. You have an accounting degree?

A. No, I do not.

Q. I believe you also testified that for the past sixteen years you had done the general accounting work of the C. E. Niehoff & Company, is that correct?

A. That's right.

1008 Q. Will you tell us, briefly, what your general accounting work consists of?

A. It consists of the preparation of P & L sheets and balance sheets for management control.

Q. Is that related to the cost of the manufacture of the C. E. Niehoff & Company's products?

A. That is right.

Q. And solely to the cost of the C. E. Niehoff & Company products?

A. Oh, no.

Q. What else does it consist of?

A. Sales analysis and general administrative expenses, sales costs, net profits, from month to month, and general periods throughout the year.

Q. Will you give us in a little more detail just what you do?

A. Specifically, I supervise the accountants as well as doing the work myself at various times by taking a trial balance off of the general and other ledgers, giving effect to accrual depreciation adjustments and various other adjustments to arrive at definite accrual data for the purpose of determining profits.

Q. Now, in the course of your past year's work with the C. E. Niehoff & Company, had you prepared in documents similar to the documents that have been marked for identification as Respondent's exhibit 16, 17-A, B, and C, and 24-A, B, C and D?

1009 A. Insofar as the actual figures that are contained in those reports refer to 1949, yes; but not insofar as the forecast.

Q. And the forecast are the three columns on Respondent's Exhibit 17-A—the last three columns?

A. That's right.

Q. And that would apply entirely to Exhibit 17-B for identification and Respondent's Exhibit 17-C for identification?

A. That's right. Exhibit 17-C is not a forecast. Those

are, approximately, actual figures for the year 1949, giving effect to certain rebate adjustments.

Q. But it is a projection of a situation that never did occur, is that not true?

A. That's right. I would like to modify that—partially so, the net sales and the rebates allowed did actually occur; the forecast of an allowance of 15% rebate did not occur; and the net profits of $187,000.00 did occur.

Q. But the net sales adjusted did not occur?

A. That's right.

Q. Now, the compilation of Respondent's Exhibit 16, 17-A, B, and C for identification, did you confer with Mr. Dreyer on that?

A. Exhibit 16?

Q. Yes, Exhibit 16?

A. Yes.

Q. Did you confer with Mr. Dreyer with relation to Respondent's Exhibit 17-A, B, and C for identification?

1010 A. No.

Q. I will show you Respondent's Exhibit for identification, 18-A, B, and C, are you familiar with that exhibit, sir?

A. No, sir.

Q. You have never seen that exhibit before?

A. Never have seen it.

Q. I will show you Respondent's Exhibit for identification 21-A and 21-C, and 22 and 23, and ask you if you have ever seen any of those exhibits before, sir?

A. If I have seen them, I can't remember. I have had no occasion to study them or to see them.

Q. What was the nature of the conference with Mr. Dreyer?

A. Regarding the overhead spread as shown on Exhibit 16.

Q. Will you be a little more specific?

A. There was a certain overhead figure on Exhibit 16 in the amount of $43,000.00 which is the overhead burden, the general administrative expense applicable to the direct labor of processing orders.

Q. And Mr. Dreyer asked you to compute this?

A. That's right.

Q. Did you notice what the purpose of asking you to compute it was for—for what it was to be used?

A. Not specifically.

Q. You had no idea at all.

A. I had an idea of what it was to be used for.

1011 Q. What was your idea, sir?

A. My idea was to answer his question. He asked me if I would try to estimate the over head of direct labor for the processing of the order department.

Q. You knew that the result of your work would be used with relation to Respondent's Exhibit 18-A, B, and C for identification?

A. I didn't know it because I am not acquainted with these exhibits.

Q. With reference to Respondent's Exhibit 16 for identification, was that prepared by you, sir?

A. That's right.

Q. Who did you give that Exhibit to?

A. I gave it to Dreyer. I think I sent two copies: one to Mr. Niehoff and one to Mr. Dreyer.

Q. Do you recall making any comments in passing that exhibit on to Mr. Niehoff?

A. No, I don't remember any specific comments.

Q. You don't recall what you told Mr. Niehoff, if anything, when you gave him that exhibit?

A. I probably said to him that I am sending Mr. Dreyer those figures he asked me for, and I will send you an extra copy.

Q. Did you mention what they were to be used for?

A. No, Mr. Dreyer has a certain duty to do and I have a certain duty to do, and I confined myself to the work

1012 that was supposed to be done by me.

Trial Examiner Hier: May I interrupt here a moment? Mr. Eldridge, it is rather striking to me, although I know nothing about the automotive business, the respondent is a manufacturer of automotive supplies, and I understand from this exhibit that there is approximately $97,000.00 factory labor cost, and yet an overhead burden of $200,000.00—isn't that rather unusual?

The Witness: It is not particularly unusual because only approximately 50% of the business is manufactured; the other 50% is purchased parts, not requiring labor; and the year, 1949 is not a criterion for the subsequent years, because they had been building this up.

Mr. Schrup: I think the Examiner is anticipating my question.

Trial Examiner Hier: And a $22,000.00 burden goes to processing orders out of the total of $97,000.00. I assume the same explanation would apply to that?

The Witness: This is direct factory labor and this is direct labor involved in the processing of the orders in the office (indicating Exhibit); there is no relation to that and that.

Trial Examiner Hier: All right, I will shut up. I won't anticipate anything you are doing.

By Mr. Schrup:

1013 Q. Mr. Eldridge, you have conferred with Mr. Steele in relation to your work?

A. Yes.

Q. Did you not furnish Mr. Steele a copy of the memorandum which you had sent to Mr. Niehoff in which memorandum you stated that the break-down figures which you furnished Mr. Niehoff was to be used in allocating the portion of the 1949 general administrative expenses in the direct labor or processing orders?

A. I don't think I had any such conversation and I don't think I gave that to Mr. Steele. I furnished that exhibit when I previously appeared down here.

Mr. Sprowl: That is the legend on the exhibit that was previously identified.

Trial Examiner Hier: There is such a legend on Respondent's Exhibit 16 at the top.

By Mr. Schrup:

Q. Didn't the memorandum you sent to Mr. Niehoff also include the statement, "Should you desire to do so, you can pass only the percentage figures on to Dreyer—"

A. I don't understand your question.

Mr. Schrup: Will you read the last question?

(The reporter read the question as follows:

"Question: Should you desire to do so, you can pass only the percentage figures on to Dreyer—")

The Witness: I don't remember.

1014 By Mr. Schrup:

Q. Turning your attention, if you will, Mr. Eldridge, to Respondent's Exhibit 17-A for identification, and particularly, with reference to the first column dealing with the actual figures under 1949, will you tell us how you arrived at the net sales figures there?

A. Those net sales figures were copied off of the annual audit report.

Q. And they reflect the gross sales after what deduction?

A. After a deduction of sales allowances, customer's allowances, and excise taxes on the sales.

Q. And if you add those deductions to the sum of $2,461,242.25, would that give you the gross sales?

A. No, it doesn't.

Q. What were the gross sales?

A. The gross sales were $2,461,242.25.

Q. Does that figure, to your knowledge, represent the sales before or after any deductions from the face of the invoices?

A. Before.

Trial Examiner Hier: Which figure, the last figure, the gross sale figure?

The Witness: $2,461,242.25 represents the gross amount before any deductions.

By Mr. Schrup:

Q. That represents then all sales of the C. E. 1014½ Niehoff & Company at the job or list price?

A. It represents all their sales.

Q. I asked you if it represents all their sales at the job or list prices?

A. Well, I would have to check that myself to find out. When you define job or list prices, I can't remember.

Trial Examiner Hier: The answer is, he doesn't know without checking.

By Mr. Schrup:

Q. Well, by job or list prices, sir, I mean all sales prior to any deductions?

A. That's right, it does.

Trial Examiner Hier: Off the record a moment.

(Discussion off the record.)

Trial Examiner Hier: On the record.

The Witness: The figure of $2,461,242.25 represents the net amount from sales invoices to customers.

By Mr. Schrup:

Q. And that figure reflects those sales to those customers after the deduction from the face of the invoices that go to such customers that receive such deductions, does it not?

A. Yes.

Q. And then this figure of $2,461,242.25 is not an accurate figure as regards the gross sales?

A. In accounting terminology, my opinion is that
1015 figure does represent gross sales before items such as sales deductions have been deducted.

Q. As a matter of actual fact, regardless of accounting terminology, that is not the actual gross sales of the C. E. Niehoff & Company, is it?

A. It is.

Q. Now, directing your attention to the cost of sales appearing on Respondent's Exhibit 17-A with relation to the year 1949, will you break that down for us, please?

A. In dollar value?

Q. Yes, and the items.

A. Material, $1,223,200.00; labor, that is direct labor, $97,000; factory, fixed expense, $53,160.00; variable, indirect factory expense, $209,240.00, and instruction sheets freighted in, $12,200.00.

Q. All of it appears on Respondent's Exhibit 24-A for identification?

Trial Examiner Hier: You are doing the same thing you objected to in him.

Mr. Schrup: Just a moment, if the Examiner please.

By Mr. Schrup:

Q. Will you break down $1,223,200.00 for us, sir?

A. I have no break down. There is no break down on the work sheet. That is the entire material purchase sheet for the year, 1949.

1016 Q. Do you have any material with your or any document that would enable you to do that?

A. With me?

Q. Yes.

A. No, we would have to break down our whole study.

Q. Can you tell us how much of that is purchase of raw materials and how much of it is the purchase of finished parts?

A. No, not from this statement.

Trial Examiner Hier: May I inquire—when you use the term, "finished parts", I presume you mean the parts for resale by C. E. Niehoff & Company?

Mr. Schrup: That's right.

By Mr. Schrup:

Q. Can you tell us approximately the percentage of merchandise that is purchased for resale as compared with that manufactured by C. E. Niehoff & Company?

A. I would assume—my opinion would be between 45 and 50% are purchased parts.

Trial Examiner Hier: That is on a dollar volume basis?

The Witness: That's right.

Mr. Sprowl: At the present time?

The Witness: At the present time.

By Mr. Schrup:

1017 Q. What would it be in 1949?

A. In 1941, I can't estimate that close. The manufactured parts would be on a wholesale scale, possibly between 35 and 40%—which is my estimate.

Q. Now, directing your attention to the figure opposite Labor, on Respondent's Exhibit 24-A for identification, with reference to the year, 1949, that $97,000.00, what was that connected with?

A. That is direct production, factory labor.

Q. And directing your attention to Respondent's Exhibit 24-A for identification, referring to factory expenses for 1949, the figure, $53,160.00, what does that represent?

A. It represents depreciation on the building, $6,552.84; depreciation on building equipment, $5,554.21; depreciation on machinery or equipment, $28,523.05; amortization, $1,103.39; rent $8000.00; taxes, personal property, $3600.00; real estate taxes, $6800.00; other taxes $61.00, and insurance $886.26, which is a total of $53,160.78.

Q. Are you obtaining those figures from Respondent's Exhibit 24-A for identification?

A. No, I am obtaining those figures from a copy of the Company's audit report.

Q. Will that volume you have with you give you sufficient information so that you can break down the purchases?

A. No, their books are not kept giving effect to
1018 the break down.

Q. They do not show the purchases of raw materials?

A. No, they are general books.

Q. Do any of the books you have with you show it?

A. No.

Q. Do any of the books you have with you show the break down as to the purchase of piece parts?

A. Purchase of what?

Q. Piece parts?

A. These records I have with me do not show the break down of any material purchases.

Q. Will you direct your attention to Respondent's Exhibit 24-C for identification with reference to the term, variable, for the year, 1949, the sum of $209,246.00?

A. The break down of $209,246.00 is indirect labor, $153,992.15; factory supplies and services, $11,047.73; shipping supplies $10,754.53; power and light, $5,133.54; tools and dies, $4,903.41; Perishable tools, $1,535.95; maintenance of building, $4,211.25; maintenance of machinery and equipment, $5,444.00; pay roll taxes, $3,518.53; insurance, workman's compensation and general, $4,708.91; engineer expense, $1,607.50; employment service, $315.44; making a total of $209,246.89.

Q. Directing your particular attention to the item, indirect labor, what is the amount of that again, please, sir?

A. $153,992.15.

1019 Q. What did that indirect labor consist of?

A. Indirect supervision.

Q. Of what, sir?

A. Factory supervision, $42,289.81, over time premium $2,635.60; other indirect labor, $103,06.14; Christmas bonuses $103,06.14.

Q. Was this indirect labor that you are discussing related to merchandise offered for resale by the C. E. Niehoff & Company?

A. It is related to both manufactured goods and merchandise purchased for resale.

Q. Now, Mr. Eldridge, will you please direct your attention to Respondent's Exhibit 16 for identification, and will you tell us what the item, Direct Labor for 1949, $96,810.01 comprises?

A. It comprises the direct factory production labor on machines and is related entirely to manufactured goods and not purchased parts.

Q. That is merchandise actually manufactured by the C. E. Niehoff & Company for sale?

A. That's right.

Q. Now, would you break down the total shown on Administrative expenses of $194,817.35?

A. Officer's salaries, $50,544.00; accounting salaries, $19,450.31; credit department salaries, $4,939.40; purchasing department salaries, $12,813.03; sales commissions, $7,104.68; auto expense, $3,391.50; commissary,

1020 $8,122.63; depreciation on furniture, fixtures, and equipment, $5,343.50; donations, $2,845.28, and em-

ployee's welfare, $1,696.17; equipment rental, $130.55; insurance, general, $3,115.99; local audit, $5,101.80; mercantile reports, $1,123.37; office supplies and services, $4,325.03; postage, $10,548.46; repairs and maintenance, $2,693.38; pay roll taxes, $2,663.30; stationery and printing, $8,476.93; telephone and telegraph, $4,250.99; engineering fees, $3,893.74; interest and exchange, $5,256.97; taxes, general, $525.66; miscellaneous, $14.30; plant engineering, $8,547.78; administrative departmental allocations, $11,836.08; Christmas bonuses, $6,060.60.

Q. Now, Mr. Witness, that figure related to the prior one on Exhibit 16 of $96,810.01 gives you 201.24%, does it not?

A. That's right.

Q. Now, you have related your total general administrative expenses only for those parts manufactured by C. E. Niehoff & Company for resale?

A. That's true.

Q. Now, would the sum of the total general administrative expenses which you have just related, $194,817.35 also relate to those parts purchased by the C. E. Niehoff & Company for resale?

A. That's right.

Trial Examiner Hier: What do you mean, by related?

Do you mean that part of that total general adminis-
1021 trative expense has been charged to or was incurred in that part of the business which consisted in the purchase of parts for resale?

Mr. Schrup: We believe so, your Honor.

Trial Examiner Hier: I am trying to get the definition of what you mean by related, that is a very hazy word.

Is that true, Mr. Witness?

The Witness: I don't understand the question.

Trial Examiner Hier: He wanted to know whether this figure of $194,817.35, headed, Total General Administrative Expenses for 1949 was in part incurred, and therefore, partly chargeable to that portion of the Respondent's business which consists as I understand it of the purchase of parts already manufactured and then their resale of them.

The Witness: That's right.

Trial Examiner Hier: Now, would that portion be arrived at roughly by the division of the dollar volume between the two sides of the business, which you have given us as an estimate?

The Witness: No, I don't think that would be a fair basis because the plant is so used up by the manufactured equipment; and so much space is necessary just for the storage of the purchased parts.

Trial Examiner Hier: Go ahead.

1022 By Mr. Schrup:

Q. Would you break down the figure opposite direct labor in the Exhibit, the figure, $21,736.13 on Respondent's Exhibit 16 for identification?

A. I don't have a break down. I think we submitted that to Mr. Steele and Mr. Steele checked that to his approval, as I understand it.

Q. Would you examine Exhibit 18-A, B, and C for identification, and tell us if the twenty-one steps appearing on that exhibit are embraced in the figure, $21,736.13, appearing on Respondent's Exhibit 16 for identification?

A. I can't tell you. I am not responsible for that exhibit.

Q. You can't tell us what the break down on $21,736.13 is?

A. I don't have that with me, but I was under the impression that they had spent considerable time going over that exhibit with Mr. Steele, and he was satisfied with that amount.

Q. Will you give it to us, please.

Trial Examiner Hier: He doesn't have it, he says.

By Mr. Schrup:

Q. You can't tell us from reading Respondent's Exhibit 18-A as to the twenty-one steps as to whether you would eliminate any of those steps?

A. I can't tell you. I can tell you nothing about 18-A.

Q. I am not asking you that. Will you read the left column, the twenty-one steps, will you read those over to yourself?

1023 (Witness reads document as requested.)

The Witness: What is your question?

Trial Examiner Hier: He wants you to read the steps over.

The Witness: I have read them.

Trial Examiner Hier: He has read them.

By Mr. Schrup:

Q. Now, can you tell us in computing the sum of $21,-

736.13 over on Respondent's Exhibit 16 for identification which of those steps were included by you and which were eliminated by you?

A. I cannot.

Q. Can you obtain that information, sir?

A. Yes, I can get the information.

Mr. Schrup: I would suggest, Mr. Examiner, that until some of this information is obtained, that we can't go on with this cross-examination.

Trial Examiner Hier: Off the record for a moment.

(Discussion off the record.)

Trial Examiner Hier: We will take a short recess.

(A short recess was taken.)

Trial Examiner Hier: On the record.

By Mr. Schrup:

Q. Mr. Eldridge, for the purpose of helping refresh your memory, I hand you this document, and ask you 1024 have you ever seen that document before?

A. No, I have never seen this document before.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Schrup:

Q. Does that document help to refresh your memory, sir?

A. Yes, it does.

Q. And the material embraced on that document was supplied to you by whom, sir?

A. By Mr. Dreyer.

Q. What did you request of Mr. Dreyer in order to obtain that material?

A. I requested the name and salary of the people working in the processing of orders.

Trial Examiner Hier: I should like to know, does that document furnish a break down of the twenty-one thousand odd dollars and cents which is shown on Respondent's Exhibit 16 for identification?

A. Yes, it does.

Q. Now, referring again, Mr. Eldridge, to Respondent's Exhibit 18-A, B, and C for identification, the figures of $21,736.13 appearing on Respondent's Exhibit 16 for identification, does the figure appearing on Respondent's Ex-

hibit 16 for identification embrace any expenses con-
1025 nected with the opening of mail in the order processing operations of the C. E. Niehoff & Company?

A. Well, it embraces the heading of mail; it doesn't necessarily stop at the opening of the mail; the heading is mailing, and the amount is $5,029.56.

Q. Would you know what operations are involved in the mailing operation?

A. No, I wouldn't know because I didn't make a time study of the operation of this department. Mr. Dreyer is the one who made those studies, and any information that is on those schedules, he gave me.

Q. The information that appears on Respondent's Exhibit 16 for identification, $21,736.13 was computed by you on the basis of information given you by Mr. Geyer?

A. No, Mr. Dreyer, the engineer.

Trial Examiner Hier: That was the witness on the stand this morning, Mr. Dreyer.

By Mr. Schrup:

Q. Well, did Mr. Dreyer request of you any total—did he request of you in connection with the order processing operation of the C. E. Niehoff & Company any total of expenses relating to the shipping operations of the C. E. Niehoff & Company?

A. No, he did not.

Q. Well, Mr. Eldridge, does the sum of $21,736.13 ap-
pear on Respondent's Exhibit 16 for identification
1026 include any of the wages of C. E. Niehoff & Company's employees working in the C. E. Niehoff & Company shipping department?

A. May I see that sheet? No, it doesn't.

Q. Does it include any of the wages of any of the employees working in the C. E. Niehoff & Company order picking department?

A. I am not familiar with the title, order picking department, and it is not designated on this break down here so from this record here, I can say that it does not include the order picking salaries.

Q. Would you know whether the sum of $21,736.13 appearing on Respondent's Exhibit 16 for identification includes the salary of the credit manager of the C. E. Niehoff & Company?

A. It does not.

Trial Examiner Hier: Or any part thereof?

The Witness: No part thereof.

By Mr. Schrup:

Q. Directing your attention again, Mr. Eldridge, to Respondent's Exhibit 16 for identification, was any part of the sum of $21,736.13 appearing on that exhibit included in the sum of the total general administrative expenses for 1949 of $194,817.35, appearing on Respondent's Exhibit 16 for identification?

A. Yes, I think it is included.

Q. All of it?

A. Yes, I think it is all included there.

1027 Q. Now, directing your attention, Mr. Eldridge, to Respondent's Exhibit 17-A for identification with particular reference to the column of figures for the year 1949, now, do I understand that those figures represent the actual figures taken from Mr. Niehoff's books and records?

A. They do with the exception of the dollars and cents.

Q. They are carried out to the nearest dollar?

A. Yes, that is right.

Q. Now, with reference to the column two on the Exhibit, which of those figures appearing on column 2, just to the right of the figures under 1949 are taken from the books and records of the C. E. Niehoff & Company?

A. None of them.

Q. With reference to the column appearing on Commissioner's 17-A which of those figures are taken from the books and record of the C. E. Niehoff & Company?

A. None of them.

Q. With reference to the fourth column that is the "Break Even" column on 17-A which of those figures were taken from the books and records of the C. E. Niehoff & Company?

A. None of them.

Trial Examiner Hier: I would like to ask Mr. Eldridge, what do you mean by the term, "break even"?

The Witness: Break even means that they estimate the net sales volume which according to my forecast 1028 and opinion would allow the company to break even, that is not make any money or not lose any money.

Trial Examiner Hier: I see.

By Mr. Schrup:

Q. Mr. Eldridge, if there was a fifth column on Respon-

dent's Exhibit 17-A for identification wherein the volume was $1,724,000, do I understand that the sales of the C. E. Niehoff & Company would be made at a loss?

A. If you want to get down to that fine a point, yes.

Q. Directing your attention to Respondent's Exhibit 17-B for identification, that, as I understand, it represents the estimated loss statement based on a 10% over all rebate if one was made? Is that correct?

A. That's right.

Q. As I recall your testimony, I believe you stated that the net sales for the purposes of Exhibit 17-B were reduced from the actual $2,317,000.00 shown on Respondent's Exhibit 17-A for identification to $1,300,000.00, is that correct?

A. That's right.

Q. Will you tell us again why you reduced the volume of that figure?

A. Yes, sir. The Schedule 24-D has the detail of how this $1,300,000.00 was arrived at.

Q. Now, Respondent's Exhibit 24-D is explanatory of Respondent's Exhibit 17-B for identification, is that correct?

1029 A. That's right.

Q. And both of those exhibits represent your opinion on a hypothetical situation, is that correct?

A. The details in 24-D are not hypothetical; they are actual, and those figures are arrived at by using the starting point of $2,300,000.00, net sales, actual sales for 1949—

Q. But you have arrived—

Trial Examiner Hier: Let him finish.

The Witness: (continuing) —by the elimination of foreign sales which wouldn't be represented on this. The figure of $2,086,499.00 represents the actual net sales on all accounts, including foreign business; and that figure is broken down by accounts, jobber accounts in which there was no discount given at all, amounting to $156,855.00; and jobber agreement accounts in which the discount ranged from 5-7-10% and for the purpose of this $392,000.00 in business on which the distributor had a 10% discount, the discount allowed, amounting to $540,038.00 and the distributor agreement amounting to $997,606.00; that makes a total of $2,086,499.00 actual sales for the year 1949 exclusive of foreign sales, and for the purpose of forecasting, arriving at the figure of $1,300,000.00 sales to give

effect just as though all accounts were going to be treated alike, with a 10% discount, the following steps were taken—

By Mr. Schrup:

1030 Q. Just a moment, before you go to that, I want you to complete your answer to the last question on Exhibit 24-D for identification, the figures opposite, 10% discount to all accounts, which of those are actual figures that prevailed in the year 1949?

A. Those figures I just got through reading.

Q. That may be true, but what does the term, 10%—charged to 10% to all accounts, what is that figure?

A. That is the assumed figure for the purpose of forecast.

Q. And that next figure is also an assumed figure for the purpose of forecast?

A. That's right.

Q. Then next is "none;" then you have the word, "out," and for the purpose of this chart, you also assumed there would be no distributor sales, is that correct?

A. For a discount of 10%.

Q. Do you base that chart on the fact that if the distributor would not get that 10% discount, C. E. Niehoff & Company would lose all that business?

A. Yes, that is right; that is the crux of it.

Trial Examiner Hier: Now, you said the following steps were taken—Go ahead with that.

The Witness: All right. Using this actual figure, and on the assumption that they give no discount and that the jobber account in $156,855.00, and if 10% were al-
1031 lowed to this class of accounts, a reduction of $15,685.00 would be anticipated. The jobber agreement discounts range from 5-7-10% and it has been averaged that a 3% discount would be taken off of these accounts on the assumption that they averaged, actually, 7% for the year 1949; and 3% of $392,000.00 would amount to a reduction there of an additional discount to be allowed of $11,760.00 and on the assumption that the distributor agreement accounts who did receive discounts in excess of 10% would be entirely eliminated which amounts to $997,608.00 and would make a total of $1,025,051.00 to be deducted from the actual net sales of $2,317,000.00, so for the purpose of the figures shown in Exhibit B, the round sum of $1,300,000.00 was used.

Trial Examiner Hier: Mr. Eldridge, I don't understand why you were anticipating a decrease in jobber's business if they received a 10% discount.

Mr. Schrup: I don't think that is what he said.

Trial Examiner Hier: He may not have meant that. I understood him to say that the jobber's business would decrease some fifteen thousand dollars.

The Witness: The jobber's accounts now, we give no discounts. If we were going to give everybody a discount, we would give them a 10% discount, which they would not be getting.

Trial Examiner Hier: Oh, I see; that is taken off of the existing business.

1032 The Witness: That is right.

Trial Examiner Hier: And you make no forecast that that business would increase?

The Witness: No.

Trial Examiner Hier: All right, I misunderstood you.

By Mr. Schrup:

Q. Mr. Eldridge, referring again to Respondent's Exhibit 17-B for identification and Respondent's Exhibit 24-D for identification, these two documents, as I understand it, and if I am incorrect tell me, form no part of the justification for the prices charged by the C. E. Niehoff & Company to its customers in the year 1949?

A. No. They were not used for any purpose except this hearing. I should clarify that because the figures that were on 24-D were actually taken off of our statistical record for management control.

Q. That is true, but it has no relation to the actual prices charged?

A. No.

Q. Now, referring, Mr. Eldridge to Respondent's Exhibit 17-C for identification, as distinguished from Respondent's Exhibit 17-D for identification, 17-C reflects net sales of $2,300,000 is that correct?

A. That's right.

1033-1043 Q. Now, on Respondent's Exhibit 17-C for identification, I note the terms—Add Rebates allowed, actual, $70,000.00, does that comprise all the rebates, discounts, allowances made by C. E. Niehoff & Company to its customers?

A. That's right: the actual figures for the year 1949.

Q. Did that sum of $70,000.00 include any discount taken off of the invoices?

A. No, that sort of discount is a financial discount of 2% and is not treated as a sales deduction.

Q. I am talking now about trade discounts as distinguished from the end of the year volume allowances.

A. No, there is no trade discount taken off of that $70,000.

Q. It would be in addition to the $70,000.00?

A. That's right.

Q. Likewise in the case of group buying organization, which I believe the testimony shows takes their 10 and 7% off the face of the invoice, that would not appear in the $70,000.00?

A. Not if that is the case because the $2,360,000.00 shown is the net amount on the face of the invoice.

Q. Well, is that the case or not, do you know?

A. There are no trade discounts. These are the rebates, the $70,000.00. I don't know that there are any other trade discounts.

Mr. Sprowl: Off the record, for a moment, please.

Trial Examiner Hier: Off the record.

1044 (Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Schrup:

Q. To refresh your memory, Mr. Eldridge, I will show you Commission's Exhibit 26, and invoice, #17954, and the figures less 10%, less 7% appearing on the face of the invoice from C. E. Niehoff & Company to Cotton States, Inc.—

Trial Examiner Hier: Under what date?

Mr. Schrup: 11/22/49.

Trial Examiner Hier: All right, what is the question?

By Mr. Schrup:

Q. Would it refresh your memory now, if I again asked whether the $70,000.00 appearing on Respondent's Exhibit 17-C reflected the discount given on the face of the invoice by C. E. Niehoff & Company to Cotton States?

A. It does not.

Q. In preparing Respondent's Exhibit 17-C for identification, with reference to the potential over all 15% rebate, did you assume that under such a discount that the same

selling expenses would prevail on the part of the C. E. Niehoff & Company?

A. Yes, I did because in that exhibit, 17-C, we have worked from actual net profits of 1949 and have only given effect to net sales caused by the over all 15% rebate.

Q. In other words, you assumed that the selling effort to customers, not new customers, but customers not re-
1045 ceiving the 15% rebate would be the same as if they did not receive the 15% rebate?

Trial Examiner Hier: Mr. Witness, is it possible to make this type of forecast without making a number of assumptions one way or the other?

The Witness: No, sir, it is impossible. It is the best guess a person can possibly make under a situation they know. It is like all budgets; it is like the United States government budget—

Trial Examiner Hier: Let's not bring that up.

By Mr. Schrup:

Q. Now, with reference to Respondent's Exhibit 17-C, the same as Respondent's Exhibit 17-B for identification, I will ask you the same question, and that is, this exhibit forms no part of the cost justification for the prices charged by the C. E. Niehoff & Company for the year 1949?

A. No.

Trial Examiner Hier: Well, none of these projections do.

Mr. Schrup: Well, I wanted to establish that for the record, sir.

Trial Examiner Hier: As I see it, they are estimates of what would happen to its business if the order which they anticipate might issue under this complaint, as they construe the complaint, is that right?

1046-1048 Mr. Sprowl: Yes, an order issued as against C. E. Niehoff & Company and not against its competitors.

By Mr. Schrup:

Q. I am not quite clear yet, Mr. Eldridge, prior to the year 1949, did you state that you did or did not perform any cost studies for C. E. Niehoff & Company with relation to their sales, administration or merchandising?

A. We have never done any cost accounting for C. E. Niehoff & Company. All of our work has been in connec-

tion with their general over all accounting system and their Federal taxes and monthly over-all statements.

Mr. Schrup: Now, if the Examiner, please, if we may have a very short recess.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: We will take a short recess.

(A short recess was taken.)

Trial Examiner Hier: On the record.

By Mr. Schrup:

Q. Mr. Eldridge, directing your attention to Respondent's Exhibit 16-C for identification, the sum of $21,736.13, that sum was computed by you on the basis of a request from Mr. Dreyer?

A. That's right.

Q. Did he furnish you any information upon which 1049 you could compute that figure?

A. Yes, without furnishing all the information to me.

Q. Will you tell us what information he furnished you?

A. He furnished me with the names of the employees that were involved in the work of mailing the inventory, the pricing, the billing, the statistical filing, all of which was in the processing of orders.

Q. And you computed their annual salaries and arrived at a figure—

A. I didn't compute them. He gave me the annual salaries.

Q. And they amounted to the sum of $21,736.13?

A. That's right.

Mr. Sprowl: Off the record.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Schrup:

Q. Now, Mr. Eldridge, turning again to Respondent's Exhibit 17-A for identification, the first column under 1949, entitled Cost of Sales, $1,594,800.00, do you recall I asked you a previous question with regard to purchases of C. E. Niehoff & Company during 1949, and you were unable to answer it at the time, now, do you have some material before you which will enable you to answer that?

A. Yes, I have found that there is a break down.

1050 Q. Will you read that, please?

A. Raw material for manufacture amounted to $27,918.42; piece parts for manufacturing, amounted to $112,422.17; purchased parts for resale amounted to $939,-332.51; and packages and cartons amounted to $48,998.62; and service purchases amounted to $4,378.93, which is a total of $1,132,350.65. I would like to qualify my estimate of manufactured and purchased parts to this extent—

Trial Examiner Hier: All right.

The Witness: That these purchased parts and their amounts are reflections of a percentage of manufactured and resale parts for the reason that this only represents the material to which is added labor; to which is added factory costs-overhead; and then it becomes comparable to the total figure given, which is more comparable to the purchased parts cost, and when the manufacturing costs are added to this raw material, and the piece part purchases, it then becomes more comparable to the division between manufacturing and purchased parts sales.

Trial Examiner Hier: You would not care to give an estimate, would you as to what proportion of the general overhead is attributable to the resale of purchased parts and what proportion is attributable to the sale of manufactured parts?

The Witness: I wouldn't want to give an estimate
1051 except to this extent that the purchased parts are bought and they are stored and shipped and do not compare as far as operations are concerned in any way with the manufacturing space required, the investment or circumstances in connection with the manufacturing operation. I would like to say further that while the amount I have allocated to overhead reflects what we say it does, it does not include selling, advertising and other overhead and indirect factory expenses such as stock room and shipping.

Trial Examiner Hier: Perhaps this question should be more properly put to Mr. Dreyer, but you can give me your best judgment, but is the expense of filling orders, the picking and packing, substantially the same for items that are manufactured and items that are for resale?

The Witness: I would say, substantially, the same.

Trial Examiner Hier: Is that true of both of these types of items here?

The Witness: I don't think it is true for one reason. This plant was built in 1939 and they came from small

quarters where the largest percentage, the major portion of their business was purchased parts, and all they did was store them; and the greater part of this plant that was put up was in anticipation of manufacturing, and three or four additions have been added caused by the additional manufacturing processes and operations.

1052 Trial Examiner Hier: Go ahead, Mr. Schrup.

By Mr. Schrup:

Q. Mr. Eldridge, to your knowledge, prior to this study of the costs for the C. E. Niehoff & Company for the year 1949, has any other prior study of a similar nature been done by the C. E. Niehoff & Company?

A. Well, we have on many occasions studied our reports at the end of the year to ascertain what the volume of business is that we have to make to get a certain profit and what our break even point is, and most of this has to come from our annual reports at the end of the year, all of which is broken down by sales percentage and spread of overhead to the different factory departments; and we study our business constantly, always aware of the knowledge that we must do a certain volume of business to have certain results.

Q. I mean in connection with your sixteen years relation with C. E. Niehoff & Company, to your knowledge has any cost study identical or similar in nature to the one being presented here been made by C. E. Niehoff & Company?

A. Not identical.

Trial Examiner Hier: Certainly not for that purpose, I take it?

The Witness: Not for this purpose.

By Mr. Schrup:

Q. Well, has any cost study of this nature ever been made?

1053 A. Well, yes, we are constantly studying costs for management control.

Q. I am referring now to the cost of sales, administration, merchandising and order processing and things of that nature?

A. Not to my knowledge so far as the cost of order processing is concerned.

Mr. Schrup: I believe that is all.

Trial Examiner Hier: Any redirect examination?

Mr. Sprowl: I think we can shorten this up if we can

have a minute or two with Mr. Eldridge. I am confused on a few things, and maybe rightly so.

Trial Examiner Hier: All right.

Redirect Examination by Mr. Sprowl.

Q. Do you have Respondent's Exhibit 16 for identification before you, Mr. Eldridge?

A. Yes, I do.

Q. Now, you testified that C. E. Niehoff & Company in the year 1949 made 50-60% of its purchases on a dollar volume from other plants and didn't manufacture the items themselves?

A. That is approximately right, yes, sir.

Q. Now, notwithstanding that fact, is it my understanding of your Exhibit 16 that in determining the percentage of general and administrative expenses to the direct factory labor, you would apply the ratio of the total general
1054 administrative expenses to the year 1949 to direct labor or 201.24%?

A. That's right.

Q. Is there any item of overhead which you would call total general administrative expense in the year 1949 which is what I would call advertising and selling overhead?

A. No there are none.

Q. Now, as to this merchandise which C. E. Niehoff & Company buys or bought direct in 1949, which is manufactured completely, would that be in the nature of a sort of wholesale operation?

A. On the purchased parts?

Q. Yes, where they purchase the finished parts.

A. I would say, yes.

Q. And that in relation to the total plant space of C. E. Niehoff & Company in 1949, how much would be used for warehouse facilities for the purchased parts?

A. Well, I would make an estimate of about 15-10% of the warehouse would be necessary for storage.

Q. That requires no machinery?

A. Nothing at all—only inventory.

Q. Does that include the space that Niehoff & Company also puts their manufactured parts in?

A. No, I would say it took additional space for the manufactured parts.

Q. And allowing for the fact that it costs something to

go through the administrative detail of purchasing those items, is it still your opinion that the way to arrive at this burden of 201.24% is to apply the total administrative general cost for 1949 to the direct factory labor for that year?

1055

A. Yes.

Q. As I understand it, you then took that 201.24% arrived at in that manner, that is the burden you applied to the order filling division of the Company?

A. That's right.

Q. Assuming this figure on Respondent's Exhibit 16 were doubled would the burden still be 201.24% or would it be different?

A. On the theory of using direct factory labor, we would use the same percent, 201.24%.

Q. In other words, the manner of deriving the 201.24% is the computation above the line on Exhibit 26?

A. That's right.

Q. And all you have done below the line is simply to apply that to a figure?

A. That's right.

Q. And if the figure here included only one half of the salaries involved in order filing, it still wouldn't change that 201.24%?

A. That's right, by using the same factory spread.

Q. In other words, that has not anything to do with the derivation of the 201%?

1055-A A. That's right.

Q. I assume there are other methods of figuring that?

A. Yes, various methods. Sometimes they take the fuel, heat and light or possibly the phone service in ratio to the over all. In my experience I have seen factories take their direct labor.

Q. In your opinion, this is the proper way to compute it for an operation such as Niehoff's?

A. Yes.

Q. Could some other person compute this overhead and arrive at say, 225%?

A. There is that possibility.

Q. Or they might arrive at 175%?

A. They might. I would like to add here, Mr. Sprowl, if I may that this $21,736.00 is simply the office operation and doesn't include other processing labor that applies to this same operation.

Q. You mean like order picking?

A. That's right.

Q. Now, if you added direct labor for order picking and wrapping, would it change your 201%?

A. No, not under my theory or my opinion.

Trial Examiner Hier: During this lull, Mr. Eldridge, look at Respondent's Exhibit 16, if the figure of some 194 thousand and some hundreds of dollars was split so that part of it was allocated to that merchandise which is
1056 bought finished for resale and the rest allocated as you have allocated it, that would change the figure of 201% very materially wouldn't do it. Suppose you split it in half, would you come out with a figure of 102?

A. On that theory, you would, but this $21,000 is for processing.

Trial Examiner Hier: I understand that. I am talking about the method by which you would arrive at it.

The Witness: I don't think that is correct. There would be a very small portion if you were allocating it to the overhead in purchased parts.

Trial Examiner Hier: All right, go ahead.

By Mr. Sprowl:

Q. That wouldn't carry over as to the resale of those purchased parts, the advertising, selling etc.?

A. No, it has nothing to do with that nature of expense.

Q. Your point is that as to the acquiring of these and getting them into your warehouse that there could be very little of this figure that could be allocated to that?

A. That's right.

Q. You take the ratio between the whole amount of time and the direct factory labor?

A. That's right.

Mr. Sprowl: That is all I have.

1057 *Recross Examination by Mr. Schrup.*

Q. Mr. Eldridge, the 810.01 opposite the direct factory labor for 1949 on Respondent's Exhibit 16, could you tell us, or do you know as an actual fact what would be the expense incident to the acquisition of that merchandise purchased by C. E. Niehoff & Company?

A. The expense for the acquisition of the purchase parts?

Q. Yes.

A. I think it would be confined pretty much to the purchasing department.

Trial Examiner Hier: Let me ask you, in acquiring the merchandise, there would be some expense or some burden in the acquisition in point of freight?

The Witness: Of course but that would not be overhead.

Trial Examiner Hier: That's right. That is direct. Then you have storage and supervision of that storage and inventory and all that sort of thing, and then you have picking and packing, out-going.

The Witness: That's right.

Trial Examiner Hier: Plus any supervision?

The Witness: Yes, of course, that comes under indirect expense.

Trial Examiner Hier: It would be part of that?

The Witness: No, that isn't included in the orders; 1058 that is all out in the factory under direct labor.

Trial Examiner Hier: But you have the items comparable to direct factory labor for that branch of the business confined to resale.

The Witness: That's right.

By Mr. Schrup:

Q. You use the term, indirect labor in the factory, what does that comprise?

A. It comprises from the top, the factory superintendents, and all the foremen, and any one that is doing anything in the factory except working directly on a productive machine.

Q. And that would be related to merchandise purchases for resale or part of it at least?

A. Well, the factory superintendent or any of his superintendents wouldn't have anything to do with the purchased parts; that is all in connection with handling machinery and direct labor.

Q. You have used only the direct labor in compiling Respondent's Exhibit 16?

A. That is correct.

Q. Now, isn't it usual that that would only be used in a factory that manufactured some in part and purchased others in part for resale?

A. It is based on the theory of a manufacturing plant.

Trial Examiner Hier: Well, I take it your answer 1059 is, yes, then?

The Witness: Yes.

By Mr. Schrup:

Q. In making up the total general and administrative expenses for 1949 as appears on Respondent's Exhibit 16, would not the major part of that amount be salaries of the various officers of the C. E. Niehoff Company?

A. No, it would not. I enumerated those a while ago. I will refresh my memory here and give you some of the break down. What salaries did you ask for?

Q. The salaries of the officers of C. E. Niehoff & Company, the employees of the credit, purchasing, and various other departments.

A. It appears that the salaries are approximately between 40 and 50%.

Mr. Sprowl: Of what?

The Witness: Of $194,000.00.

Mr. Sprowl: Of all kinds of salaries?

The Witness: Yes, credit department, purchasing, general accounting department and the officer's salaries.

By Mr. Schrup:

Q. But that is restricted to the general administrative expenses which does not include any of the salaries in the factory?

A. No, it doesn't.

1059-A Q. Are any of these salaries included in the figure which appears on Respondent's Exhibit 16?

A. I think they do.

Q. About how much of that figure?

A. I would say the whole thing.

Trial Examiner Hier: We will take a short recess.

(A short recess was taken.)

Trial Examiner Hier: On the record.

Mr. Schrup: I have no further questions.

Trial Examiner Hier: Do you have anything further?

Mr. Sprowl: No, I haven't. But while we are here, I should like on the record to substitute for Respondent's Exhibit 23 for identification an agreed exhibit which is identical as to computation. The only difference being the number of sales to Greiner; the sales in 1949 were asserted to be 32 rather than 26 as shown on the original identified exhibit. I have extra copies, and I understand that this is agreeable.

Trial Examiner Hier: Is it agreeable gentlemen?

Mr. Schrup: Yes.

Mr. Sprowl: Here is the new one marked as the new Exhibit 23, and we shall physically withdraw the old one.

Now, also, I should like to refer to Respondent's Exhibit 5 which is already in evidence and correct on the face thereof, the figures 26 should be 32, and the average amount per sale should be $322.00 instead of $396.00, which I
1060 understand is agreeable to counsel supporting the complaint.

Trial Examiner Hier: Is that agreeable.

Mr. Schrup: Yes.

Trial Examiner Hier: All right, the record may show the corrections.

Mr. Sprowl: Now, would you rather I would offer my exhibits now, or would you rather defer that until in the morning?

Mr. Schrup: If I may interrupt you one moment. May we have Mr. Dreyer available to us—?

Trial Examiner Hier: I understand that he has offered three exhibits that do not depend in any wise on Mr. Dreyer—Respondent's Exhibits 17-A, B and C and so much of 24-B and C as refer to those projections. If you want to offer those now, I am prepared to rule on those exhibits.

Mr. Sprowl: I am afraid you are. I wish to offer Respondent's Exhibits 17-A, B and C, and so much of 24-A, B, and C and D as relates thereto.

Trial Examiner Hier: Do you have any objection?

Mr. Schrup: Yes, as being conjectural and no part of any cost computation relating to any of the issues in this case.

Mr. Sprowl: I would like to make a statement.

Trial Examiner Hier: You may.

Mr. Sprowl: We have heretofore offered and had
1061 admitted the testimony of both Mr. Niehoff and Mr. Geyer respecting what would be the effect upon the business of the Niehoff Company if it were put under a cease and desist order as sought in this case and its competition was not put under a similar order, and that was admitted on the basis that it went to the good faith of this proceeding; and I offer this as cumulative testimony or evidence that goes to show in a projection what that result would be and on the question of the good faith of the Commission for if the former is admissible, certainly this is admissible on that point.

Trial Examiner Hier: What have you got to say on that point?

Mr. Schrup: If I understood him correctly, he was talking about the good faith of the Commission—

Trial Examiner Hier: Just a minute.

Mr. Sprowl: In bringing this proceeding against one Company and not against the rest of the industry.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record. Respondent's Exhibit 17-A, B and C and so much of Respondent's Exhibit 24, A, B and C and D as relates to 17 are admittedly, with the exception of the first column from the left of Respondent's Exhibit 17-A, projections of what would happen under an assumed state of facts, namely, that the re-
spondent would break even or lose money, etc., if cer-
1062 tain discounts now given by them were eliminated
by reason of a cease and desist order. None of the items, with possibly one or two exceptions are actual. They are adjusted or computed or arbitrarily fixed by the witness, Eldridge, on the basis of his experience and represent his opinion as to what would happen. The exhibits are, therefore, as counsel in support of the complaint has said, conjectural and speculative. In my opinion, assuming everything on these exhibits to be factual, even then they still constitute no defense to the complaint in this case for the reason that whether or not the enforcement of the Robinson-Patman Act results in loss to a particular Respondent is not, in my opinion, any defense for the reason that Congress in passing the act must have made the legislative assumption that what it conceived to be the public good to be achieved by the passage and enforcement of the Act outweighed any possible or probable private loss since the testimony of that nature was before Congress at the time of the passage of the Robinson-Patman Act. So I believe that these exhibits are admittedly incompetent as to a defense, and I don't think they constitute any defense whatsoever. However, counsel for the Respondent state that they are offered for the purpose of showing an abuse or misuse of administrative discretion on the part of the Federal Trade Commission in the issuance of this complaint against this Respondent and not simultaneously
against other companies engaged in a like business,
1063 and calls my attention to the fact that I permitted
Mr. Niehoff to testify to that same effect, although, generally, on pages 375 through 381 of the record, and that the record shows at that place that counsel in support of

the complaint made a similar objection and was overruled for the purpose indicated and the answer strictly limited to that purpose.

Mr. Schrup: Mr. Examiner, in view of the ruling, I would like to amend my objection to include an objection to the introduction of this document with regard to the testimonial qualifications of Mr. Eldridge to give such an opinion.

Trial Examiner Hier: That part of the objection, I don't think is well taken: the fact that Mr. Eldridge is not a certified public accountant and does not have a degree in accounting.

Mr. Schrup: And he is not a market analyst either.

Trial Examiner Hier: But you overlook the fact that these documents are not going to be admitted for the truth of what they purport to give; they are not factual; nor are they admitted as a defense to the charge in this complaint. So Respondent's Exhibits for identification, 17-A, B, and C; and 24-A, B, C and D are admitted in the record over the objections of counsel in support of the complaint, not for the truth of what they purport to give nor as a defense to the charge in the complaint, but simply for the purpose of showing by way of corroboration of Mr. Niehoff's testimony at pages 378-381 of the record and 1064 what the respondent claims, namely, that this proceeding represents, so far as the respondent is concerned, a misuse of the discretion of the Federal Trade Commission in the use of its authority. The objections of counsel in support of the complaint to the admission of these documents for any purpose are, therefore, overruled.

Mr. Schrup: I should also like to offer these exhibits 17-A through C and 24-A through D as not supporting any evidence of the defense that the Niehoff volume discount was justified from the standpoint of cost for it is my contention that these projections could not possibly produce the loss factors that they purport to indicate.

Trial Examiner Hier: The tender just made is refused. The documents are not accepted for the purpose stated but because they are admittedly non-factual and they represent opinion only.

(The documents referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 17-A, B, and C, and RESPONDENT'S EXHIBITS 24-A, B, C, and D were received in evidence.)

Trial Examiner Hier: Let the record show the reporter

is relieved from the responsibility for the documents just accepted in the record, since the Trial Examiner is going to retain them in his possession for use in tomorrow's hearing, and they will be turned over to the reporter who takes tomorrow's hearing.

1065 Trial Examiner Hier: The hearing will be adjourned until ten o'clock tomorrow morning.

(Whereupon, at 4:30 p.m., November 6, 1951, the hearing in the above-entitled matter was adjourned to 10:00 a.m., November 7, 1951.)

1066 Room 1600, 173 W. Madison St., Chicago, Illinois, Tuesday, November 7, 1951.

Met, pursuant to adjournment, at 10:00 a.m.

Before: Frank Hier, Trial Examiner.

Appearances:

E. P. Schrup and Francis G. Mayer, Attorneys for the Federal Trade Commission.

Charles R. Sprowl, 134 South La Salle Street, Chicago, Illinois, Attorney for the Respondent.

1067 Proceedings.

Trial Examiner Hier: The hearing will come to order. Show that Mr. Louis Dreyer resumes the stand again, having been previously sworn, but before any cross examination of Mr. Dreyer is undertaken, I want to make an additional statement.

Last night, at the close of the hearing, over objection, I admitted in evidence Respondent's Exhibits 17-A, B, and C; and Respondent's Exhibits 24-A, B, C and D for the reason that the Respondent contended that these exhibits, which are admittedly speculative, tended to substantiate its claim made in this proceeding that the Commission had abused or misused its discretion in the issuance of the complaint. That is a matter, of course, over which I have no jurisdiction, but it is a serious matter, and I do not wish to do anything to hamper the Respondent in the presentation of its claim; but I think it should be added to that the additional reason which has also been advanced by Respondent's counsel, namely, that the issuance of an order against this Respondent and not in addition an order against it competitors would work, so the respondent

claims, a serious injury to the respondent, and these exhibits are contended to support that position; that also is a matter over which the Commission has a very broad broad and exclusive jurisdiction, and a matter which can be addressed only to them.

1068 Go ahead with Mr. Dreyer.

Mr. Mayer: May we go off the record for a moment?

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

LOUIS DREYER resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Mayer.

Q. Mr. Dreyer, directing your attention to Respondent's Exhibit 16 for identification, are you familiar with that exhibit, sir?

A. Well, I have heard about it, and I have had a glance at it but I don't claim that I am strictly familiar with it with the exception that the results of the examination or time study were told to me, but what I was interested in, chiefly, was the burden rate derived from this exhibit. How it was derived, I don't know except in a very general way, and the details of that I am not at all familiar with; but Mr. Eldridge came up with the per cent of 201.24 and from this, I arbitrarily used 200% as the burden rate.

Q. Now, sir, directing your attention more particularly to the first entry underlined in the center of the exhibit, Direct Labor Involved in the Processing of Orders, and to the figure, $21,736.13, do you have any personal

1069 knowledge as to how that figure was arrived at, sir?

A. No, I don't sir. Mr. Eldridge asked me who was involved in the work included in the twenty-one steps, and I gave him a list of the people I knew were involved—I mean at the time of the study.

Q. Along with the people that you gave him, I suppose you gave him their salaries too, is that right, sir?

A. No, I don't recall. I gave him whatever information he asked for. I don't remember—no, I don't think I did;

I think he got that information about the salaries from the pay roll and personnel department—I am not sure. I may have given it to him but I have no recollection of it.

Q. The people whose names you supplied to Mr. Eldridge were those people who were engaged in the processing of orders in the Niehoff plant as of the time you gave him the information in 1951?

A. Yes, there was a certain amount of discussion involved there but I don't remember, definitely, whether I gave him all the particular names and all the steps involved; but I did give him, as I recall, the names of all the people in the office and other people involved in the factory and I don't remember if I went into even the detail of giving him all the factory people. I think I did. I am not sure.

Q. What was the purpose of giving him this information?

A. To establish the amount of labor involved.

1070 Q. Did you give him then the various costs which would be assigned to the twenty-one steps as they appear on Respondent's Exhibit 18-A, B, and C?

A. The costs? No, I don't recall giving him any information on that.

Q. Well, giving the employees names and the salaries paid?

A. My recollection is that I didn't give that to him but there was so much work involved in that and other work, that I wouldn't want to say positively. My recollection is I gave him a list of the names and I don't recall that I gave him the money involved. I think he got that up himself.

Q. Do you recall when you gave him this information?

A. No, I don't. It was sometime during the course of the studies.

Q. Was this information you gave Mr. Eldridge on a prepared memorandum or a written document of some kind?

A. I think it was a rough sheet of paper. I don't think it was typed. I don't remember whether extra copies were made of it or not. I think there were but I am not positive.

Q. In order to arrive at the figure, Mr. Dreyer, as it appears on Respondent's for identification 16 of $21,736.13 would it be necessary to consider all of the personnel in-

volved in the twenty-one steps as you have them outlined on Respondent's Exhibit 18-A, B and C?

A. I think it would with the exception that not
1071 all of the time all of the people were involved. Mr. Eldridge would, naturally, as I suppose he did, take, for instance, he would consider the credit approval, now, that man's time, only a fraction of it is involved in the step of approving credit, and certainly you couldn't take his entire day and charge it to direct labor, to the labor involved in processing these orders, so I am quite sure in my own mind that Mr. Eldridge did that but I certainly have no positive proof.

Q. If all of the employees who are considered or concerned in the twenty-one steps as shown on Respondent's Exhibit 18 for identification, being 18-A, B and C, were not included in the figures on Respondent's Exhibit for identification 16, than that would be an inaccurate figure that resulted as to the direct labor involved in processing the orders?

Mr. Sprowl: I object to the question.

Mr. Mayer: Just a moment.

Trial Examiner Hier: Don't answer the question.

Mr. Sprowl: I objected because the witness said he didn't know anything about the computation of it.

Mr. Schrup: The question was if it was made incorrectly, the result would be incorrect.

Trial Examiner Hier: I will overrule the objection.

The Witness: I think, normally, that if something starts on an incorrect basis, any results based on it would be incorrect.

1072 By Mr. Mayer:

Q. Mr. Dreyer, to be correct, the figures on Respondent's Exhibit 16 of $21,736.13 to be correct would have to involve or take into consideration the salaries of all the people involved in the twenty-one steps as you have them outlined on Respondent's Exhibit 18-A, B and C?

Mr. Sprowl: I would like to interpose an objection to that. The witness, Eldridge, testified that the 201% burden figure were figures calculated from a type of average and that was irrespective of the salaries involved, and unless the witness knows what you are talking about, he is not qualified to testify as to whether that is correct or incorrect.

Mr. Schrup: That is not the point.

Trial Examiner Hier: Read the question.

(The reporter read the question as follows:

"Question: Mr. Dreyer, to be correct, the figures on Respondent's Exhibit 16 of $21,736.13 to be correct would have to involve or take into consideration the salaries of all the people involved in the twenty-one steps as you have them outlined on Respondent's Exhibit 18-A, B, and C?")

Trial Examiner Hier: I think that is perfectly within his knowledge. Go ahead.

The Witness: I am sorry. I didn't follow that accurately but so far as any accuracy in these figures, I
1073 would have no knowledge of that.

Trial Examiner Hier: That is not the point. The question, as I understand it, would it have to take in the salaries of every one involved in performing the twenty-one steps outlined on the exhibit which you prepared?

The Witness: The figures show that the $21,736.13 is the direct labor involved in processing the orders in 1949 and in that case, I should say it should include all the labor involved and all the steps. However, so far as arriving at any conclusion in the percentage of burden, there are different way of figuring the burden, and I don't know what method he used.

Trial Examiner Hier: He is not asking you that. But you didn't figure it?

The Witness: I didn't figure it, no.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record. Put your question.

By Mr. Mayer:

Q. Mr. Dreyer, as I understand it, Mr. Eldridge asked you to supply him with certain information upon which he was going to base this figure on the direct labor involved in processing orders in 1949, is that correct, sir?

A. He asked who was involved. What his purpose
1074 was, I don't know although I might assume that he was going to use it for that purpose.

Q. Just exactly what did he ask you for?

A. The people involved—the names of the people in 1949 and the people now are entirely different so he wanted to know the type of operation involved, what kind of work was involved in these various steps.

Q. Did you supply him with the names?

A. To my recollection, I did, yes. I gave him some names, and others, I gave him jobs, as I recall it. I am a little hazy on that but that is my recollection of it, that I did give him the information that he wanted, but so far as the figures are concerned, the dollars and cents, I didn't supply that.

Q. When was this, Mr. Dreyer, that you supplied this information?

A. I don't recall. It was probably some time in August.

Mr. Sprowl: Of this year?

The Witness: I am not certain about that.

By Mr. Mayer:

Q. That is of 1951, of course?

A. Yes.

Q. But you don't recall the names of any particular persons you supplied, is that correct, sir?

A. No, I don't recall whether I gave him the name of the operators or the type of work they did. I may 1075 have given him some names. I am not entirely sure of that any more but that is as far as I did go. Take for instance in the typing of orders, there are usually four or five people involved, and there were people entirely different from the ones there in 1949 and he wanted me to give him their names and their present rates and he was going to use the rates as I understand it used in 1949 so all I did was to give him how many typists there were and that is as far as my information went. I may have given him names but I don't think they would mean anything if I had. I didn't take the 1949 records and attempt to give him the names and address of persons working on those operations at that time.

Mr. Mayer: That is all we have from Mr. Dreyer.

Trial Examiner Hier: Do you have anything, Mr. Sprowl.

Mr. Sprowl: No, I do 't, sir.

1082 **FRED H. GEYER** resumed the stand and testified further as follows:

Direct Examination by Mr. Sprowl (continued).

Q. Mr. Geyer, at my request have you prepared a territorial map of the United States?

A. Yes, sir.

Q. Showing the territories of your various salesmen, direct salesmen, in the year 1949?

1083 A. Yes, sir.

Q. Will you hand me one of those maps so that it can be identified?

A. Yes.

Mr. Sprowl: Mark this as Respondent's Exhibit 25 for identification.

(The paper referred to was marked Respondent's Exhibit 25 for identification.)

By Mr. Sprowl:

Q. Mr. Geyer, I notice several lines on this map in colored crayon, will you explain to me, generally, what those are?

A. Well, each territory is laid out for each salesman, and we have a district number on each territory and a respondent man for each numbered territory.

Q. Now, as a specific example, I see that the State of Illinois is outlined in green as well as the state of Wisconsin with a circle in green around the town of Milwaukee and a number 10, what do all those symbols indicate?

A. It outlines the territory of Illinois, Wisconsin and the Upper peninsula.

Q. Not Chicago?

A. Not Chicago. Chicago is one territory. And the number is the number of the territory, No. 10; and the salesman, Mr. McManus lives in Milwaukee.

Q. And the town of Milwaukee is circled because

1084 that is the home of the salesman?

A. That is right.

Q. And moving over west, I see Minnesota and Iowa, excluding Council Bluffs, and also a few towns along the Mississippi River, with the Number 4, is that a single territory?

A. Yes.

Q. And the circle around Minneapolis, does that indicate that the salesman for that territory lives in Minneapolis?

A. Yes, he is Jack Henze.

Q. And territory No. 5 embraces Montana, North Dakota and South Dakota?

A. That's right.

Q. And the circle around Bismark indicates what?

A. The salesman's headquarters and No. 5 is the number of the territory.

Q. Now, all of these are rather large territories, I observe, and embrace two or three states with the exception of this territory marked around Chicago, No. 11?

A. That's correct.

Q. Is there any other territory comparable to that Chicago territory?

A. No, all the other territories consist of two or three states and in some cases, they are even a little larger, possibly three and a half states.

Q. I notice over in Boston, the Number 18, is that 1085 just to identify your Boston manufacturer's representative?

A. Yes.

Q. What is that company's name?

A. The House of Peaslee.

Q. And in New York?

A. L. C. Bigelow in New York City.

Q. That is No. 17?

A. That's correct.

Q. Now, I notice out in Los Angeles some numbers, is that the Paul G. Niehoff territorial headquarters?

A. Yes, sir.

Trial Examiner Hier: What does the 1-2-3 mean?

The Witness: In other words, we divide this up in 1-2-3 districts the same as we have here (indicating exhibit) and due to this territory being as large as it is, we have designated it into 1-2-3 districts.

Q. Is that the Paul G. Niehoff territory?

A. Yes, and he in turn has men who work the different territories.

Trial Examiner Hier: Look at Wichita—you have a yellow circle and a 7-8?

The Witness: The reason for that again is that Texas is such a large territory, we have to put two districts in it although one man covers the entire territory.

By Mr. Sprowl:

1086 Q. That consists of the southern half of Kansas, Oklahoma and most of Texas?

A. And half of Louisiana. That is the reason for the two numbers on it.

Q. Will you give me—or just read into the record, if you have some notes that will refresh your memory, the names of each salesman in each territory, and the territory number, and the number of accounts in that territory in the year 1949?

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

There being no objection from counsel, the data as to the number of salesmen etc. is being read into the record by counsel for the respondent.

Mr. Sprowl (To Reporter): I will give you just a tabulation: The first column will be the territory; the second column will be the name of the salesman; and the third column will be the number of customers.

	4	Henze	61
	5	Voight	28
	6	Cannell	55
	7-8	Gerwin	98
	9	Ricketts	59
	10	McManus	121
	11	King	80
1087	12	Holz	100
	13	Dierkes	79
	14	Zachary	44
	15	Eakin	43

By Mr. Sprowl:

Q. Now, will you in a general way, tell me how, for instance, Mr. Henze serves the territory which is marked No. 4 and bordered in orange crayon?

A. Mr. Henze sends us a route sheet of a two weeks trip and he might start to go up to Duluth and Superior and go up to Hibbing and up to Chisholm and back by the way of Fergus Falls into Brainerd and St. Cloud and back into Minneapolis; that would be one trip; and on the next trip, he might start out and go over to Willmar and work his way down to Sioux City and back to Ft. Dodge and then Maquoketa and Albert Lea and then back

to Minneapolis; and then he would start another trip, going to Red Wing, Winona, Rochester, and down to Dubuque, Iowa, and Cedar Rapids, and Clinton, and work his way back to Waterloo, Mason City, and Austin, and back in Minneapolis again; and then he would take another trip, going to Des Moines, down to Creston, over to Ottumwa, Iowa City, Marshalltown, and again back to Minneapolis; and in between any of these trips, he may work a few days in Minneapolis or St. Paul.

Q. How would he make his trips, by car, or other means?

A. Always by car.

1088 Q. What is the duration of each trip?

A. Usually two weeks and there may be some occasions when he might be out three weeks, and maybe an occasion when he would only be out a week.

Q. You have named certain towns, are those the only towns that he would call on?

A. No, I just mentioned some of the major cities where he has business and he stayed over night; in between any of these points, there are similar cities where we may have a jobber or a large jobber may have a branch, and which accounts Mr. Henze also contacts. In other words, we try to make any trip a productive trip, going out and coming back.

Q. Now, how many times a year would he make the trips you have detailed, covering the full extent of the territory?

A. Well, I would say, in fact, that we like to have him make it at least six times a year, but in most cases, I think it will run five to six times.

Q. Now, excluding the Chicago territory, would the manner of covering each of the other territories shown on Respondent's Exhibit 25 for identification be the same for the salesman assigned to that territory?

A. Yes, sir, in some cases, the distance may be a little greater but otherwise the principle is the same.

Q. Now, turning to the Chicago territory, how many salesmen serviced that particular territory in 1949?

1089 A. We had one man up until the latter part of 1949. We then decided to put an additional man into the territory but for the greater part of 1949, it was serviced by one man, Mr. King.

Q. I notice you say or have given in this memorandum that there are eighty accounts in that territory, now, in

servicing those eighty accounts, was it necessary for Mr. King to stay over night at any time away from home?

A. No, Mr. King is a city salesman and his contacts are very close by and that means that there is a great number of accounts and he can see these accounts very quickly due to the short distance, and he can see many more accounts, but he is never away from home over night.

Q. By the same token, I assume the mileage he would traverse would be considerably compressed as compared with the mileage the other salesmen would traverse in their territories?

A. Very much so.

Q. While Mr. King was handling the Chicago territory alone in 1949, what was the frequency of his calls upon your customers in that territory?

A. Well, possibly once a month.

Q. That territory extended how far north?

A. It went north to Zion City.

Q. And south to—?

A. Hammond.

Q. In other words, it embraced the suburban towns around the Chicago metropolitan area, Chicago proper?

A. That's correct.

Q. Now, you added a second man late in 1949, what was his name?

A. Mr. Malina.

Q. And since that time, have you had continuously to the present time, two salesmen servicing the Chicago territory?

A. Yes, sir, we have.

Q. How do you divide the territory between them?

A. We take Madison Street as the dividing line and one man works south of Madison Street, and the other man works north of Madison Street, taking in the suburban cities.

Q. Again, now that you have two men in this territory, is it ever necessary for either of these salesmen to stay away from home over night?

A. No, sir.

Q. Now, that you have the two salesmen in this territory, what is the frequency of the calls a salesman can make on the customers in the Chicago territory?

A. I would judge that at the present time, we are con-

tacting accounts every two weeks; at least we make every attempt to do so.

Q. Is there any other peculiar fact relating to the accounts in Chicago that are close to your factory as to the manner in which those accounts obtain service from
1091 the factory that would not apply to the outlying accounts?

A. Yes, in this way, not only close to the factory but pretty near any part of Chicago, we get a lot of telephone calls and jobbers will drop into the plant and pick up orders.

Q. In other words, they might 'phone in and ask you to prepare an order for them and send their own truck around to pick it up?

A. That's correct.

Q. In other words, from these customers you receive what you would call a telephone order as distinguished from an order the salesman himself would obtain by calling on them?

A. That's right.

Q. Now, as to the other territories that you have on the map before you, the situation is substantially the same today, roughly, the same large territories with a single salesman covering them?

A. Yes, sir.

Q. Do you have any other territory comparable to the Chicago area?

A. No, sir.

Q. Now, if the C. E. Niehoff Company were to dispense with the Paul G. Niehoff operations on the west coast, how many salesmen would you have to put into that territory to service it in the manner you service your other territories?

Mr. Mayer: The same objection we had to the
1092 accounts in Memphis and New Orleans as being problematical.

Trial Examiner Hier: Speculative?

Mr. Mayer: Speculative. Speculation of this witness as to what would happen.

Trial Examiner Hier: I take it this witness is certainly in a position to know how many men he would have to put in a given area to cover it.

Mr. Sprowl: I would like to limit it to 1949, what you would have computed in 1949.

Trial Examiner Hier: The objection is overruled.

The Witness: I believe we would have had to have four men in the territory.

By Mr. Sprowl:

Q. Would you have needed any warehouse facilities of your own?

A. Yes, sir.

Q. Turning now, to the House of Peaslee territory in Boston in the year 1949, had you not had the use of the facilities of the House of Peaslee, how many salesmen would you have required for that territory?

Mr. Schrup: The same objection.

Trial Examiner Hier: Same ruling.

The Witness: Two men.

By Mr. Sprowl:

Q. Would you again have required some warehouse facilities?

A. Yes, sir.

1093 Q. And turning to the metropolitan area of New York, if you had not had the use of the facilities of the Bigelow Company in 1949, how many salesmen would you have required?

A. Three.

Mr. Schrup: Objection.

Trial Examiner Hier: All right, the record may show the same objection pertaining to that question and the same ruling.

By Mr. Sprowl:

Q. And that again would have entailed warehouse facilities?

A. Yes, sir.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record. Go ahead.

By Mr. Sprowl:

Q. Now, if you went through each of the other territories in the same fashion you detailed the travels of the salesmen that service the Illinois-Wisconsin, territory No. 10, would their number of trips throughout the territory each year run around five?

A. Yes, I would judge so.

Q. In other words, I mean, it isn't all one trip?

A. No, it would be broken down the same as territory No. 10 or in any one of the other territories.

Q. And each time, it would end up at home for a while to renew acquaintance with mother and the children, is that correct?

1094 Q. And I assume from your answer, to shorten this up, that no purpose would be served if you went through each territory, territory by territory, and detailed the trips, you would get the same result, of about five or so complete circuits throughout the territory a year?

A. Yes, I would judge so.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Sprowl:

Q. Mr. Geyer, do you recall in the summer months of 1951, that Mr. Dreyer requested you to pick out certain orders for him to study?

A. Yes, sir.

Q. Will you tell me how that selection was made?

A. Yes, sir, Mr. Dreyer would come into my office in the morning when we received the orders and ask me for an order that amounted to $80.00 or $90.00; and then another time, he would come in and want an order that ran around $200.00; and then another time, he would want one that ran around four or five hundred dollars; and I would go through the orders and select one or two of those orders and give them to him.

Q. Would Dr. Dreyer be there while you made the selection?

A. Yes, sir.

Q. Was there any reason why Mr. Dreyer couldn't

1095 make the selection himself?

A. Well, Mr. Dreyer looking at an order would have no idea whether the value of the order would be $80.00 or whether it would be $200.00.

Q. How many orders would he request on each occasion?

A. On some occasions, I think he asked for two orders, and on some occasions for three orders.

Q. And those would be selected out of the day's incoming orders?

A. Yes, sir, in the morning's mail.

Q. Just as they were received from the customer?

A. That's correct.

Q. Would he wait in the room while you made the selection?

A. Yes, he stayed right there when I went through the folder of orders that were submitted to me by the credit department and I would go through the orders and look them over and then submit the required amount of order that Mr. Dreyer wanted—in the size of the amount of the order he wanted.

Q. And that order selection, do you know or remember now over what period of time he would drop in and ask for those orders?

A. I believe from the time he started, he would come in about three or four days apart and want a couple of additional orders. I can't tell you exactly whether it was two or three days. It might have been four days in some cases.

Mr. Sprowl: All right, you may cross-examine.

1096 *Cross-Examination by Mr. Mayer.*

Q. Mr. Geyer, did you have any preliminary discussions with Mr. Dreyer concerning what the purpose of the time study he was about to make was?

A. Well, I knew the purpose of him asking for those orders, that they were going to make a study of them.

Q. Did he discuss with you in going over the preparations for the selection of those orders what the ultimate use of this time study was going to be?

A. No.

Q. Now, sir, in discussing the orders, and the orders which were to be selected, did Mr. Dreyer put any limitation whatsoever upon you in your selection of these orders other than to bracket the amount, the total amount of the billings on the order?

A. No, all I was told by Mr. Dreyer was that he wanted an order or a few orders of approximate amounts, and that is what I gave him.

Q. As sales manager, Mr. Geyer, in your knowledge of the progression of this particular case, you knew, of course, that these were to be used in connection with this case?

A. Yes, sure.

Q. Now, sir, in selecting the orders, in the mechanical

selection of them when Mr. Dreyer, for instance asked
1097 for an order for example of $100.00, did you go through the orders and select one or did you, for instance select two or three and maybe two or three more to make the final selection of the order?

A. If Mr. Dreyer asked me for two orders, I went through the orders and used my best judgment in trying to select from the orders I had in front of me or had come in that morning that was approximately $100.00, if he had asked for a $100.00 order.

Q. The total amount of the net billing of the order was the only controlling factor?

A. That was all that entered into it as far as I was concerned.

Q. Did you as a matter of fact, select any orders that contained service stocks or cabinets in the order?

A. No.

Q. Was that matter ever discussed with Mr. Dreyer as to any exclusion of orders because they contained service stocks or cabinets?

A. Only from this point of view, we didn't select orders with service stocks on them because all service stocks are previously prepared and all we have to do in making shipment of service stock is actually stencil the name on the cabinets and the merchandise is also selected and put up under a different number of different type service stocks, so we didn't take orders that had service stock on them.

1098 Q. Then somewhere along the line you and Mr. Dreyer did come to some sort of agreement that any orders that contained service stocks would not be used in running this time study on this order processing?

A. Well, if you say that was coming to some kind of an agreement, I selected the orders and avoided taking an order that had service stock on it, first of all, because of the amount of the service stock order or rather as I said before, the service stock has been already selected and put up and we were trying to select orders that only had merchandise on them.

Q. Mr. Geyer, what other kind of orders did you avoid in selecting these?

A. No other kind.

Q. In other words, in selecting the orders, the net billing was the control alone and you paid no attention to the

number of items on the order or the number of packages that went to a customer?

A. That's right. I wouldn't know whether it was five or seventeen packages sent. It depended on the size of the order.

Q. But you were aware of the name of the customer, his location etc.?

A. I didn't even pay much attention to the name of the customer. I just selected the order that had approximately that much merchandise on it and it didn't 1099 make much difference who he was or where.

Q. You would not select an order that from your own personal knowledge would not be credit approved?

A. When I receive the orders they are already approved.

Q. That phase had already been eliminated in these orders?

A. Yes.

Q. By Mr. Dreyer's work in determining the amount of time the credit manager puts on them?

A. I assume so. I know that when I got the orders they were approved and I would look at the order and hand it over to Mr. Dreyer.

Q. Was there any attention paid to the various classifications on the orders that you gave to Mr. Dreyer?

A. What do you mean by classifications?

Q. As to the distributor or jobber under the agreement or as to whether it was just a straight jobber or purchaser?

A. No, I would just look at the dollars and cents amount of the order.

Q. Had that been part of any of your discussion with Mr. Dreyer whether or not you should pay any particular attention as to whether or not a customer was in one classification or another?

A. Not particularly according to classification; it was obvious that when the amount of the order got up into the larger brackets such as $500.00 that it would be an 1100 account who was buying on a D. W. basis.

Q. In selecting these orders, am I correct in saying that it was your opinion that the larger customers would naturally be purchasing in larger orders than your normally smaller customer?

A. That is correct, at least on the ones we made a selection of because in trying to select orders with the larger

amount on them, they naturally went to the larger customers.

Q. Now, on the orders, as I understand it, Mr. Geyer, the amounts and the prices do not show as they come in from the customer, now, in computing the amount of that order was that just a mental process for you as you glanced at it?

A. Well, if I say a $100.00 order, that order might have been $112.00 or $92.00 but knowing the items and knowing the prices, I felt as though these orders would amount to say, $100.00.

Q. In determining, however, the prices of the net billing, wouldn't it be necessary to know the type of customer to know whether in your own mind he was going to receive a 10% or any other group discount, ten plus seven, off the face of the invoice to know what the net billing would be that would finally appear on the invoice?

A. I never took that into consideration. I just figured on our blue price sheet and in estimating the amount of the order, I just charged this amount to the order whether
1101 it was D or Dd, actually, I didn't give that any consideration at all.

Q. Was it pure coincidence then that no cabinet orders were selected in these orders?

A. I don't know that there was any.

Q. You have seen the result of the time study, haven't you?

A. No.

Q. Was there any attempt to select in one fashion or another an order from say, Mr. Greiner or Automotive Supplies or other accounts located in the southern area in the selection of these orders?

A. No, I don't think there was. Mr. Dreyer asked me for orders this morning of a certain amount and if those orders were within that, they would have been in there or anybody else if it was an order that looked to me to be what Mr. Dreyer wanted, that is what I gave him.

Q. Mr. Geyer, how many orders come into your office every morning, approximately?

A. Well, of course, they vary very much. At that particular time, I believe that was in May, if I remember correctly, it might have been in April, I am not sure, and the orders were considerably lighter than they were in let's say September or October. Our orders on Monday

are unusually heavy and on Tuesday, they will be considerably lighter.

Q. About how many orders a week, Mr. Geyer, do you handle?

1102 A. It would be purely guess work on my part. I believe, let's say, Monday, there was probably sixty or seventy orders and Tuesday, there might have been twenty.

Q. Do you know how many accounts in the entire Niehoff Company?

A. Yes, sir.

Q. Could you approximate the average number of sales you make to these accounts?

Trial Examiner Hier: What do you mean by the number of sales?

Mr. Mayer: I want to know approximately how many shipments he makes as a result of the orders.

The Witness: I don't know, Mr. Mayer. I wouldn't know.

By Mr. Mayer:

Q. Could you approximate for me the number of orders that come in from these customers?

A. I wouldn't know.

Q. Would it be over five thousand?

A. I can't tell you.

Q. You are sure it is over seventeen, is that correct?

A. Well, yes. I told you we had sixty Monday so it would be over seventeen.

Q. Sixty on Monday would make it about three thousand throughout the year?

1103 A. I believe I could get you a record.

Mr. Mayer: I would appreciate it.

Trial Examiner Hier: It isn't necessary.

The Witness: You know how many accounts we have and we get approximately one a month.

Mr. Sprowl: Twelve times 866.

Mr. Schrup: I think we prefer to have more accurate figures than that.

The Witness: Well, we can get it.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record. We will recess until 1:30.

(Whereupon, at 11:45 a. m., a recess was taken until 1:30 p. m., this day.)

1104 **Afternoon Session.**

1:30 p. m.

Trial Examiner Hier: Come to order. You may proceed.

FRED H. GEYER resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Mayer.

A. Now, Mr. Geyer, speaking with relation to Respondent's Exhibit for identification No. 25, could you tell me the particular reasons for districting the area just covered by the Paul G. Niehoff Company?

A. Only that we placed a number on each district and I have in my book under my desk a list of the states for each salesman in which he works, as far as this territory is concerned, and in making up the numbers we place the number or three numbers on Paul G. Niehoff, and one on Peaslee, and Bigelow.

Q. Do these district numbers appear on any books or records of the Niehoff Company other than your own personal records of them?

A. Only of our sales analyses where we show the accounts that each man has and what their purchases are by the month, which Mr. Niehoff has and I have so that we can watch the volume each month and then we have the prior sales of last year on this and those sheets are marked

1105 up with the district and the salesman's name on it.

Q. Would you have in your sales analyses three sheets showing the three districts of Paul G. Niehoff Company?

A. Yes. I have no records of the sales in any district broken down in District 1, 2, and 3, but I have Mr. Niehoff on the Coast, his total sales.

Q. Actually, as far as the West Coast is concerned, it is not broken down so far as the district is concerned?

A. No, it is not. The 1, 2 and 3 and the district in the East has a number on them and we show it on our sales invoice.

Q. Mr. Geyer, I wish you would take the area which embraces New Orleans and Memphis which is covered by

Mr. Ricketts and I wish you would go through that area describing Mr. Ricketts' trips through that area in the same fashion that you did for the area you described earlier.

A. Well, Mr. Ricketts would take a trip out of Memphis and go east to Jackson and go into Nashville; then he would spend anywhere from possibly three days to a week working out of Nashville, working these smaller cities, and then start back again for Memphis by the way of Paris and down to Dreyersburg and back into Memphis. That would be, say, one trip.

He would make another trip out of Memphis go to Cornett, Mississippi, to Florence, Alabama, to Gaston and Birmingham, and possibly spend the week-end in
1106 Birmingham and then start back for Memphis again by the way of Columbus and Tupelo and into Memphis.

Another trip would take him out to Ft. Smith by the way of Forest City into Little Rock and Russellville, Ft. Smith, down to Hot Springs, Pine Bluff, Helena and back into Memphis and he would make another trip into Greenville, Jackson, Vicksburg, Natchez, New Orleans and back by way of possibly Mobile, Pensacola, Hattiesburg, Meridian, Clarksdale and back into Memphis.

Q. From your knowledge of this salesman and his territory down there, approximately how many times does he make these various trips, how many times a year, that is?

A. We like to see the men contact these accounts at least every two months or six times a year. I judge that in most cases they do get to them five to six times a year.

Q. Now, is that judgment, that relation about the making of the six calls, for instance, directing our attention mostly here to Mr. Ricketts, would this be upon your knowledge of what Mr. Ricketts actually makes, how many calls he makes a year, or is that based more or less upon an average which you work out on your total calls made by all your salesmen?

A. I would say that we like to have all the salesmen make their territory on that basis.

Trial Examiner Hier: The question is: What is it based on? It is based on fact or is based on this average? Do you know, as a matter of fact, that they make six
1107 calls a year, that Ricketts does?

The Witness: No, sir.

By Mr. Mayer:

Q. As far as Mr. Ricketts, then, is concerned in this particular area you don't know how many calls per year, and let us pay particular attention to 1949, that he would make on his various callers in that area, is that correct?

A. To be exact, yes.

Q. Do you have any manner of recording, or any recording devices which would indicate the amount of time, again directing our attention to Mr. Ricketts, that he would spend with any particular customer of yours within his sales area?

A. No, we don't.

Q. There is no attempt to keep such records?

A. It would be impossible.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Mayer:

Q. Mr. Geyer, do you have any salesmen's reports, records for 1949?

A. No, sir, we don't.

Q. Do you have any for 1950?

A. No.

1108 Q. Could you tell us the policy of keeping or destroying them, whatever the policy might be, with relation to the salesmen's reports?

A. We get the salesmen's reports every day or every other day, in some cases. Mr. Ricketts, we will say, left Memphis Monday morning and drove down to Greenville; he might have made two calls or three calls on the way to Greenville.

He gives us a report telling us that he made this contact. If he took an order he shows the order number on it. If he contacted a new man and he feels as though it is a prospect, he makes that notation on there and then we follow the prospect with a letter and Mr. Ricketts gets a copy of that letter and it is in his files so if he goes back he knows he has this prospect. After that the report has no value to us and we dispense with the report.

Q. In determining any number of calls made by any particular salesmen in 1949 just what basis would you make that determination on?

A. To start with, when you say that we advise all salesmen at sales conferences, and we feel that all of our ac-

counts in any given territory should be contacted at least once a month outside of Chicago where we have a smaller radius and we can see the fellows maybe every two weeks and contact them considerably oftener.

But we try to impress on the men and the salesmen
1109 themselves know that they have to see this account because our competition is in there contacting them the same as we are contacting some of our competition.

We have to give them service; we have to check their stocks, and try to help them wherever we can so far as their inventory is concerned, and talking with their salesmen so that it is the objective of the salesmen and certainly of the company to try to see the account as often as possible. If he could see him eight times a year, it would be still better.

Trial Examiner Hier: I don't believe that that question has been answered. See if this is correct, Mr. Geyer, if I understand your statement: A computation by the Niehoff Company of the number of calls that Mr. Ricketts makes on any particular account in his area is based on your assumption that his instructions to make six calls a year are carried out rather than a basis of recorded fact in the Niehoff Company records, is that correct?

The Witness: That is true, I would say.

By Mr. Mayer:

Q. Do you know, as a matter of fact, Mr. Geyer, how many times Mr. Ricketts went to New Orleans in 1949?

A. I have no reports on 1949. I couldn't give you that.

Q. In all the territories that are described on the map, Respondent's Exhibit for identification 25, do you have any warehousing facilities of the C. E. Niehoff Com-
1110 pany located in any of its territories?

A. No, sir.

Q. Before we return the witness to Mr. Sprowl, I would like to ask him again if he would attempt to get for us some figure or approximate figure which would give us an idea of the total number of orders received by the C. E. Niehoff Company in the calendar year.

A. In 1949.

Q. It may be impossible in 1949 but about the approximate number which might have been received in 1949 and, of course, upon which shipments were made.

A. All right.

Mr. Mayer: That is all I have.

Redirect Examination by Mr. Sprowl.

Q. Mr. Geyer, if the Niehoff Company had its own salesmen on the West Coast and the New England states, and New York City, what would be your practice on bringing those salesmen back on occasion to Chicago for the Auto Business Show?

A. Well, we would have to bring their men back the same as we have our men. When we have a show like we do here in Chicago we try to arrange for a sales conference before or after the show so we bring the men in, and, of course, it is quite expensive.

Now, the way we do it, at the Coast Mr. Paul G.
1111 Niehoff comes in once in a while, he doesn't even come in for all of them, but we submit all the conference reports which we give to our men, we submit those to him now and the same holds true with Bigelow and Peaslee because they have their own conferences and we naturally try to give them all the information that we give to our men when we have them in here.

If we operated the Coast it would mean an additional four men to come in for this meeting, where the way it is now it is submitted to Mr. Paul Niehoff.

Q. And where is his own conference?

A. He has his own sales conference. He operates his men; he regulates their trips, pays their expenses, and does the same thing as we do out of Chicago to our men.

Mr. Sprowl: That is all.

Recross Examination by Mr. Mayer.

Q. Do you bring all your salesmen in every year?

A. Once a year and sometimes they will come twice a year, for the NSPA show, the man from Michigan, Minnesota, Wisconsin, and St. Louis,—our Missouri territory man was here.

For the NEW in December we will have the Ohio man, I believe Mr. Ricketts will come in, Mr. Voight and possibly Mr. Zachary.

Q. In spite of the fact that you have no show?

A. We always bring them in once a year for a reg-
1112 ular conference.

Trial Examiner Hier: I suppose you are offering Exhibit 25?

Mr. Sprowl: Yes.

Trial Examiner Hier: Any objections?

Mr. Mayer: No objection.

Trial Examiner Hier: Respondent's Exhibit 25 is received in evidence.

(The document heretofore marked RESPONDENT'S EXHIBIT 25 was received in evidence.)

Mr. Sprowl: May we have a few minutes' recess?

Trial Examiner Hier: Let the record show that Respondent's Exhibits 17A, 17B, 17C, and 24A, 24B, 24C, 24D which were retained by the Trial Examiner last evening for use today, and the reporter that was here yesterday was relieved, so these are now delivered to the reporter.

C. E. NIEHOFF, having been previously sworn, resumed the stand and testified further as follows:

Mr. Sprowl: I should like to have these identified as Respondent's Exhibits 26, 27, 28.

(The papers referred to were marked Respondent's Exhibits 26, 27 and 28, for identification.)

Trial Examiner Hier: There have been marked for identification as Respondent's Exhibit 26, a document headed House of Peaslee, Inc., Boston, Massachusetts, 1113 containing estimated cost figures, and as Respondent's Exhibit 27 for identification a similar tabulation for L. C. Bigelow & Co., Inc., New York City, and as Exhibit 28, a similar tabulation for Paul G. Niehoff Company, Los Angeles.

Redirect Examination by Mr. Sprowl.

Q. Mr. Niehoff, will you direct your attention to Respondent's Exhibit 26 for identification and tell me what the first two figures are in that exhibit which aggregate $7835.39.

A. The figure of 20% discount is allowed on the actual warehouse purchases to the House of Peaslee, which amounted to $1884.25.

Q. What year was that?

A. 1949.

Q. And that figure is from the books and records of the Niehoff Company?

A. That is correct, and the other figure is the commis-

sion extended to the House of Peaslee on the sales made or shipments made into the Peaslee territory and paid to him in the year of 1949. The amount is $5,951.14, making a total of $7,835.39.

Q. At my request did you estimate on the basis of 1949 costs what the cost would be to C. E. Niehoff Company to have maintained an adequate selling organization for the same territory that was handled by the House of
1114 Peaslee in that year.

A. Yes, sir.

Q. And is that the tabulation which follows the amount of discounts and commissions paid to the House of Peaslee in the year 1949 on Respondent's Exhibit 26 for identification?

A. The amount paid to the House of Peaslee was $7,835.39.

Q. And does your projection of what it would have cost the Niehoff Company follow that figure?

A. That is correct.

Q. Will you explain those figures and your basis for arriving at those figures?

A. We would require two men to cover this territory, two salesmen. We would require an office man and an assistant, a shipping clerk and the normal amount of warehouse space and the cost of that would cover the total of $16,400, as computed here on this exhibit.

The first item covers the actual cost of a competent salesman that can manage the territory who would be acting as supervisor, and another salesman that would assist in covering the territory based upon a $100 a week cost factor or $5,200 per annum.

Q. In this estimate you have one salesman of managerial ability at an annual salary of $7500 and I assume from this at the outset you endeavor to have him handle the territory by himself rather than have an extra man in there with him?

1115 A. Yes, that would be comparable to Mr. Peaslee himself, although it wouldn't probably be full compensation for his ability or the man who would take his place to handle that area.

Q. The salesman's expense of $100 a week; is that comparable to what you paid in 1949 to your other salesmen?

A. Yes, that is a rather conservative figure on that.

Q. The office man and the shipping clerk, I assume, would be a single person at $3,000 a year.

A. It would actually mean a man who could handle all of the office details, the orders, and actually do the shipping himself.

Q. And you have 500 square feet of warehouse space at $1 a foot, I assume that is $1 per annum rental per square foot?

A. That is correct.

Q. What is your basis for that rental figure?

A. Well, I have been in Boston myself and I have discussed this problem with Mr. Peaslee and his set-up there and actually this figure is a very nominal figure for warehouse space and 500 square feet would be the very minimum that we would require.

Q. What would be embraced in the figure you have as utilities?

A. Well, that is telephone, light, cleaning and probably they have—I know they have some taxes to pay and if we would have that, there would be local taxes too.

1116 Q. Is there any insurance?

A. Yes. It is a very nominal amount.

Q. Would that one salesman of managerial ability give you the same coverage that you are able to get with the Peaslee facilities or would it be more desirable to have more salesmen?

A. The one salesman would not be adequate to cover the entire territory and do it properly.

Q. If you added another salesman would you have to pay him $7500 a year?

A. No; I think we can get a man for $100 a week.

Q. Something around $5,000 a year?

A. Yes.

Q. Would he have expenses also in connection with his duties, travelling, etc.?

A. Yes, the travelling cost if pretty well established; it is somewhere around $100 a week.

Q. That is your experience in keeping salesmen out in the territory?

A. That is right.

Q. Turning to Respondent's Exhibit 27, the figure at the top, I assume, is the 21% discount that was allowed to the Bigelow Company in 1949?

A. That is correct.

Q. $7,868.85, is that right?

A. That is the earnings on his purchases that he

1117 made to the warehouse.

Q. And following that, in your previous testimony

on the prior exhibit, I presume is your projection of what it would cost the Niehoff Company to maintain its own organization in that area?

A. That is correct.

Q. Do you want to explain those, item by item?

A. The territory would require two salesmen, one of top quality.

Q. With a sort of managing ability?

A. Yes, who would be the key man or the general supervisor of the territory, at $8,000 a year, and one salesman at $5,000 a year and then item 3 shows the expense that would be required;—being local men to a degree the cost would be smaller than covering a larger area or a minimum of $50 a week.

Q. And that would cover both salesmen?

A. And that would cover both salesmen and total $5,000.

Q. That is, it would be $50 a week per salesman or $100 a week for the two of them?

A. That is correct.

Q. What is the next item?

A. The shipping clerk and the assistant would cost $5,400, figuring the clerk at $300 a month and the assistant at half time, and would fill it at about $1800, bringing the total of $5,400.

1118 Now the shipping clerk would also handle the office detail. He would have to be able to handle the orders that might come in over the telephone and compute the records and do the allocating of the merchandise that would be required to keep this warehouse stock in order.

Q. And the next item: Warehouse space of 2,000 square feet.

A. Based upon the volume of business we would require 2,000 square feet at a little higher rate than would apply to the New York City area or the cost of $2500 per annum.

Q. You have used $1.25 per square foot per annum rent?

A. Yes; I have based it on my knowledge of the warehousing cost figures in New York and personal visits with Mr. Bigelow and actually it might be a little higher for that much space.

The utilities, of course, make up the telephone and the light and the heat, and there is insurance; there would be local taxes, miscellaneous items, totalling $800 per annum or less than $75 a month.

Q. This figure of $26,700 is the total that you would estimate these annual expenses would be?

A. Yes; $26,500 is the total for the operation of the New York City warehouse.

Q. I would like to return to Respondent's Exhibit 26 for a moment, the figure at the bottom of that exhibit opposite the statement: Savings to C. E. Niehoff Company, $8,564.61; this is merely the difference between the
1119 discounts and commissions allowed and paid in 1949 and the estimate of the cost as you show on that exhibit?

A. That is correct.

Q. That explanation would apply to the figure $18,831.12, that appears on Respondent's Exhibit 27?

A. That is correct.

Q. And will you address your attention to Respondent's Exhibit 28 for identification, and to shorten this up, in the light of your previous explanation, is the discount of 21% and the commission allowed appearing at the top, totalling $46,612.70, the amount of discounts?

A. And commissions extended or paid.

Q. To the Paul G. Niehoff Company by C. E. Niehoff Company in 1949, as shown by its books and records?

A. Yes, $21,088.25.

Q. Is the commission allowance on the warehouse purchases for the Los Angeles operation and the other item for the actual commissions paid to the Paul G. Niehoff Company on the sales?

A. And shipments made from the factory to the accounts in the territory.

Q. Go ahead, Mr. Niehoff. Have you a copy of the Paul G. Niehoff Company exhibit?

A. Yes.

Q. On the tabulation appearing on Respondent's
1120 Exhibit 28 for identification being estimated cost to C. E. Niehoff & Company, if it used its own sales force to handle the territory served by Paul G. Niehoff Company, will you explain those items?

A. He would require a top manager to manage the sales facilities of this area, at a cost of $15,000 per year.

Q. That is for salary?

A. To get a man that would be equivalent to the one that we have at the present time and there are three salesmen who would be required in addition to that, at $5,000 per man, or $15,000 per year.

Item 3 covers the sales expense based upon an average cost of $100 a week, or $20,800 per year to cover the territory in question. I doubt whether that would be fully adequate considering the geographical picture out there.

The warehouse space required would be a much larger one than on either of the other exhibits and would require not less than 5,000 square feet.

Q. And what rental have you figured that at?

A. The rental here is $1 per square foot, and is very low. The building that my brother has out there has a 150 foot frontage and he rents one half of the building, or approximately one half, at a figure of $800 a month, and he retains the other half, which he uses for warehousing of these different lines and that cost would be $5,000 as a minimum, to only handle our own line.

1121

Then there would be required in this operation two shipping clerks, a top man of about $375 a month, and he would also act as somewhat of a supervisor of the handling of the department and an assistant at $275 a month, or totalling $7,200 per annum.

Then also in the office you would have to have a stenographer there to handle the detail work and correspondence, etc., and that is figured at $250 a month, at $3,000 per annum.

And the utilities which are required are principally telephone which, I believe, will average $70 to $75 a month, light, heat, maintenance of the office, insurance is figured at $1,000 per annum, bringing the total cost of operation of a Pacific Coast branch warehouse set-up at $67,000.

Q. Now, you would extend to Paul G. Niehoff on the items that he purchased on a discount basis, a 21% discount, is that correct, in 1949?

A. Yes, that is correct. There are some items which are a little less than that.

Q. Now, if the Niehoff Company had operated that territory itself in the manner you have retailed here, in reselling its merchandise to jobber customers, you would in turn have granted some kind of a discount under your then existent discount plan, would you have not?

1122

A. Yes, sure, with the accounts whose volume would be in the higher brackets.

Q. Would that average something between 7% and 10% on the over-all picture?

A. It would be probably close to 10%.

Q. So that the discounts extended to Paul Niehoff would

not be entirely saved; you would have to, in turn, extend some in selling the merchandise yourself, is that correct?

A. That would apply particularly on the first item on the warehousing of the merchandise.

Q. That is what I am directing my attention to. So that the apparent increase in cost of $20,387.30 would, in fact, be greater because in selling you would, in turn, have to extend some more discounts?

A. It would undoubtedly be greater because there would be other factors to be considered, in the sense that our own sales manager would have to give some further attention to the territory and probably would have to make occasional trips into the area.

Q. That is Mr. Geyer?

A. Yes.

Q. And, by the same token, you would have the salesmen back on occasion, once a year, to the Niehoff plant?

A. We do have our own men come in.

Q. And if these were on the staff they would come, too?

1123 A. Yes.

Q. And similarly, where the House of Peaslee has extended a discount and Bigelow have extended a discount, if you operated the territory, you would, in turn, be extending this average 10% to your customers, is that correct?

A. I would say so, with regard to most of the cases, particularly Peaslee.

Mr. Sprowl: That is all. You may cross-examine.

Cross-Examination by Mr. Mayer.

Q. Mr. Niehoff,—

Mr. Mayer: First, Mr. Examiner, in examining the witness on Respondent's Exhibits for identification 26, 27, and 28, I don't want to waive any objections I have to the introduction of those documents into evidence.

Trial Examiner Hier: They haven't been tendered yet.

By Mr. Mayer:

Q. Mr. Niehoff, do these three accounts, the House of Peaslee, and Bigelow, and Paul G. Niehoff Company, do they sell the C. E. Niehoff merchandise only to jobbers?

A. Yes, they sell the Niehoff merchandise only to jobbers but they also handle other lines that they sell to jobbers likewise.

Q. Do any of these three accounts re-sell the merchandise purchased from the C. E. Niehoff & Company as
1124 a jobber themselves?

A. They do not.

Q. Does the C. E. Niehoff Company sell and ship directly to any jobbers located in these three trade areas?

A. We do ship to the customers in the New England territory covered by the House of Peaslee directly from the factory on which commissions are shown here on the exhibit and on which they receive a commission as indicated here by Peaslee.

Q. Peaslee receives the commission?

A. Peaslee receives the commission, yes.

Q. Is that true of the New York house?

A. No, the New York house carry their own accounts, handle all their shipments, and, of course, do all their selling, and it is completely under the supervision of the Bigelow Company.

Q. What about the Paul G. Niehoff Company, in the Los Angeles area?

A. In the Los Angeles area we ship into the territory to the customers and the commission stated on such business allowed to Paul G. Niehoff Company on such business.

Q. By the commission in this instance, you mean the commission paid by the C. E. Niehoff & Company either to the House of Peaslee, or Paul G. Niehoff Company on sales which you make directly into their territory, is that correct?

A. On sales that they make in the territory. They
1125 make all the sales. We simply handle the shipment.

Q. Which are shipped from the C. E. Niehoff Company, in Chicago?

A. That is correct.

Q. And, in some instances, at least, are these shipments as a result of orders which are sent direct to the C. E. Niehoff Company in Chicago?

A. It might be, yes.

Q. Now, on particular transactions, which come from the customer located in the Paul G. Niehoff area and which is shipped directly from C. E. Niehoff in Chicago, who is billed for that transaction?

A. The customer is billed for that transaction except when it is shipped out of the warehouse. In that case it may be billed to Paul G. Niehoff Company.

Q. But in the instance in which it is shipped from Chicago, it is billed to the customer and remitted for by the customer to C. E. Niehoff in Chicago?

A. That is correct.

Q. Would that apply to the instances of this taking place in the House of Peaslee territory?

A. Yes, it would.

Mr. Sprowl: I don't mean to object to the relevancy of this but I do believe that this has all been gone over twice before in the record, Mr. Hier.

1126 Trial Examiner Hier: It is my recollection but I am not sure about it.

Mr. Sprowl: I know it is.

Trial Examiner Hier: The only thing he has testified to here is these exhibits.

Mr. Sprowl: That is right.

By Mr. Mayer:

Q. Now, directing your attention in particular to Respondent's Exhibit for identification 26, Mr. Niehoff, dealing with the House of Peaslee, could you tell us the total sales as a result of your transactions with the House of Peaslee in 1949?

A. Well, I can't tell from this Exhibit but I think we have the figures available and I think we have testified to it before. You will find it in the records. If you want an approximate figure, I could do that.

Q. An approximate figure would be all right.

A. On the warehouse sales they would between $8,000 and $9,000 and on the direct sales approximately $60,000.

Q. Would that be a total then of approximately $70,000?

Trial Examiner Hier: $68,000.

A. Yes, it would be slightly less than $70,000.

By Mr. Mayer:

Q. All right; now, directing your attention in particular to the first entry under the 1949 cost to C. E.

1127 Niehoff & Company which reads: Discount 20% and also at $1,884.25; could you tell me the basis of those figures?

A. Well, that is the commission allowance on the warehouse purchases of the House of Peaslee.

Q. Am I correct, then, in saying that the 20% discount as it shows there at $1,884.25 was on the purchases by the

House of Peaslee itself to be stored in its warehouse, is that correct?

A. Yes.

Q. And was that a constant percentage on all or any type of purchases which they warehoused themselves?

Mr. Sprowl: I wish to object. I am only interested in saving time. We have spent a full day and a half in having Mr. Niehoff go over this in detail as to precisely how each of these accounts operate; I think it is only repetitious.

Trial Examiner Hier: It seems to me the examination ought to be limited to the validity and authenticity or genuineness and accuracy of the figures on this exhibit. We have gone over this line.

Mr. Sprowl: The question is obviously directed to whether 20% is an average or not of the discount paid or whether there is a flat 20% discount which was paid in 1949 on purchases from the C. E. Niehoff Company which were warehouses. Can we go off the record?

Trial Examiner Hier: Off the record.

1128 (Discussion off the record.)

Trial Examiner Hier: On the record.

I will overrule the objection to this particular question. What is your answer, Mr. Niehoff? Is that 20% an average of varying discounts, or is that a flat 20% on any and all items sold by you to the House of Peaslee?

The Witness: Well, I think it is an actual figure.

Trial Examiner Hier: Well, I know; it can be an actual figure but do you mean to imply or infer by that, that it is a flat figure on any and all items?

The Witness: The House of Peaslee was given a 20% discount allowance on its purchases for the warehouse and this is the figure that is represented here which amounted to $1,884.25, which is actual; the commissions are also actual; that is the amount of commissions paid the House of Peaslee in 1949 for the sales in the territory.

By Mr. Mayer:

Q. I am not sure I understood the last answer. The commission figure, as I understand it, $5,951.14 is a commission paid by the C. E. Niehoff Company to the House of Peaslee on sales made by the House of Peaslee to customers within the Peaslee territory, is that correct?

A. That is correct.

Q. Are you including in those sales any direct trans-

actions which might have taken place, that is, the
1129 order directly to the C. E. Niehoff Company in Chicago, the shipment directly from the Chicago company, the billing from the Chicago company, and the remittance to the Chicago company, are those commissions contained in the figure $5,951.14?

A. Well, the commissions, $5,951.14, are the actual commissions and the figure does not include the amount allowed on the warehouse purchases.

Q. Then this commission figure, as I understand it, includes sales made by the C. E. Niehoff Company to customers located in the House of Peaslee territory when the order was directly to the Chicago company and you shipped directly and billed directly and received remittance directly from them, is that correct?

A. The figure $5,951.14, yes.

Trial Examiner Hier: The answer is Yes?

The Witness: Yes.

By Mr. Mayer:

Q. Now, could you estimate for me or give me any proportion of how much of that $5,951.14 figure could be attributed to this type of transactions?

A. I gave you a $60,000 sales figure on that, in round figures.

Trial Examiner Hier: He wants to know what part of the $60,000 sales figure were direct transactions.

The Witness: All of it was direct.

1130 By Mr. Mayer:

Q. What we are attempting to do, Mr. Niehoff, is to find out the proportionate amount of the commission paid upon sales for the House of Peaslee out of his own warehouse stock and the commission paid to Peaslee by C. E. Niehoff on sales made by the Chicago company to customers located in the House of Peaslee territory or in that area?

A. The figure is given here.

Trial Examiner Hier: He wants it broken down. He wants it split up into two parts.

Mr. Sprowl: May we go off the record?

Trial Examiner Hier: Yes. Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

It is agreed between counsel that with reference to the figure of $5,951.14 on Respondent's 26 for identification, that this figure represents commissions on sales made by

the House of Peaslee and its salesmen but shipped, billed, invoiced, and handled entirely by the C. E. Niehoff & Company, is that correct?

Mr. Schrup: I am not so certain about that. That is the point I am trying to get clear on the record.

Trial Examiner Hier: Mr. Sprowl has just stated that.

Mr. Schrup: I am not so sure that it is not a
1131 brokerage fee and that the sale is not made by Peaslee but made by C. E. Niehoff in the Peaslee territory in which the C. E. Niehoff Company gets a commission.

Mr. Sprowl: Off the record.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Mayer:

Q. Mr. Niehoff, as I understand it on sales to jobbers in the House of Peaslee territory, you also pay the particular jobber or allow him certain discounts depending upon his customer classification with relation to the C. E. Niehoff and Company, is that correct?

A. That is correct.

Q. So that actually as to the cost to the C. E. Niehoff Company, there is an additional cost of doing business with the jobbers located in the House of Peaslee, which would be the commissions or the allowances given to these customers independent of the commission figure which you have set forth on Respondent's Exhibit for identification 26, is that not correct?

A. No; that is not correct.

Q. In what is the error in that statement?

A. That is the billing price to the customer and the commissions paid to Mr. Peaslee or the House of
1132 Peaslee are on the net selling prices.

Q. Now, as to the billing to the customer, isn't it often the fact that the billing also includes a 10% discount which appears on the face of the invoice to the customer located within this particular Boston area?

A. That is correct, and the commissions are figured on the net amount of the invoice.

Q. Now, directing your attention, Mr. Niehoff, to the item 1 on Respondent's Exhibit for identification 26: Salesmen of managerial ability, i. e., $7500 per year; how many salesmen in the C. E. Niehoff organization in 1949 did you have at a salary or at earnings of $7500 per year?

A. We had a number of them.

Q. And these earnings, the $7500 earnings, I take it that the salesmen as you have it estimated here, would be estimated on a salesman's earnings in a normal territory of approximately $70,000, is that correct?

A. I would say Yes, but it doesn't necessarily follow that if we had our own salesmen in the territory that it would be economical in operation. That is one of the reasons why we chose to do business through a factory representative which we find more economical.

Q. I didn't quite get the basis, then, of the allocation of $7500 as a particular salesman's salary then in this territory, if you were handling it direct yourself.

1133 A. Well, if we have to get a man of Mr. Peaslee's ability to manage that territory as we have now, it would cost us $7500.

Q. Does Mr. Peaslee deal exclusively in Niehoff products?

A. No; he represents other types.

Q. Are all the salesmen comparable to Mr. Peaslee in their work in their territory?

A. Well, I would say maybe one of them will be.

Q. Then wouldn't it be logical to base it upon the average salesman's cost to the Niehoff company in the territory, of $70,000?

A. No; I think in order to effectively handle this territory and in view of the competition in this area we would have to have a man of that ability and it would cost us fully $7500 per year.

Q. And is this an exceptional competitive area throughout the country with Niehoff products?

A. Yes, because most of our competitors are located right in the eastern area.

Q. Much more competitive, then, than in any other area, I take it, that the Niehoff company services with its products?

A. Well, to a degree, yes.

Q. Now, directing your attention to Point 2, was that the average salesman's expenses for the Niehoff company during the year 1949?

1134 A. Yes, I would say it was.

Q. Now, directing your attention to Item 3: Office man and shipping clerk, is that the estimated amount which it would take to handle the orders that are being shipped,

only to Peaslee under the 1949 situation, which would otherwise have to be shipped direct to the customer?

A. I would qualify it in this way, that if we didn't have the facilities that were offered by the House of Peaslee, that we would have to have a man there of that ability, —some one who is thoroughly dependable and it would cost us that much.

Q. Now, not assuming for the moment that you would have a warehouse but rather handle this from the Chicago office, would it be necessary to employ an office man and a shipping clerk and the natural total of the amount of expense to you in the sales direct from the Chicago office, that you are now sending to the Peaslee warehouse in Boston?

A. If we didn't have a warehouse we could possibly eliminate part of this cost because we would probably have to maintain some form of office in the Boston area.

Q. Do you maintain an office in the territory now covered by Mr. Ricketts in the south?

A. No, we don't.

Q. Do you maintain any office at the present time outside of the office headquarters in Chicago?

1135 A. No, we do not.

Q. All right, sir; now directing your attention to item 4: Forget for a moment Respondent's Exhibits for identification 27 and 28A, if this were the situation as you have it shown on your Exhibit 26: Warehousing space at Boston, Massachusetts, would that be unique in that it would be the only warehousing space which you had in the United States?

A. I don't quite follow that question.

Trial Examiner Hier: Repeat the question.

(The reporter read the question as follows:

* * * * *

A. (Continued.) Insofar as we don't have any other warehousing space it would be unique, yes.

By Mr. Mayer:

Q. And am I correct now, directing your attention to item 5, Mr. Niehoff, that the utilities amount which you have shown on Respondent's Exhibit 26 for identification is necessarily tied up to the idea of a warehouse in that location, is that true?

1136 A. Not necessarily so, because it would be tied up with an office.

Q. I am sorry, I didn't make myself clear; either an office or some warehousing facilities in that particular area, is that so?

A. Yes; that is so.

Q. Of the total amount of $70,000 involved in the Peaslee situation, Mr. Niehoff, could you tell me the approximate amount of that which is shipped direct to the customer without ever passing through the Peaslee warehouse?

A. Well, it would be—

Mr. Sprowl: I submit that that is the third time—

A. (Continued.) It would still be 70% of the total.

Trial Examiner Hier: It seems to me he said $60,000, $60,000 were shipped direct and $8,000 sent to the warehouse.

By Mr. Mayer:

Q. Then, in reality, the warehousing space would accommodate the $8,000 sales made in that territory, is that correct?

A. Well, yes; it would be for that season. Of course, the warehouse was established either late in 1948 or the beginning of 1949, and it is the beginning of an operation, you might say, so far as the warehouse set up was concerned.

Trial Examiner Hier: We will take a short recess.

(A short recess was taken.)

1137 Trial Examiner Hier: On the record.

By Mr. Mayer:

Q. Mr. Niehoff, directing your attention to Respondent's Exhibit for identification 27, could you approximate for us the total sales in the Bigelow company area in 1949?

A. Yes; they would be approximately $37,000.

Q. And do I understand it correctly that these sales are all made directly to the Bigelow Company from C. E. Niehoff Company?

A. That is correct.

Q. Now, directing your attention to items 1 and 2, as they appear on Respondent's Exhibit for identification 27, do I understand it, then, that your estimated cost of salesmen in that territory having a total sales of $37,000 in 1949 would be approximately $13,000 in salaries alone, is that correct?

A. That is correct.

Q. Do you have any comparable territory, Mr. Niehoff, which did a business in 1949 of approximately $37,000?

A. I think our sales manager could answer that better than I could, because, offhand, I just cannot answer that question.

Q. Well, just approximating, don't that appear to be rather a small amount for any one territory's sales in a given year in 1949?

A. Yes, it would.

Q. And how many territories do you have in which
1138 you have two salesmen who earn approximately $13,000 or who did earn approximately $13,000 in 1949?

A. Well, I don't think that we can compare this New York City area with any other territory, because the development of the business in this area is, I would say, an uphill matter.

We have to make an investment in the territory to accomplish what we may term even reasonable results and if we had to operate this ourselves, the figures here would reflect the cost involved in the operation, and that is why we used the House of Bigelow because they have the facilities and it is more economical for us to do so.

Trial Examiner Hier: Read the question back.

(The reporter read the question as follows:

"Question: And how many territories do you have in which you have two salesmen who earn approximately $13,000 or who did earn approximately $13,000 in 1949?")

A. (Continued.) None, I would say.

By Mr. Mayer:

Q. Now, Mr. Niehoff, directing your attention to items 4, 5 and 6, are they based upon the supposition that you would need an office or a warehouse in this particular location to transact this business?

A. Yes, it would be.

Q. Now, in 1949, in any similar situation or terri-
1139 tory doing that amount of business, did you, in fact, maintain an office or a warehouse in any of your other territories?

A. No, but the situation in these areas is not similar in any way whatsoever.

Q. The answer to the question was No, there were no warehousing facilities or office maintained in any territory by C. E. Niehoff in 1949, is that correct?

A. That is correct.

Q. Now, directing your attention to Respondent's Exhibit for identification 28, and speaking in particular of your figures: Discount 21% and your commission figures of $25,524.45, in addition to those on your billings to customers located in that area in which you give certain discounts off the face of the invoice, is it not a fact, then, that you are allowing already certain discounts to certain customers located in that area?

A. We are, yes.

Q. And those discounts are not contained in your figures of discount, 21%, nor commission?

Mr. Sprowl: I object. It is the second time that it has been asked. If you are going to add it in as to the expense up above you have to add it in as a comparable and offsetting expense down below.

Mr. Mayer: We never maintained where it should be added. We are merely asking him about a factual
1140 question, about what the figures contained.

Trial Examiner Hier: Overruled. Read the question.

(The reporter read the question as follows:

"Question: And those discounts are not contained in your figures of discount, 21%, nor commission?")

A. Well, again, as to the discount on the warehouse business that would not be contained in that figure but as to the commissions, they are based upon the net amount of the billing to the customer.

Mr. Sprowl: I don't think he understood the question.

Trial Examiner Hier: Ask him again.

By Mr. Mayer:

Q. As I understand it, the net billing amount to the customers would already contain in some instances discounts which were allowed by the C. E. Niehoff Company to that particular customer, is that correct?

A. I just don't understand. The commission—there is no other discount beyond the 21%; is that what you are trying to get at?

Q. No; I am not speaking about the particular amount of discount paid to the Paul G. Niehoff Company, but I am speaking more particularly about customers located within the Paul G. Niehoff company area which you bill and which you receive remittances from, and from
1141 the basis for your commission figure of $25,000.

Now, isn't it a fact that on invoicing those cus-

tomers in many instances a 10% discount appears on the face of the invoice to the customer?

A. Yes; that is true.

Q. Now, Mr. Niehoff, could you estimate for us the total amount of sales in the Paul G. Niehoff Company area in 1949?

A. $280,000 or a trifle less than that.

Q. All right, now, in any comparable territory doing a business of $280,000 during 1949 did you employ a separate sales manager?

A. No, we did not.

Trial Examiner Hier: I want to ask: Do you have a comparable territory or did you in 1949?

The Witness: Well, yes, I think we did.

By Mr. Mayer:

Q. And in these territories, Mr. Niehoff, which do a comparable amount of total business to this Paul G. Niehoff Company territory, how many salesmen did you employ in those territories?

A. Probably one, or maybe two.

Q. Do you know of any territory in which you employed two, in that instance?

A. We have them here in Chicago. We had—

Trial Examiner Hier: You had them here in Chi-
1142 cago, more than one?

The Witness: Yes.

Trial Examiner Hier: Did you have them anywhere else?

The Witness: Well, we may have had. I don't know about it just specifically.

By Mr. Mayer:

Q. Now, Mr. Niehoff, directing your attention to items 4, 5, 6 and 7, they are predicated, are they not, on the assumption that it would be necessary to establish a warehouse or an office in this particular area to take care of this business, is that correct?

A. Well, it would be necessary to establish an office in order to do business on the Pacific Coast and it is predicated on that basis, yes.

Q. Now, in this year of 1949, did you have any other warehouse or any office which you maintained to take care of any particular territory?

A. None other than through the warehousing distributors or the factory representatives.

Q. This warehouse item 4 would be independent of any warehouse distributors you might have in that area, I take it?

A. That is right.

Mr. Mayer: That is all we have, Mr. Niehoff.

1143 *Redirect Examination by Mr. Sprowl.*

Q. Mr. Niehoff, actually in Chicago you have an office and a warehouse in this metropolitan area, do you not?

A. That is correct.

Q. You had that in 1949?

A. Yes, sir.

Q. What is the fact as to whether or not the House of Peaslee is in a densely populated metropolitan area?

A. Well, it is, yes.

Q. The same with Bigelow's territory?

A. Very much so, in Bigelow's territory.

Q. You have already testified to this in previous hearings but what is the fact as to whether or not you could operate in those territories without a warehouse?

A. Well, the further away you get from the home office, the greater the necessity for such a set-up and you have a competitive condition that you have got to meet with in those areas.

Q. And you have distributed your products through Peaslee and Bigelow in the east and Paul G. Niehoff in the west, because they have afforded these facilities to you?

A. That is correct, yes.

Q. And these exhibits are put together on a projection of what it would cost you to develop that service, is that correct?

1144 A. Yes.

Q. Not to prove it would or would not be economical; merely to show what it would cost you to develop that service?

A. That is correct.

Mr. Sprowl: I offer these three exhibits in evidence.

Trial Examiner Hier: I take it that you are offering these as cost justifications for differences—the discounts from list that are granted in these three accounts, each of these has a special arrangement of 20%, 21%.

Mr. Sprowl: That is right.

Trial Examiner Hier: And I take it you are offering

each of these three as justification for divergence from that jobbers' list

Mr. Sprowl: Yes.

Trial Examiner Hier: Any objections?

Mr. Mayer: I object to the admission of these documents into evidence. In my opinion it is by speculation attempting to cross-justify a situation which actually existed and I further think that the documents are not grounded properly in that all of the estimations are based upon a situation which did not exist or upon a situation which did not even exist on a comparison basis in the C. E. Niehoff Company in 1949.

1148 Trial Examiner Hier: On the record.

Ruling is deferred on Respondent's Exhibits 26, 27, and 28 which the Examiner is taking with him to Washington for the purpose of considering the question of certifying the basic question involved to the Commission.

Mr. Sprowl: I call Mr. Kirchschlager.

H. L. KIRCHSCHLAGER was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Sprowl.

Q. State your name, please?

A. H. L. Kirchschlager.

Mr. Sprowl: Mark this Respondent's Exhibit 29 for identification.

Trial Examiner Hier: There has been marked for identification as Respondent's Exhibit 29, a series of five sheets stapled together, the cover page of which indicates 1947 Census of Manufacturers by the U. S. Department of Commerce.

(The papers referred to were marked Respondent's Exhibit 29 for identification.)

By Mr. Sprowl:

Q. Where do you live?

1149 A. 2444 Estes Avenue, Chicago, Illinois.

Q. Are you affiliated with the C. E. Niehoff Company, the respondent in this case?

A. I am.

Q. In what capacity?

A. Primarily as export manager and I do, on occasion, assist Mr. Niehoff in certain other administrative duties.

Q. At my request did you go to the Chicago Public Library and examine a report of the United States Department of Commerce, called the Census of Manufacturers, 1947?

A. Yes, I did.

Q. Specifically, Volume II?

A. Yes, sir.

Q. And did you request the Public Library to furnish you with photostatic copies of said sheets of that census?

A. Yes, I did.

Q. And I show you Respondent's Exhibit 29 for identification and ask you if that is the photostatic facsimile which you received from the Chicago Public Library?

A. That is correct.

Q. Now, directing your attention to page 18, a paragraph on that page headed 29 captioned: Value added by manufacturer. Did you study that paragraph to determine the manner in which the compilators of this census report computed value added by manufacturer?

1150 A. Yes, I did.

Q. And for the year 1949 did you make a comparable computation with respect to the C. E. Niehoff Company?

A. Yes, I did.

Q. And did you make that from the figures which you obtained from the books and records of the company for that year?

A. That is correct.

Q. And using the formula described in paragraph 29, what did you determine was the value added by manufacturer, by the G. E. Niehoff Company in 1949?

A. An approximation would be one half of 1%.

Q. I mean the round figure.

A. Slightly in excess of $1,000,000.

Q. Would be the value added by manufacturing?

A. That is right.

Q. Computed in accordance with the formula described in Exhibit 29?

A. Yes.

Q. You did that for comparative purposes with the figure appearing on page 731, table 1, under Engine Electrical equipment?

A. That is correct.

Q. The sixth column headed: Value added by manufacture, which is $196,351,000?

1151 Q. I am sorry, Mr. Kirschschlager, was your computation made on the basis of the 1949 or 1947 figures?

A. For the basis of this comparison we used 1947 figures.

Q. Would it be substantially the same for 1949?

A. We have every reason to believe so, yes.

Q. But the $1,000,000 figure you used was, then, actually a 1947 figure?

A. That was in 1947.

Mr. Sprowl: That is all.

Trial Examiner Hier: Cross-examination? Off the record.

(Discussion off the record.)

Trial Examiner Hier: Let the record show that the cross-examination of this witness is reserved and that ruling on the Exhibit 29 identified by him is likewise reserved and that the hearings here in Chicago are now adjourned, to reconvene on five days' notice, probably some time in February.

(Whereupon, at 4:20 p. m., November 7, 1951, the hearing in the above-entitled matter was adjourned.)

1152 Room 1310,
173 West Madison Street,
Chicago, Illinois,
February 26, 1952.

Met, pursuant to notice, at 10:00 a. m.

Before: Frank Hier, Trial Examiner.

Appearances:

F. C. Mayer and E. P. Schrup, Attorneys for the Federal Trade Commission.

Charles R. Sprowl, Attorney for the Respondent, C. E. Niehoff & Company.

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1155 (The paper referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 29, was received in evidence.)

Mr. Mayer: Then we would like to ask Mr. Kirchschlager a couple of questions.

Trial Examiner Hier: All right, you may do so.

H. L. KIRCHSCHLAGER resumed the stand and testified further as follows:

Cross-Examination by Mr. Mayer.

Q. Mr. Kirchschlager, directing your attention to page 731, which is it, the third or fourth page of Respondent's Exhibit No. 29 for identification, and the figure that you made there, you show in the engine electrical equipment entry there—are those figures confined to what we would term original equipment manufactured or replaced, or
1156 rather, replacement parts manufacture, or does that figure include both or any one of the two?

A. Well, I am taking the figure that is shown on the United States Department of Commerce Census Bureau exhibit here, of $196,000,000.00 value added. In the preliminary material, on page 730, in the middle of the right-hand column, it broadly defines what is included in that figure. I would estimate that it covers both the original and replacement, and any type of equipment manufactured.

Trial Examiner Hier: The point of that question is: Whatever is included or excluded in any figure in that ex-

hibit depends entirely on what the exhibit says itself about it—you have no knowledge, other than what the exhibit says?

The Witness: That is right.

By Mr. Mayer:

Q. Mr. Kirchschlager, in your computations of the value added by manufacturing, or rather, by the manufacture of the C. E. Niehoff Company in 1947, what figure did you apply a percentage figure of one-half of one percent to

A. One-half of one percent is the result of our particular experience, as related to this figure of $196,000,000.00; to arrive at our value added by manufacture, we followed the directions indicated in the second paragraph of page 18, which gives you the process by which you would arrive—

Q. (Interposing.) At your own particular figure?

1157 A. We come out at approximately one million dollars, which, related to the 196 million dollars, is roughly one-half of one percent.

Q. Did that one million dollars result from the computations which included either or both the purchase of products for manufacture by the C. E. Niehoff Company and the purchase of replacement parts, which do not need any manufacture to them?

A. It covers both.

Mr. Mayer: That is all we have.

* * * * *

LOUIS DREYER resumed the stand and testified further as follows:

1158 *Further Direct Examination by Mr. Sprowl.*

Q. You are the same Mr. Louis Dreyer who previously testified in this matter?

A. Yes.

Q. And you have before you the Order Processing Analysis, which you previously testified about, and which was marked Respondent's Exhibit 18-A, 18-B and 18-C?

A. Yes.

Q. Will you explain to me on that exhibit where the adjustment comes in, to reflect the 200 percent burden factor, which you are using in connection with that exhibit?

A. The 200 percent burden factor is applied to the last line, which shows the total cost per dollar of net invoice, and the 200 percent burden rate was used to obtain the figures on the bottom line of the sheet.

Q. Wasn't there also a 25 percent waiting factor that you told us about?

A. Yes, there was.

Q. In other words, on this Exhibit 18-A, you go from the top of the exhibit on each sheet down to the very last line, or right down to the last line, through "Basic Cost per Dollar of Net Invoice," and everything up to that point is computed in that manner that you previously testified to, without regard to any 200 percent factor?

1159 A. Yes.

Q. The last line, as you have testified, is the results applying that burden factor and the 25 percent waiting factor to the figure in the next to the bottom horizontal line?

A. That is correct.

Q. Now, at my request, have you personally given consideration to determining the burden factor which would be applicable to the Order Filling and Shipping Process for the Niehoff Company?

A. Yes.

Q. And without going first into too much detail, what is the fact as to how many burden factors you determine?

A. In checking over the 21 steps, I determined there was not one common burden rate which would be applicable to all of the steps. However, in checking them closer, I found the same burden rate could be applied to all of the factors involving shipping, which would be Steps 8, 9, 10, 11 and 12.

Q. Steps 8, 9, 10, 11 and 12 of Respondent's Exhibit 18?

A. That is right, Respondent's Exhibit 18-A, B and C. An actual burden rate would apply to all the other steps, or rather, a second burden rate would apply to all of the other steps.

Q. Is that because of a difference in the physical location of the packing, checking and shipping division of the Niehoff Company, in relation to the physical location in the company where the other steps were carried out?

1160 A. By the physical location and the nature of the work—

Trial Examiner Hier: (Interposing.) When you talk about the burden factor, you are speaking of this allocation of general and administrative expenses to the manufactur-

ing end of the business, are you not? I am sorry, I did not mean to interrupt you, but I wanted to ask you that question.

The Witness: Not exactly. The establishment of a burden rate involves quite a number of other factors besides that. They will be further explained as we go into the details of establishing these two burden rates.

Trial Examiner Hier: I see.

Mr. Sprowl: I should like to have the reporter mark for identification as Respondent's Exhibits 31—as Respondent's Exhibits 30 and 31, these two documents.

(The papers referred to were marked Respondent's Exhibits 30 and 31 for identification.)

Mr. Sprowl: Respondent's Exhibit No. 30 is the Burden Analysis—C. E. Niehoff and Company, Shipping Department, for May, June and July of 1951. Respondent's Exhibit No. 31 is the Burden Analysis—C. E. Niehoff and Company, Office-Processing Orders, May, June and July, 1951.

Trial Examiner Hier: This is off the record.

(Discussion off the record.)

Trial Examiner Hier: Back on the record. It developed during the off-record discussion between the witness 1161 and Mr. Schrup that a synonymous term for burden analysis was "overhead." In other words, overhead and burden analysis are synonymous on these exhibits. You may go ahead, Mr. Sprowl.

By Mr. Sprowl:

Q. Do you have before you a copy of Respondent's Exhibit No. 30 for identification?

A. Yes.

Q. Did you prepare this computation?

A. I did.

Q. Will you explain to me, and to the people present, what that computation represents and how you obtained the figures appearing thereon, and how you arrived at the conclusions reflected in that exhibit?

A. In the Niehoff Company, we have a rather complete record on labor, both direct and indirect. The indirect labor includes the breakdown of supervision, overtime and miscellaneous indirect labor, and we also have monthly records of the variable charges against the various departments for such items as the factory supplies and services, shipping supplies, payroll, taxes, insurance—taxes paid by

the Niehoff Company and the insurance on the workmen's compensation and group insurance, and any other item that comes in there, or any item that comes up which might be involved in the variable expenses in operating each department during any given month, and for the months of May, June and July, which were the same months on
1162 which the Processing Analysis was made, also.

Q. That is the same months that Exhibit 18 covered, when that exhibit was prepared?

A. That is right.

Q. I mean, rather, the studies which go to make up the exhibits were taken from that?

A. That is correct, and of course, these figures were obtained for the burden rates and applied to the labor on the work as it existed during that same period. Also the present records for labor as for the Niehoff Company—between the direct labor and the indirect labor—in the Shipping Department are grouped as one item, or as indirect labor, and I therefore went back to the original records of the Payroll Department and found out how they grouped it in a breakdown of the work done by each employee in that department, and in that manner I obtained a breakdown between indirect labor and direct labor, direct labor being that portion of the labor which was applied to the checking and packing directly.

Trial Examiner Hier: The figure that you first show on the Niehoff books, before you went back to the records, is this figure of 7646.26 the one that you mean?

The Witness: Yes, sir.

Trial Examiner Hier: Go on.

The Witness: The record in the breakdown also showed the amounts chargeable to supervision and for over-
1163 time, and those were so recorded.

From the other records, which are also available, is the amount spent during those months here for the factory supplies and services for this department, and there is included, also, a fixed charge for depreciation of equipment, which is $206.25, and that does not come from the records. There was no record for that, so I compiled it. The figures for that breakdown are the ones that I compiled, which would be available.

Trial Examiner Hier: What equipment would that be?

The Witness: Well, there are many, many typewriters —not in the Shipping Department—but in the Shipping Department there are mostly considerable amount of shelv-

ing, a matter of benches which were constructed, or which were made in the last ten years, and the variation of those was determined on the basis of a ten year write-off. They are not merely depreciation for the three months being established.

Trial Examiner Hier: A ten year write-off applied to all types of equipment, no matter if it was a pushcart, or a shelf?

The Witness: Yes, that is correct.

Trial Examiner Hier: That is always an arbitrary judgment on both the Internal Revenue Department and the taxpayer.

The Witness: So it seems.

1164 Trial Examiner Hier: You may proceed.

The Witness: Then there are other items which should be included in the burden analysis, such as the taxes and other things but, not ordinarily described as fixed charges. The Niehoff policy, or rather, the Niehoff method, is to lump all of the sums for the whole plant, and allocate them according to either floor space or the payroll to each department.

In the matter of transfers—Departmental Transfers applicable to the Shipping Department were obtained.

By Mr. Sprowl:

Q. I don't think that we all understand that item of Departmental Transfers.

A. Well, you can take your matter of city taxes. There is a lump sum for the year, and that would be applied to each department according to floor space, and instead of splitting each item up, all of the items that go into the fixed charge of the Niehoff Company, you lump them and apply that to the department by floor space in one group and all those applicable to the burden rate through the payroll in another group, and then you prorate them.

Trial Examiner Hier: Why would payroll taxes be prorated on the basis of floor space?

The Witness: They wouldn't. They are two groups. One set of expenses includes a certain type and then over here, on the other hand, you have another type of

1165 expenses, usually the variable—

Trial Examiner Hier: (Interposing.) This is off the record.

(Discussion off the record.)

Trial Examiner Hier: Back on the record. Go ahead.

The Witness: The floor space allocation is applied, generally, to the depreciation of buildings, depreciation of building equipment, and so forth, and the personal owned real estate taxes, and the item divided according to payroll and general factory expenses and the factory office expenses.

By Mr. Sprowl:

Q. Payroll taxes are allocable to the payroll involved?

A. The payroll taxes are taken directly off the payroll for that department.

Trial Examiner Hier: Go ahead.

The Witness: The items such as building depreciation and so forth are in the Land and Building account, and all items in that account are prorated according to floor space.

By Mr. Sprowl:

Q. The only two items of Respondent's Exhibit 30, into which a judgment opinion on similar operations enter, as opposed to what was actually laid out, are those items of depreciation of equipment and departmental transfers, is that correct?

A. I think departmental transfers were taken directly off of the record. If I understand you correctly, the
1166 depreciation on equipment is a figure which is probably involved in getting up this report and—

Q. (Interposing.) No, I mean that depreciation of equipment is like any depreciation charge-off. It is a matter of arbitrarily assuming that a given piece of equipment will last so many years, and then charge off one fraction of that for each year over a number of years?

A. That is right. I went back to Mrs. Niehoff for all of the invoices on equipment, and she told me when it was bought, how much they paid for it, and the rate of depreciation that they took, and they were on the 10 year basis.

Q. That is one item, but the other item that I asked about is departmental transfers, and that does involve an element of arbitrary allocation, in a sense, at least, in that the Respondent has allocated real estate taxes on the basis of floor space, is that not right? I am not saying that was inaccurate, but it is an arbitrary allocation?

A. Yes, sir.

Q. The rest of them are actual expense items?

A. Yes, they are.

Trial Examiner Hier: Off the record.
(Discussion off the record.)
Trial Examiner Hier: On the record.

By Mr. Sprowl:

Q. Will you please go ahead with your explan-
1167 ation, or if you have anything more to say, you may do so, or do you care to refer to Exhibit No. 31?

A. The total departmental factory expenses is the total of the indirect labor as shown—the fixed charges and the variable charges of the departmental transfers. Dividing the total factory expenses for the department by the direct labor involved in that department will give you the overhead or the burden rate. For the Shipping Department it was 126.8 percent.

Q. Now, directing your attention to Respondent's Exhibit No. 31, which I assume is a similar computation of burden or overhead in relation to direct labor for the office departmental work in processing orders, and will you explain where you obtained the figures appearing on that exhibit and what the computation discloses?

A. Again, the breakdown for labor was not available, and in other words, I obtained a list of all the people on the payroll during these three months—the office payroll—and found out, if any, what part of their time was applied to the processing of orders. In some cases only a percentage is applied. That is available through a breakdown, which is a work-sheet, and I do not believe that it will be put in evidence, but it is available to show how each person's time in the office was employed, so far as the processing of orders was concerned.

Trial Examiner Hier: To make it clear to me, Mr. Dreyer, supposing you explain to me where you got
1168 the figure of $5,836.79, the total for the three months, and why there are no figures for each of those months, May, June and July?

The Witness: Because it was a total breakdown. The figures for the individual months are obtainable, and the total for the three months was obtained, and without a breakdown. Now, it could have been done, but it wasn't.

Trial Examiner Hier: Let me ask you this: Does the figure of $5,836.79 represent the sum of the amount of salaries paid each office employee during May, June and July, for the amount of time which they spent during those months on the processing of orders?

The Witness: Yes, that is right.

Trial Examiner Hier: You took that proportion of their time that they spent, and you added that in one column and came out with that figure of $5,836.79?

The Witness: That is right.

Trial Examiner Hier: That is clear. Now, will you please tell us about the indirect labor?

The Witness: There you have your supervision and checking, and then there are two men in the departments, the office manager and there's another man in the mailing room. In each case, part of their time is applied directly to the processing of orders, and part of their time is applied to supervision, and then a part of their time is applied to work which does not pertain to the processing of
1169 orders at all, so their time, in each case, was split up according to those categories.

In addition to that, there is a certain time of the Sales Manager, which is essential in the processing of orders before the work can even begin, and that part or portion of his time was charged to this. In other words, before an order can even begin to be processed, the Sales Manager must pass on it, and from the analysis of his time which was given to me—a check by Mr. Niehoff—it was determined that regardless of the time spent out in the field, that he spent, on an average, of two hours a day on that type of work. In other words, he had to check orders as they came in before they could be released, and that, to my mind, is as much a part of processing an individual order as typing or anything else.

Trial Examiner Hier: In connection with Exhibit No. 31, wherever there has been an allocation percentagewise of time, and therefore of salary, of any employee to the processing of orders, the percentage so used represents a judgment of Mr. Niehoff and who else?

The Witness: Only Mr. Niehoff, to the extent of the Sales Manager. Chiefly, it was not his judgment, but his confirmation.

Trial Examiner Hier: Who else's judgment entered into it?

The Witness: There was an analysis by the Sales Manager, plus a reasonable analysis on my own part, of
1170 what I had seen there, and I thought it was about correct.

Trial Examiner Hier: All right, go ahead.

By Mr. Sprowl:

Q. That is included in what figure?

A. In the packing, supervision and checking.

Trial Examiner Hier: And, to some extent, in the $5,836.79, too?

The Witness: No, no, I figured the checking was in the same category as supervision, and it was necessary to it, although indirect to the processing of orders.

Trial Examiner Hier: Where do these percentages apply that are listed here on this exhibit? How many of those figures are actual and how many of those figures are estimates?

The Witness: Going down the list would probably be both ways. The office supplies are actual, the janitor's time is also, the office supplies, or rather, the total amount for the three months was established and the 46.4 percent was applied, which was the ratio of the payroll of the people in the processing of orders to the total office payroll. If there is 10 clerks in a department and 6 of them are on processing of orders, then you would assume that they would use 60 percent of the supplies. In the same manner, I determined the processing of orders involved 46.4 percent of the clerical labor in the department, and therefore, supplies was chargeable in about the same proportion. The janitor was based on the floor space, 1171 roughly, or as one janitor, and he applied a part of his time, or rather, he spent so many hours a day or week cleaning up the office, and so there you have the floor space being involved in the office as against the total floor space in the office, or about 45 percent, and I applied that percentage of the charge to that, and that is approximately correct. The night watchman's service, the total for the factory, is $1,965.00 for three months, and the basis of the floor space used for processing of orders as against a total factory floor space, 4.32 percent was used.

Trial Examiner Hier: This is off the record.

(Discussion off the record.)

Trial Examiner Hier: Back on the record. Go ahead.

The Witness: There are certain machine rentals involved, which amounted to $47.05. I allocated that according to the payroll. The light and power was the total for the three months available, and there is no way that I know of splitting that actually between the factory and the office, because the factory uses a great deal more than

the office does, and I estimated that 2½ percent would be about right, and that is my own figure.

By Mr. Sprowl:

Q. Well, you omitted the fourth item, which is "Repairs and Maintenance of Office Equipment."

A. That was allocated, again, on the basis of the 1172 payroll. The real estate taxes were allocated on the basis of floor space, against the total factory, and so were the next two items, which is Building Repairs and Maintenance and Fuel.

The personal property tax, according to Mr. Niehoff, 5 percent was applied for furniture and office equipment, and on that basis, 60 percent was used, and arbitrarily, more of it being chargeable to the processing of orders than the other, and the amount used was $102.47. Then there was a depreciation of equipment, and that, again, was compiled by me from records of actual purchases, and also we had the date of the purchase, and again, the rate of depreciation there was not available, and I had to do it.

Trial Examiner Hier: In all of these depreciation allocations, did you use the figure that the company used in reporting its taxes to the federal government?

The Witness: Yes, as far as I know, that was taken from the actual vouchers. Then, there is a certain Commissary expense, and that is lunches paid for the Niehoff Company for such employees at this particular time, and that amounts to quite a bit of money. That was prorated on the basis of office payroll.

Then there is an arbitrary Stationery account, and that was not available, but I figured that out on the basis that we use so many invoices a year that cost so much per thousand, and we also needed so many envelopes and 1173 so many stamps, and they were using so much in the processing, and of course, it all amounted to so much a month, and I want to state right here that it does not include all of the stationery used by the department, but it was on the conservative side.

Then you have telephone and telegraph charges, and I believe that that estimate was given to me by one of the officers of the company, and I believe that 20 percent was applicable to this nature of work in checking the various things with the salesmen and so forth. Now, I don't know how that is divided, but they said 20 percent, and there is no way for me to check it for the processing of orders.

There is employment expense for the office. So much of that is allocated according to payroll and building depreciation, and, again, there is an arbitrary figure used, and which is slightly less than the total. The Workmen's Compensation and Group Insurance was taken not off of the records. That was compiled at the same time that the labor was broken down. In other words, each girl earned so much in three months, and she would have so much workmen's compensation, and if she took insurance, here the company paid so much towards the insurance, and those records are compiled and they are available. Now, the same applies to the F. I. C. A.—

Q. (Interposing.) What is that?

A. Those records were applied and they are available—

Q. (Interposing.) What is that?

1174 A. That is the Old Age Benefits under the Federal Compensation Act.

Q. Where is the allocation for fire insurance?

A. That is in with your general insurance. That is not all applied to the office end of it. I suppose it could have been added, but it wasn't.

Q. Where is your Building Reserve?

A. It is right up there, the third line from the bottom. The total expenses were added and divided by the direct labor, and they resulted in a burden rate of 109.8 percent.

Trial Examiner Hier: This is off the record.

(Discussion off the record.)

Trial Examiner Hier: Back on the record. We will take a short recess at this time.

(A short recess was taken.)

Trial Examiner Hier: You may proceed, Mr. Sprowl.

By Mr. Sprowl:

Q. Mr. Dreyer, in preparing Respondent's Exhibits 30 and 31, is anything allocated in the indirect charges appearing thereon for executive payroll and executive expenses?

A. No.

Q. And by "executive," I mean the men like Mr. Niehoff, and Mrs. Niehoff, the Treasurer, and that type of executive personnel?

A. No, there isn't.

1175 Q. Why have you not made some allocation?

A. Well, it seems to be a little difference of opinion as to if it is applicable. I am not a qualified Certified Public Accountant, but in my reading books on accountancy, there

is some of them who seem to think that it could be applied, while others felt that it should not be applied, and so, to be safe, I omitted it.

Q. Notwithstanding the fact, I wondered why you didn't include it, and instead of including it, you have omitted it, is that right?

A. Yes, I thought it would be better to omit it, rather than to get it in and then to get in the controversial end of it, although it would amount to quite an item, if it were included.

Mr. Sprowl: I would like to have identified as Respondent's Exhibit No. 32 this document, please.

(The paper referred to was marked Respondent's Exhibit No. 32 for identification.)

Trial Examiner Hier: This is off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Sprowl:

Q. I show you Respondent's Exhibit No. 32 for identification, and will you tell me what that computation represents? First of all, did you prepare this computation?

A. I did.

1176 Q. And does it relate to Respondent's Exhibit 18-A, B, C and D?

A. Yes, it does.

Q. Will you explain how that relation arises and what the figures represent?

A. It is a recalculation of the last line on Exhibits 18-A, B and C.

Q. That is the bottom horizontal line?

A. That is right, bottom horizontal line. In the first column on Exhibit No. 32, it shows the Sales Order Number. Now, on Exhibits 18-A, B and C that appears in the top horizontal line.

The second column on Exhibit No. 32 is headed "Total Process Cost—Labor," and that is the same as appears on the third horizontal line from the bottom under each sales order number.

The third column is "Shipping Cost—Labor," and is the sum of the amounts shown under each sales order number for the items 8, 9, 10, 11 and 12.

The fourth column is "Office Cost—Labor," and would be determined by the second column amounts and the first column amounts, which would represent office labor costs.

According to the revision of the burden rates, the Shipping Burden, amounting to 126.8 percent, is shown over in Column 5, and it was obtained by multiplying each
1177 item in Column 3 by 126.8. Similarly, the amounts on the exhibit for "Office Burden," in Column 6, headed "109.8 percent Office Burden," was obtained by multiplying the Office Costs for Labor in Column 4 by 109.8 percent.

Mr. Mayer: Pardon me, but I wonder if we could have these marked on the exhibit as Column 1, 2, 3, 4 and so on. There are eleven columns.

Trial Examiner Hier: Yes, I think we can do that on the face of the exhibit, and each one will mark their own.

Mr. Sprowl: May we be off the record?

Trial Examiner Hier: Yes, we will be off the record.

(Discussion off the record.)

Trial Examiner Hier: Back on the record. You may go ahead, Mr. Sprowl.

By Mr. Sprowl:

Q. Will you please proceed, Mr. Dreyer?

A. The heading of the seventh column is "Total Burden," and that would be the sum of the amounts shown in Columns 5 and 6, so, therefore, the "Total Labor Burden Cost," shown in Column 8, would be the sum of the amounts shown in Columns 2 and 7.

To this Total Labor Cost, there was added 25 percent for incidentals, and I note that the word "Incidentals" is not spelled right, but as found by adding 25 percent to the amounts shown in Column 8, over in Column 10 is this
1178 net billing that was obtained from Exhibit 18 for each sales order. Column 11 is the "Processing Cost Per Dollar of Net Invoice," and that would be obtained by dividing the amounts shown under Column 9 by the amounts shown in Column 10.

Trial Examiner Hier: Those are the figures in Column 11 which should supplant the last horizontal line of the original exhibit, Respondent's Exhibit 18-A, B and C?

The Witness: That is right.

Trial Examiner Hier: Of the page which has to be recomputed?

The Witness: That is right.

Trial Examiner Hier: That is all. You may go ahead, Mr. Sprowl.

By Mr. Sprowl:

Q. Mr. Dreyer, you will recall that you testified concerning some graph which you prepared previously, and—

A. (Interposing.) I think that those graphs were identified as Respondent's Exhibit 21-C and 21-D.

Q. Have you, at my request—first of all, I should like to state that those graphs, Respondent's Exhibit 21-C and D for identification were compiled, in part, from the material that appeared on Respondent's Exhibit 18-A, B, C and D, or which appear on the last line. Now, in view of these corrections appearing in the figures on that last line, have you recounted and redrawn these two graphs?

1179 A. Yes.

Mr. Sprowl: Before we get into that, let's have this marked for identification, and these are the two graphs. One will be Respondent's Exhibit 33 and the other one will be Respondent's Exhibit 34.

Trial Examiner Hier: What is the caption on the first one?

Mr. Sprowl: I am trying to remember what way they were in on the last one, and I have more or less forgotten.

Trial Examiner Hier: This is off the record.

(Discussion off the record.)

Trial Examiner Hier: Back on the record.

Mr Sprowl: I would like to have this graph identified as Respondent's Exhibit 33, which shows the relation between the total processing cost per dollar of net invoice, to the net billing in dollars.

(The paper referred to was marked Respondent's Exhibit 33 for identification.)

Mr. Sprowl: And then, as Respondent's Exhibit No. 34, this is a graph which shows the relation between the total processing cost per order, in relation to the net billing, or rather, the total processing cost per dollar, of net billing.

(The paper referred to was marked Respondent's Exhibit 34 for identification.)

By Mr. Sprowl:

1180 Q. And before we proceed, Mr. Dreyer, I would like to show you Respondent's Exhibits for identification 21-A and 21-B, and 21-A is a graph showing the relation, the number of packages per order to the net billing, and No. 21-B is a graph showing the relation of the number of items per order to the net billing. Now, none of your corrections which you have made, in Respondent's Exhibit

No. 18 for identification, in any way relate to Respondent's Exhibit 21-A and B for identification, do they?

A. They do not.

Q. So all of the testimony which you have given this morning, and on the exhibits which you have testified to, will, in no way, affect the material appearing in Respondent's Exhibit 21-A and B?

A. No, they remain as they are.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: Back on the record.

By Mr. Sprowl:

Q. Mr. Dreyer, I think we can shorten up this direct examination on Respondent's Exhibits 33 and 34 by asking you if these two exhibits were prepared in the same manner that Respondent's Exhibits for identification 21-C and D were prepared?

A. They were, yes.

Q. With the exception that in 33 and 34 for iden-
1181 tification, you have used the coordinating corrections in the manner that you have testified about this morning?

A. That is right. I can make them clearer, if you wish for me to.

Q. Will you do that?

A. For Exhibit 33, the figures used are from Column 2 and 11 of Exhibit 32, respectively, and in Exhibit 34, the net billings were arbitrarily taken. In other words, instead of taking the order numbers, and not exactly taking them off of the curb on Exhibit 33, but in taking those in round numbers, like 100,000 or 200,000 and so on, you get your total processing cost in that manner.

Mr. Sprowl: This is off the record.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

Mr. Sprowl: I should like to have marked for identification as Respondent's Exhibit 35 a document which is a cost comparison between the two Memphis customers, Stratton-Warren and Union-Electric.

(The paper referred to was marked Respondent's Exhibit 35 for identification.)

Mr. Sprowl: And I would like to have identified as Respondent's Exhibit No. 36 a cost comparison between

the New Orleans' customers, namely, Greiner and Auto-Wholesalers.

1182 (The paper referred to was marked Respondent's Exhibit 36 for identification.)

By Mr. Sprowl:

Q. I show you Respondent's Exhibits 22 and 23 for identification, which show the cost comparison between the Memphis customers, Stratton-Warren and Union-Electric, and the New Orleans' customers, Greiner and Auto-Wholesalers, and I think that you testified that you prepared those two exhibits?

A. Yes.

Q. I will ask you if Respondent's Exhibit 35 and Respondent's Exhibit 36 for identification were prepared reflecting the same two groups of customers in the same manner as on Respondent's Exhibits 22 and 23?

A. That is right, they were.

Q. Only with the exception of your outlined figures being corrected to the extent that you have corrected them this morning in your testimony?

A. That is right.

Q. And that fundamentally goes merely to the burden factor? In your exhibits, they all stem from the 200 percent burden factor, and in your new exhibit they stem from the new burden factors which you testified to today?

A. That is correct.

Trial Examiner Hier: We might say there, for the record, and show at this time the Respondent's Ex-

1183 hibits 21-C, 21-D, 22 and 23 are withdrawn by you?

Mr. Sprowl: That is right.

Mr. Schrup: Those are for identification.

Trial Examiner Hier: That's right, because they are supplanted by the corrected exhibits, or the changed exhibits, at any rate, namely, 33, 34, 35 and 36.

Mr. Sprowl: That is right, and except for that one difference, Respondent's Exhibits 35 and 36 were prepared in identically the same manner as Respondent's Exhibits 22 and 23, is that not right, Mr. Dreyer?

A. Yes.

Mr. Sprowl: Now, I will make the withdrawal of the exhibits as described, Mr. Hier, and I will reserve the new offer until after they have cross-examined Mr. Dreyer.

1185 **Afternoon Session.**

2:30 p. m.

Trial Examiner Hier: Will you please come to order, gentlemen? Mr. Mayer, you may cross-examine Mr. Dreyer.

LOUIS DREYER resumed the stand and testified further as follows:

Cross-Examination by Mr. Mayer.

Q. Directing your attention to Respondent's Exhibit for identification No. 30, would you tell us what employees are considered in the makeup of the entry you have opposite "Supervision," which is the first item under Indirect Labor?

A. There is one foreman, and I believe that is all.

Q. Was that an allocation of his time?

A. No, that was directly off of the records.

Q. I notice the month of July shows about half the figures of the preceding two months?

A. These figures were all taken off the records. Two things are possible, and I don't know which is true; either he was ill, he was on an hourly rate, or he was on vacation, in which case, the time item was charged to some other account. It would have to be analyzed through the time sheets in the records. They are all available, and this is where that arose. I didn't change anything. In fact, we were leaning backwards. I think it is better to show
1186 more increased labor, like the $300.00, rather than the $173.00, and those were figures in the records, and I saw no justifiable reason for changing them.

Q. Do you know whether any time of that particular employee was spent in any of the work which is contained in Items 8, 9, 10, 11 and 12 of Respondent's Exhibit 18-A for identification?

A. I would have to refresh my memory on that.

Q. Will you please do that?

A. There is some. Now, for instance, I think he does a little bit on the shipping, Step 8, which would amount to about three cents an order, and so far as I know, the shipping item 12 there—well, I mean sometimes he does do something on that. In other words, the work on the

order might be where he will say, "We will run through so and so," or he might say, "We will ship it by freight," and that kind of thing, but the chief work is in the supervision of the department.

Q. If there is, however, any of the expenses allocated by the entries 8, 9, 10, 11 and 12 of Exhibit 18-A, wouldn't they result in part of this?

A. There would be a slight reduction in the charge against supervision. It was not accounted for in this analysis as being such, and it probably could have been, or should have been, but it wasn't. It doesn't seem to me, in the general picture, to make any appreciable change in the final setup.

Q. Directing your attention to the entry "Other," under Indirect Labor, could you tell me how you arrived at the figure of $729.62?

1187

A. Yes, the records for the department are not split up in Direct Labor and Indirect Labor. All of the labor of the Niehoff records are charged to Indirect Labor, and I went back to the original timekeeping records, and operator by operator I analyzed them. That breakdown is available, and from those records the Direct Labor was established and from the total for the department of $7,646.26, the total for Direct Labor was deducted and the remainder was "Other" Indirect Labor. That applied to the men doing trucking and things of that kind for the department—odd jobs that are not definitely allocated to any of the steps in processing the orders, but still necessary for the operation of the department.

Q. The $729.00 item cannot be individually identified? It is more of a left-over item, after you had taken out your Direct and Indirect Labor expense?

A. We have about 27 or 28 Indirect Labor account numbers. In some cases, that could be charged against those. In some cases, it is a matter of subtraction. This is all obtained by the process of subtraction.

Q. Directing your attention to the other item of "Variable," of Factory Supplies and Supervision, could you break that down?

A. I am afraid that I can't, excepting that the records show that these amounts were charged against this department in those months. The analysis of that would be available, but that is what the record showed. Sometimes the supplies are purchased, maybe, for three months or more, but they are all charged against one month,

1188

at the time they are billed, I mean, and in that way one month's charges will be higher than the other. In June it was $778.06, and in July it was $198.79. That is the way in which the accounts are kept at the Niehoff Company, and that is the way those records show.

Q. Do you have any way of knowing whether May, June or July of 1951 were typical three months in the operations of the Niehoff Company in 1951?

A. There is no way of telling that.

Q. Is it possible that for August, September and November of 1951, the Factory Supplies and Supervision might amount to only $300.00 instead of $1200.00, as you show on Exhibit 30?

A. All things are possible. I do not think it is likely. The reason that May, June and July were taken is because those were the three months in which the processing of the orders were made. Therefore, the burden rate for those three months was applied for the time shown in the processing, and I think that is a fair way of handling it.

Q. In the preparation of the processing charts on these analyses for the three months of May, June and July of 1951, was it your intention to apply them only to transactions engaged in by the Niehoff Company, or be-
1189 tween the Niehoff Company and its customers during the same three months' period, May, June and July of 1951?

A. I am sorry, but I don't quite understand that.

Mr. Mayer: Will you please read the question?

(The reporter read the question as follows:

* * * * *

The Witness: Are you referring to the burden rate? I am not trying to spar for time, but I don't understand the question. The burden rate, of course could be applied to anything done by Direct Labor during that period, regardless of whether it took place during the processing of orders.

Trial Examiner Hier: I might state at this point that I am responsible for the selection of those months, because I instructed the Respondent to go ahead with his defense in May, and I think that we fixed August originally, and then changed it to September as the time, and that may be laying it at my door, so to speak.

Mr. Sprowl: There was no pre-selection on our part.

Mr. Mayer: I am not attempting to elicit that
1190 information from the witness at all now. What I want

to know is now, what was the nature of the Supplies and Supervision in making up that item?

The Witness: Probably was paper that was involved in wrapping, and including shipping supplies, tape and various types of twine, but I actually couldn't say where all of that money is involved. I would have to check all of the invoices, but there are many miscellaneous supplies that the company uses. The Supervision would involve calling in a truck, or, if it were necessary in the Niehoff operations, and things of that nature.

Mr. Sprowl: You are speaking of shipping supplies?

Mr. Mayer: No, factory supplies and supervision.

The Witness: All of these figures were obtained from the labor analysis for that month. They were shown as a lump sum on the records, and they were merely copied from it.

By Mr. Mayer:

Q. Are those records restricted to the Shipping Department?

A. That particular setup is taken from the records of the Shipping Department only.

Q. Do you have any idea what would be included in supervision in that?

A. Not to my knowledge, no, I don't.

Q. Going on to Shipping Supplies, Mr. Dreyer, what would be considered in that item?

1191 A. The major item to be considered would be shipping cartons, and there, again, the way they are purchased, there might have been a large amount of buying for price reasons in that particular month, and they might not buy very many at all, so you have a value of $400.00 to $1400.00 and that is the way those would be charged on the records. $400.00 might not have been adequate for May, and $1400.00 might be too much for the month of July. That does not mean that they were used in that month, but they were purchased in that month.

Trial Examiner Hier: Contrary-wise, Mr. Dreyer, the month of May, $462.34, there might have been considerable more cartons used in that month?

The Witness: That is true. This does not show usage, it shows the purchases.

By Mr. Mayer:

Q. That applies to the Factory Supplies and Supervi-

sion, or to the Factory Supplies and Services item, just above it?

A. Yes, it does, to the best of my knowledge.

Q. Could you tell us if there was any particular basis or reason for allocating Shipping Supplies, as I understand them, the cartons, in which Niehoff merchandise is shipped on the basis of Direct Labor?

A. Excepting that it is an item of expense for the department. You can't run it without it, and therefore, it would become a part of the cost of operating the De-
1192 partment and would be, therefore included in your overhead and burden charge, rather than a direct charge. It is a question of accounting. Some companies might want to take the individual cartons and charge them to the individual jobs. That is not done at the Niehoff Company.

Trial Examiner Hier: According to his understanding, he means that there must have been a much larger item showing supplies, $462.34 for May, apparently from the whole factory, and there is $5,000, $6,000, $7,000 or $8,000, and why is it that you take a certain percentage of the total? Is it because the percentage is determined by the ratio existing between or by the labor that goes into the Shipping Department and the total labor, in order to arrive at the figure of $462.34?

The Witness: No, this $462.34 is taken from the record as Shipping Supplies for that month.

Trial Examiner Hier: Possibly I didn't make myself very clear, but those are actual expenditures for that department?

The Witness: Yes, for that department.

Mr. Sprowl: That is not an allocated figure on payroll, per square foot basis?

The Witness: That is correct.

By Mr. Mayer:

Q. Can you explain the item of "Moving Expenses?"

A. No, sir, I can't. I couldn't find out anything
1193 about it, but it was there. I don't know what it is, and I could not assume any reason for excluding it, any more than including it.

Trial Examiner Hier: Is that because the department moves the parts in the department around, like they move packers' benches and that sort of thing, and they then charge it to moving expenses?

The Witness: I just couldn't nail it down to anything specific.

By Mr. Mayer:

Q. Do you have any knowledge as to if that was extraordinary expense during this period, or was it a normal moving expense?

A. It is an unusual expense.

Q. Would you normally include unusual expenses in your analysis of determining your burden of cost to the Shipping Department?

A. In establishing a burden for an item of this nature, I would take all expenses.

Q. Which occurred in that period?

A. I think so.

Q. I take it that you did not make any attempt to determine if this was a typical three months' period at the Niehoff Company?

A. No, I didn't. I took it because they were the three months in which these studies were made.

Q. Had there been an extraordinary moving ex-
1194 pense of $5000, would that have affected your burden rate on this exhibit?

A. I would be more prone to question a large sum like that. The effect of an expense, amounting to $5,000.00, which would be alone equivalent to all other total expenses would be much more closely analyzed than another, or rather, not even a similar expense, but would be much more closely analyzed than other expenses. However, the moving expenses were undoubtedly legitimate. They were there, and it cost that much to do the work in the department, and if you were to split that over three months or twelve months, you just simply could not justify that any more than you can justify the expenses for Shipping Supplies, as given over the three months, rather than taking a twelve months' average.

Q. Directing your attention to the entry of "Departmental Transfers," I realize that you have explained this before, but would you please explain it again?

A. That involves two things, really. It involves the sum of the fixed charges and the sum of the variable charges. The fixed items would be charges like rent, depreciation on buildings and power would come under the variable, and the other things which are needed to run the whole factory, and these items, instead of the costs

being divided between the departments, they were all lumped into the two groups, and one of them, which would be, as I have already said, to rents and lands and buildings account, and they are prorated among the de-
1195 partments according to floor space. The land and building account would include items like depreciation or building depreciation, or building equipment, or depreciation on building equipment, real estate taxes, and so forth.

Trial Examiner Hier: Wouldn't maintenance and repair be in that?

The Witness: Maintenance and repair will come in there, too. Yes, they come under the variables.

By Mr. Mayer:

Q. If it was a variable, it would not be listed under departmental transfers, would it?

A. It would be listed under that—the total for the land and building account as established for the month. That, then, is prorated to each of the various departments on a basis of floor space, and it appears that that is the percentage for the Shipping Department, and I don't know what it is offhand, but these figures are shown here.

Q. It would be the same as on the next exhibit, 4.32 on the floor space basis?

A. That is right.

Mr. Sprowl: Might I inject, parenthetically, something that I don't understand, and Mr. Dreyer explained it to me, which Mr. Steele would understand, readily, and that it is the difference between a fixed charge and a variable charge?

The Witness: It is like depreciation or taxes—
1196 divided up into twelve months, the taxes is considered as a fixed charge. Things like maintenance, and things that change from month to month are variables, but they are still included in the Indirect grouping of expenses, and, to a certain extent, both types are included in this departmental transfer account.

Trial Examiner Hier: Alimony, taxes and rent are fixed charges?

The Witness: That second type is the charge for general factory expenses, which would include General Factory Indirect Labor and some General Factory Supplies, some heat and fuel and some taxes and insurance on payrolls, which would be chargeable to the general factory,

and the cost of running the factory's office. Those total expenses are prorated according to the payroll and thrown into the Transfer Account.

By Mr. Mayer:

Q. But there would be certain items in the Departmental Transfer Account here being allocated to the Shipping Department, which were expenses actually incurred by the factory division of the Niehoff Company?

A. That is correct.

Mr. Sprowl: And the factory office?

Mr. Mayer: Just the factory office.

The Witness: The general factory and the factory office, those are two separate expense accounts.

By Mr. Mayer:

1197 Q. Could you tell us, in the third entry, under May, June and July for Departmental Transfers, how much of that figure is made up of depreciation of building equipment?

A. I couldn't tell you directly. It would be on the records, though. I mean the breakdown would be in the Niehoff records.

Q. Would that include depreciation of building equipment, other than equipment for the Shipping Department of the Niehoff Company?

A. Those items which are of general interest, for instance, a boiler, would be a general factory depreciation, or it would be depreciation on things like the boilers, or anything like that. When it comes to depreciation on equipment, that is items used only in the Shipping Department that is shown under the fixed charges and the depreciation on equipment for the three months' total is $206.25. This other would not include that.

Q. The way that you have the exhibit drawn up, is that there would not be any chance of duplication on this item of $206.25, depreciation equipment item under Fixed Charges, being under the Departmental Transfer? Do you see what I mean?

A. Yes, I understand you, and the answer is "no."

Q. To make it perfectly clear, then, in the Departmental Transfer item, there would be several allocations of expenses which were incurred by other parts of the Niehoff Company, other than the Shipping Department of the Niehoff Company?

1198 A. Yes.

Q. But in the Direct Labor item, on which you are making a basis of establishing this burden rate, that is confined to the salaries of the Direct Labor involved in the Shipping Department alone?

A. That is right.

Q. That represents no allocation from any other departments at all?

A. That is right.

Q. Directing your attention to the next exhibit, Respondent's Exhibit No. 31, could you tell us what personnel is included in the Supervision and Checking item—the first item under "Indirect Labor"?

A. Yes, a part of the time of the Office Manager is there, and a part of the time of the Supervisor of the Mailing Room, and also, a part of the time of the Sales Manager in checking.

Trial Examiner Hier: This is off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record. You may go ahead.

By Mr. Mayer:

Q. Now, Mr. Dreyer, does any of the personnel which you have just indicated, some of their salaries here allocated to Supervision under Indirect Labor, would any of that be connected up with the Direct Labor item which immediately preceded it?

1199 A. That is deducted from the totals, yes.

Q. Which totals?

A. Well, there wasn't any included in the Direct Labor. In Exhibit 18, there would be the opening of mail, and in the item for credits at that time, it was included in Direct Labor, but not in the Supervision or Checking, I don't think.

Q. Well, let me ask you this: Would some of the Sales Manager's time be given or allocated to the Supervision?

A. Not Supervision. Well, it is a general account. It is more of a checking, but he doesn't do supervising. When orders come in, they cannot be processed at all until they are checked by him, and that all takes so many hours a day, on an average, and on that basis, the time charged to that was included as part of the Indirect Labor chargeable to the processing of orders.

Q. And there is an item of Indirect Labor appearing under the Indirect Labor. What is that?

A. In the department there are several girls who, besides doing work like filing, they also do miscellaneous errands and things like that for other people, and taking their total salary for the three months and deducting that which was chargeable, directly, to the processing of orders, the balance was charged to Indirect Labor. Those things are a part of the situation which are available in the company for checking.

Q. But there would be no chance of duplication there?

1200 A. No, sir, there would not be.

Q. So then when they appear both under Direct Labor and Indirect Labor, that is for the same work performed?

A. No, a file girl spends a certain percentage of her time in filing, and then in other miscellaneous work connected with the processing of the orders. The balance, then, is classified as Indirect—as being service charges for the department.

Q. I take it that that percentage was also excluded from the charges against the filing item on Exhibit 18-A?

A. Oh, yes, there's no duplication there.

Q. What is included in that Office Supplies item, Mr. Dreyer, on Respondent's Exhibit No. 31 for identification?

A. There are so many things in that, including some types of stationery, and also including billing forms and anything connected with carbon paper, and endless items of that nature. These figures were all taken off of the records for the months according to the count covering Office Supplies, and the amount for the three months was $983.96, of which 46.4 10ths percent was applied to the processing of orders, 46.4 10ths percent being the ratio of the labor in the department on processing, as against the total payroll.

Q. That is the payroll percentage?

A. That is right.

Q. As you have determined it?

A. That is right.

1201 Q. Mr. Dreyer, isn't your opinion, then,—isn't it your opinion, then, that during the three months' period, May, June and July, that 46.4 percent of the office supplies purchased by the C. E. Niehoff Company were purchased for the processing of orders department?

A. I couldn't see any better way of splitting it up between the work involved in processing orders and the total expenses of the clerks and those involved in running the office. You have to assume that most of the typing, or work of that nature, involves clerical work, and if you have half of them, or 40 percent of them, using carbon paper for processing an order, then you assume that the other part is used by the other part of the office forces in their work, and I can see no better way to allocate it than through payroll ratio.

Trial Examiner Hier: Your answer is that it is your opinion that 46.4 percent of the office supplies purchased by the Respondent during the three months of 1951 were consumed and used in the processing of orders?

The Witness: That is right.

By Mr. Mayer:

Q. Could you tell me the purpose of the individual entry of "Stationery," which appears later on, on Respondent's Exhibit 31?

A. Yes, that is a pecial account, and that includes the invoices. In other words, they use about 50,000 in-
1202 voices a year, at so much per thousand, and in addition to that, they use about the same number of envelopes, or they would use a smaller quantity of envelopes than they would invoices, because, generally, the invoices come in a set of more than one, and it involves so many stamps, and that sort of thing, and I went over that with the Office Manager to get his analysis of that, which was usable for that purpose, and my understanding is that it is not a duplication against Office Supplies.

Q. Mr. Dreyer, do you consider that Stationery Expense of $660.00 to be a normal expense of that type for any three months' operations of the Niehoff Company?

A. Yes, I would consider the total for the year would be a normal expense, because it would be divided by four.

Q. What was that?

A. Yes, I said I would, because the total for the year was taken and it was divided by four.

Q. I see. I didn't understand you to say that the first time.

A. Well, I possibly had it somewhat garbled.

Q. And that is the way in which you arrived at the $660.00?

A. That is right.

Q. In other words, the exhibit does not reflect the fact that $660.00 was actually expended during the three months' period for May, June and July, for Stationery in this case?

A. No, that is the closest estimate, that could be arrived at, on the total expense of stationery used in any three months.

1203 Q. Directing your attention, Mr. Dreyer, to the item of "Personal Property Tax," and in parenthesis right under that, it says "5 Percent Furniture and Office Equipment," could you tell me how the figure of 60 percent was arrived at in the percentage applied column?

A. It was an estimate. In other words, five percent of the total Personal Property Tax for the year was $3,415.53, and that was applied through this processing, or rather, took off—maybe I'm not clear on that, but the fact of the matter is that there is no equipment used in the processing of orders, no more used than there is in the general office work, and therefore, I considered that the 46.4 percent was low, and I arbitrarily raised it up to 60 percent, to be more or less on the safe side, as a fair rate, and it could possibly be more, or it could possibly be less, but it is certainly much more fairer than the 46.4 percent.

Q. Directing your attention to "Commissary," the Commissary item, rather, wouldn't it have been perhaps better to distribute the cost of that item on the number of the people which used the Commissary, as opposed to the number of people in the processing of orders, rather than on the payroll basis, as you have done it?

A. I don't know how you could do that. In other words, this Commissary Department is an expense for maintaining the good will in causing a decline or a decrease in
1204 in the turnover of the entire office force. It is an expense incurred by the company to help increase or improve better understanding between office and management, and of the 46 percent of the people in the office who work on processing of orders, I would say the same ratio would apply to the Commissary expense.

Trial Examiner Hier: Your allocation is on the assumption that everybody at the Niehoff plant uses that commissary?

The Witness: That is right, unless they have ulcers, or something—not everybody, but those in the office, pardon me.

By Mr. Mayer:

Q. I think that Mr. Dreyer inadvertently answered the question when he said that 46 percent of the people used the commissary would be involved in the processing of orders in the Niehoff plant, and that isn't the basis of the allocation here. Isn't your allocation based upon the salaries, as opposed to the salaries of the entire office, rather than the number of persons?

A. That is true to some extent, but the range and the salaries, I don't think, would make too much of a difference, or have too much effect on it. There aren't too many very high salaries or very low salaries. The average would be the same, and the distribution would be the same.

Q. It is your opinion that 46 percent of the actual 1205 expenses incurred in maintaining the Commissary is for the benefit of the people processing orders in the Niehoff plant?

A. That is my opinion, yes, sir.

Mr. Sprowl: Could I ask a question to clarify that?

Trial Examiner Hier: Yes.

Mr. Sprowl: At this particular time in May, June and July of 1951, what group of employees were served by the Commissary Department?

The Witness: Only the office force.

Trial Examiner Hier: This is off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Mayer:

Q. Mr. Dreyer, inviting your attention to Respondent's Exhibit 32 for identification, the date appearing in the upper left-hand corner of February, 1952, is when this exhibit was prepared?

A. That is right.

Q. And not the period of time that it involves?

A. That is right.

Q. Then in the heading under Column 8, perhaps it would be better to have it headed as "Total Labor and Burden Costs?"

A. No, it is a total labor burden costs. It shows up here. That is A plus B—I beg your pardon, it should be Labor and Burden Costs, your Total Labor and Burden Costs.

1206 Q. Paying particular attention to Column 9 in that particular column, as I understand it, you have added 25 percent, or a 25 percent figure here, called "Incidentals," to the Total Labor and Burden Cost?

A. That is right.

Q. It seems to me, that in line with the previous figures you have already had on Exhibit No. 18 for identification, Exhibit 18-A, B and C, that perhaps more correctly that 25 percent should be added to the labor alone, wouldn't that be correct?

A. No, it would not be, because unfortunately the burden charge that the company has to pay on its labor also has to be paid on the time while they are doing this miscellaneous gawgling to justify the time spent and the burden charge is applicable to that, as to the time when they are doing the productive work.

Q. Yes, I agree with you, and that is what I was trying to bring out. Now, the 25 percent should be actually applied to the total labor cost, whereas the effect of applying it as you have in Column 9 would be to add 25 percent to the cost of the office supplies—to the janitor's amount that you have applied here, and to taxes and to depreciation and so forth?

A. No, this is purely labor. It has nothing to do with the other expenses.

Q. But wouldn't it have been more accurate to apply the 25 percent to the total labor cost, rather than to burden?

1207 A. You apply it to both. You add it to the extra Burden charge. It is just a question of mathematics as to how you apply it. If you add the 25 percent to the Total Labor Cost, then you add it to the Burden. It would be the same as this, in the long run, because this is a matter of convenience, to show exactly the Shipping Burden for the different sales orders. You can analyze it any way you want to. If you add Burden to Labor or the Incidentals to Labor, and then add the Burden, they both come out the same. It just comes out exactly the same, and you can apply it or play with it any way you want to, and it will still wash out the same. The answer would be the same, no matter how you apply that. That is clear, isn't it?

Trial Examiner Hier: This is off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Mayer:

Q. In the preparation of Respondent's Exhibits 33 and 34, as they are substituted for the old Respondent's Exhibits 21-C and 21-D, the only difference being the difference in the Burden, which was distributed on Exhibits 18-A, B and C?

A. In the final analysis, that would be correct. It is the application of two different Burden rates as against one before.

Q. Would you tell me, with particular attention, now, to Respondent's Exhibit No. 33, just what that exhibit purports to show?

1208 A. Well, it shows that, as you increase the Net Billing in dollars, you decrease the Total Processing Cost in dollars, not a ratio which is in anywhere near that of a direct ratio. In other words, a direct ratio would be a straight line ratio. This is a grouped, or a curved line, rather, and this curve shows, as you increase your Billing, your Total Processing Cost per dollar of Net Invoice increases that at a much different rate and at a varying rate than at a straight ratio.

Q. It increases for the first three or four dollars per invoice and then dwindles?

A. Yes, sir.

Q. And then it goes up very sharply and stays there?

A. That is right.

Q. The basis for Exhibit 33 is Exhibit 18-A, B and C, plus Exhibit 32, is that correct?

A. Exhibit 34 is based, chiefly, on Exhibit 33. In other words, taking the different values for the Net Billing, and running those in the curve, and reading on down to the Net Processing Cost Per Dollar, that would establish Column B on Exhibit 34, and multiplying A times B would give you the Total Processing Cost Per Order, and then going on over to the third column are the points which would determine the knowledge shown on Exhibit No. 34.

Q. What I was asking was, it would be the basis for Respondent's Exhibit 33, rather than 34?

1209 A. The basis for that would be Exhibits 18-A, B and C, plus Exhibit 32.

Q. What does Exhibit No. 34 purport to show, Mr. Dreyer?

A. Well, again, it shows that as the Net Billing increases—let me see—the Total Processing Cost Per Order

changes or increases, but at a different rate than it would be if the ratio were a direct line ratio. For instance, a bill for $800.00, as shown here, costs $8.00 to process. However, a billing of $400.00, which is half of the $800.00, costs only $5.80, which is not half of the original $8.00.

Q. The interpretation which you have given, Mr. Dreyer, on Respondent's Exhibits for identification 33 and 34, depends, does it not, upon the accuracy of the items which you have listed, shown in Exhibits 18-A, B and C, with a correction?

A. Yes.

Q. Which is Respondent's Exhibit 32?

A. Yes, that is right.

Q. It relates to the Exhibit 18 for identification. Now, have you figured, or can you figure the total number of sales transactions made by the C. E. Niehoff Company in 1949?

A. I don't know if I can or not. I can find out, though. I suppose it is available, but I haven't checked into it myself.

Mr. Kirchschlager: We can have it for you tomorrow.

The Witness: We buy 50,000 sales order blanks, but we use quite a bit more than one set on some orders.

1210 By Mr. Mayer:

Q. I understand that. Now, directing your attention to Respondent's Exhibit No. 35, again I notice it is dated February of 1952. To clear it up, would you tell us what period of time the exhibit actually covers, or the transactions that it applies to?

A. That is for some time in 1949, and that is as close as I can get to it on that.

Mr. Sprowl: Which exhibit is that?

Mr. Mayer: Exhibit No. 35. It doesn't have any indication on it as to the exact transaction that it applies to.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: Back on the record.

Mr. Sprowl: For the record I will state in the year of 1949 there were 10,008 separate sales transactions between the Niehoff Company and its customers.

By Mr. Mayer:

Q. Mr. Dreyer, if you were to attempt, or if you were to establish the cost of doing business between the Niehoff

Company and these two customers, as they are shown on Respondent's Exhibit No. 35, Stratton-Warren and Union-Electric, wouldn't you examine the sales transactions between the Niehoff Company and those two companies?

A. Well, the only thing I know about that is that 1211 these Net Processing and Number of Sales were closely analyzed in Commission's Exhibit 7-A and E in sheet 2, I believe, and so, as far as I am concerned, I see no reason for questioning that at all.

Q. Well, I meant to determine the cost of doing business between the Niehoff and Stratton-Warren and Union-Electric—the cost of doing business between Niehoff and Stratton-Warren and the cost of doing business between Niehoff and Union-Electric, wouldn't you examine the actual sales between Stratton-Warren and Union-Electric to determine the actual cost of doing business with those two customers?

A. I really don't know on that. I suppose that it would give a clearer picture, but so far as the purpose of this analysis is concerned, I see no reason for that. We consider the processing, the number of sales, the average amount of the sales, and from our graph we have obtained the order of the processing cost per dollar, and from that we got the actual Order Processing Cost, and that was substantiated by a check on the Exhibit 34, and therefore there is no reason, really, for questioning the final figures obtained.

Trial Examiner Hier: I don't understand your answer, or rather, I don't understand the question. You said to examine the actual transactions, and I would like to know what there is to examine that would give you the cost of doing business with Union-Electric. What do you 1212 have out there in the way of a record?

Mr. Mayer: This original Order Processing Analysis, as I understand it, that Mr. Dreyer made up, was set up on the basis of the individual transactions between the C. E. Niehoff Company and those customers.

Trial Examiner Hier: Do you mean to actually clock the operations for each one of the operations of the 21 steps—any time an order comes in from Warren, or from Stratton-Warren, or Union-Electric for a period of a year?

Mr. Mayer: It would be more accurate to include it in this form, rather than in the analysis.

Trial Examiner Hier: There is nothing to show that

there were no orders from them, or that there were in there some orders from them.

Mr. Mayer: I believe he testified that there were none.

Mr. Sprowl: Our Exhibit No. 19 is the records which were examined by Mr. Dreyer. He has already testified to the manner of their selection, and if Mr. Mayer says that they probably were not in the Stratton-Warren or Union-Electric group, then there weren't, probably.

The Witness: No, there weren't.

By Mr. Mayer:

Q. In the last column, and I think that we went over this once before in the other exhibits that were
1213 offered earlier, but wouldn't it be better to say "Order Processing Cost As Computed by the Niehoff Company," rather than the word "Actual,"—"Order Processing Cost—Actual," to Stratton-Warren or Union-Electric?

A. So far as these figures are concerned, it is the actual multiplication of the Columns A and B on Exhibit 35, and the Order Processing Cost Per Dollar were obtained from the graph which was developed by myself, so naturally, the Order Processing Cost would be the one developed on that basis.

Q. However, the examination was not made of any orders or any transactions between Stratton-Warren and Niehoff Company—none of those transactions were examined?

A. No, they weren't. None were available at the time of the study.

Q. Wouldn't this, then, be a Computed Order Processing Cost, as a result of the analysis of the Niehoff Company?

A. I personally see no reason for calling it that. I think it is a computed cost, sure.

Q. Again, with reference to Respondent's Exhibit 35, it actually is a result of your analysis of the processing orders that were made, the 1951 costs, as they were supplied, then, to 1949 sales transactions?

A. That is correct.

Q. Would it be correct to say, Mr. Dreyer, that the Respondent's Exhibits 33 and 34 are set up upon 17
1214 individual transactions, whereas the Order Processing Costs, as you have applied them in Exhibits 35 and 36 are set up upon an average basis?

A. The Order Processing Costs are based upon the Exhibits 18—this is not so much an average as a graphic presentation on which they are based.

Q. But the graphic is based upon a means between the 17 transactions?

A. The what?

Q. Pardon me, the graph, I should have said, is based upon a means between the 17 transactions?

A. The graphs are determined in that manner.

Q. And on Respondent's Exhibits 35 and 36, you applied your average amounts per sale, rather than any one particular transaction?

A. That is right, under Column A, each one is the average amount per sale.

Q. In your compilation of Respondent's Exhibit No. 35, and more particularly, to Respondent's Exhibit 36, would it make any difference to you whether or not the 26 sales of Greiner had been made up of two orders of $5000 each and 24 orders of $12.50 each?

A. Yes, it would have changed the average amount per sale, and that would be reflected in the Order Processing Cost Per Dollar. It would make a big difference.

1215 Q. Then, how did you arrive at the average amount per sale, on Respondent's Exhibit 36?

A. Dividing the Net Process to C. E. Niehoff Company between the number of sales, or by the number of sales, rather.

Q. Then, to go back to my original question, when I said would it make any difference to you, had there been two sales to Greiner of $5000 each and 24 sales of $12.50 each—

A. (Interposing.) Oh, yes, because the average amount per sale in each instance would be entirely different.

Mr. Sprowl: I don't think that you understand the question, do you, Mr. Dreyer?

Mr. Schrup: The witness understands the question, all right. Just let him alone.

Trial Examiner Hier: Let the witness finish his answer.

The Witness: Well, the average amount per sale would be considerably changed, if you use the same Net Processing for all sales and change the number of sales. Naturally, one being divided by the other makes a big difference in the average.

By Mr. Mayer:

Q. I used the same number of sales. I used two sales

of $5000 each and 24 sales of 12.50 each, which makes a total number of sales of 26, actually, and a total proceeds of approximately $10,306.00, or very near that.

A. Yes, I understand that, but so far as the figures
1216 are concerned, there is no indication there at all as to the size of any orders. So far as these figures are concerned, there would be no difference, because the average amount per sale would remain the same.

Q. In determining the actual cost in dealing with Greiner, as opposed to the dealing with the individual, or rather, as opposed to dealing with Auto-Wholesalers, would the size of the individual purchase of Greiner, any individual purchase of Greiner, have anything to do with the amount of the cost saving on Greiner, as opposed to Auto-Wholesalers?

A. I suppose that you could take any group of figures and apply extremes to them, which would put the thing all out of kilter. So far as I know, without having figured it before, and without having the figures before me right offhand that—at my fingertips—such extreme conditions would not exist. If they would exist, it would not influence the average cost for processing orders at all. I fail to see where it would affect any of the figures we have here to any extent, because these are based on the averages, rather than on the extremes.

Q. But there is no direct relation, as 33 and 34 show—There is no straight line on those two charts which show the savings in cost as opposed to the progression in the size of the order?

A. Oh, no.

Q. Then you show the cost of saving, and that
1217 would depend on the size of the individual orders, as received by Niehoff from Greiner?

A. If you took an order like Greiner and broke each one down and priced them according to the charts, you would still have a great extreme between the upper and the lower. In other words, if you have sales, of say, Greiner, and you mentioned $5000.00, and I think you said there would be a couple of them, and then some $12.50 sales, you would have the far extreme. One would be extremely high, and one would be extremely low. Just where the average would come out on that basis would have to be a matter of computation, but those conditions rarely exist.

Q. Have you analyzed the Greiner account?

A. I have seen some analysis of them, but I am not acquainted with the variances in the sizes of their orders. I don't know that. If they are like most customers, they might vary quite a bit.

Trial Examiner Hier: We will have a short recess at this point.

(A short recess was taken.)

Trial Examiner Hier: Back on the record.

Mr. Mayer: We have nothing further of this witness.

Trial Examiner Hier: Mr. Sprowl, do you have anything on redirect?

Mr. Sprowl: I have just a few questions.

1218 *Redirect Examination by Mr. Sprowl.*

Q. Referring to Respondent's Exhibit No. 30 for identification, you mentioned certain items which are allocated, because that was the amount spent and those three amounts for those items. We pointed out that there was some Supervision cost that was in that period, which wasn't present in the months of May, June and July of 1951. Was there one less supervisor in that department then?

A. No, there was the same number of supervision. The fact that the July supervisory cost was low is due to one or two factors. Either absence of a man being paid on an hourly rate or a vacation, which is charged to the Vacation Account, rather than to Supervision.

Q. And that is where some item in that method of computation might be high for a particular month, and then another item might be correspondingly low?

A. That is right.

Q. You mentioned factory office, is that correct, that the Factory Office Supplies includes the Shipping Department?

A. Yes, it is chiefly a matter of the payroll and factory costs, which include shipping, timekeeping and so on.

Q. That was allocated on a payroll basis?

A. That is right.

Q. In your Respondent's Exhibit No. 30, your depreciation charge for equipment is only the equipment in

1219 the Shipping Department?

A. That is correct.

Q. It does not include any depreciation for machinery out in other parts of the factory?

A. No, nothing of that kind.

Q. But it does include depreciation on such general service equipment, such items as the boilers, and items like that—the boiler that you heat the factory with?

A. No, that is a fixed charge. That would include depreciation of equipment in the department only, such as the work benches and steel shelves and trucks and that sort of thing, and so forth.

Q. I don't think I made myself clear. In your Departmental Transfer figure on that exhibit, that included building and depreciation and taxes?

A. Oh, yes.

Q. And some equipment depreciation?

A. Yes.

Q. That type of equipment is the boiler equipment and services the whole factory?

A. That is correct.

Q. That does not include any machines or items of equipment used exclusively in other departments?

A. No, it doesn't.

Q. Referring to Respondent's Exhibit No. 31, 1220 under Stationery Expenses, actually, that stationery might be a type of manifold forms used to write up orders; wouldn't it?

A. That, plus the envelopes and the stamps used in mailing the invoices.

Q. Are those manifold forms the kind that have several copies with one time carbon inserted between them, or fastened together permanently at the top?

A. Yes.

Q. And those are the order forms used exclusively by the Order Department?

A. That is right.

Q. With reference to your Exhibit 18, in which you used 17 typical orders, are all orders in the Niehoff Company processed in the same manner as the 17 which you examined?

A. Yes.

Q. Taking the example that Mr. Mayer suggested to you on his cross-examination, with respect to Respondent's Exhibit 36, assume that the 26 orders placed by the Greiner Company in 1949 consisted of 12 orders of $24.00 apiece, or 24 orders at $12.00 apiece—it would have to be more than that.

Trial Examiner Hier: Let's go off the record.

(Discussion off the record.)

Trial Examiner Hier: Back on the record.

By Mr. Sprowl:

Q. Assuming that you had 24 orders at $12.00 apiece on Respondent's Exhibit 33, at the top, you show a Net Billing of $12.00, plus, generally, 10 cents per dollar to process?

1221

A. That is right.

Q. Each of the $12.00 orders, then, would cost $1.20 to process?

A. That is correct.

Q. If you had 24 of those, you would multiply the $1.20 by 24, and then what would you get?

A. $28.80.

Q. Then, if you had two orders at $5,000.00 apiece, what would the cost per dollar be?

A. Well, the chart only goes up to around $900.00, but virtually it would be about one cent a dollar.

Q. One cent a dollar on each order would be $50.00 apiece, or $100.00 for the two?

A. That is right.

Q. You said that you get $28.80 if you multiplied the $1.20 by 24?

A. That is right.

Q. And dividing that by 26 you get the per order cost?

A. That is right. Of course, you have a very aggravated story there, and it again shows that, in all probability, an average amount per sale, arriving at the number of sales there, in that manner, probably gives a clearer picture than taking the extremes.

1222

Q. All right, then, in taking the extreme figure, instead of $5.74, as a cost per order, as you show on Respondent's Exhibit 6, that would be reduced to $5.00?

A. Yes, approximately $5.00.

Q. Does that indicate to you that the average method is a proper method to approach this problem?

A. I think it is a better method, because the average in a case like this, and to my mind, is better than taking extremes.

Mr. Sprowl: That is all.

Trial Examiner Hier: Is there any re-cross examination?

Mr. Mayer: Yes.

Recross Examination by Mr. Mayer.

Q. Do you consider the average method, Mr. Dreyer, better than the method of actually processing each and every individual order between the Respondent and these purchasers?

A. I think the average method—

Q. (Interposing.) The question was, do you consider it better than actually examining each and every individual transaction?

A. I do.

Q. I mean during that period of time?

A. I do. I think it would show a clearer picture.

Q. In one of the questions asked you by Mr. Sprowl, I believe he asked you if these 17 typical orders that
1223 you used in making up Respondent's Exhibit 18-A for identification—I don't recall what was said, but I know that he further went on then and asked a question, but would you tell us exactly what investigation you made to determine that these were 17 typical orders?

Mr. Sprowl: We object. That is already in the record, and we have gone over this backwards and forwards.

Trial Examiner Hier: It seems to me that it is pretty well fixed in my mind why he picked these orders out. I think he stated in the record that he asked certain questions pertaining to them, and I will sustain the objection as being repetitious.

Mr. Mayer: That is all.

Trial Examiner Hier: Is there anything else?

Mr. Sprowl: At this point I would like to confirm the fact that we are withdrawing Respondent's Exhibit 21-C and D for identification, 22 and 23 for identification, and we wish to reoffer Respondent's Exhibits 18-A, B and C as amended today—that is everything excepting the last line, the horizontal line on that exhibit. We reoffer Respondent's Exhibit 21-A and B for identification, and also Respondent's Exhibits 30, 31, 32, 33, 34, 35 and 36.

Trial Examiner Hier: What about Exhibits 19 and 20, Mr. Sprowl, 19 is the original seventeen orders themselves, bound together, and 20 is the original timestudy papers.

Mr. Sprowl: These should be reoffered also. I
1224 appreciate your mentioning that. Exhibit 19 is a copy of the actual studies, the time studies, and Exhibit 20, I think you will recall, Mr. Mayer, that is a

very large stack of time study sheets, compiled by Mr. Dreyer. I don't have them here with me, however.

• • • • •

1228 (The papers referred to, heretofore marked for identification RESPONDENT'S EXHIBITS 18-A, -B, -C; 19; 20; 21-A, -B; 30; 31; 32; 33; 34; 35 and 36 were received in evidence.)

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1230 Room 1310,
173 West Madison Street,
Chicago, Illinois,
February 27, 1952.

Met, pursuant to notice, at 2:00 p. m.

Before: Frank Hier, Trial Examiner.

Appearances:

F. C. Mayer and E. P. Schrup, Attorneys for the Federal Trade Commission.

Charles R. Sprowl, Attorney for the Respondent, C. E. Niehoff & Company.

1231 Proceedings.

Trial Examiner Hier: On the record, gentlemen.

Mr. Sprowl: Mr. Dreyer, will you resume the stand, please?

LOUIS DREYER resumed the stand and testified further as follows:

Direct Examination by Mr. Sprowl.

Q. You are the same Mr. Dreyer who testified previously in this matter?

A. Yes, sir.

Mr. Sprowl: I would like to have identified as Respondent's Exhibit No. 37, this burden rate computation, or rather, it would probably be called "Computation, Burden Rate, Coil Department."

Trial Examiner Hier: It may be so marked.

(The paper referred to was marked Respondent's Exhibit No. 37 for identification.)

By Mr. Sprowl:

Q. At my request, Mr. Dreyer, have you made a computation of the burden rate in the coil department of the C. E. Niehoff and Company, based upon the available records for the year, 1951?

A. Yes, sir.

1232 Q. I show you Respondent's Exhibit No. 37, for identification, and ask you if this represents your computation of that burden rate?

A. Yes, it does.

Q. Will you explain the items that appear in that computation, beginning with the top, "Labor", both direct and indirect, and on down through?

A. The direct labor on the bonus and day work was taken from the records of the Niehoff payroll. The indirect labor on supervision and overtime was also taken from the payroll records, but another source; and inasmuch as supervision is on the monthly payroll rather than on the hourly basis—the overtime payments being for extra overtime—those were taken from the payroll records, as were all the other indirect labor charges.

Trial Examiner Hier: For three months or one year?

The Witness: For one year. The factory expenses and all of the variable indirect labor items—all of the variable expenses, including indirect labor, factory supplies and services, and tools, and so forth, were taken from the Niehoff records. The departmental transfers were likewise taken from the Niehoff records, all of which are available for checking.

By Mr. Sprowl:

Q. Is there anything on here which was allocated by you according to some formula?

1233 A. No, there are no allocations at all. They were all taken from the records, with the only difference being that the shop payroll records do not show "supervision".

Trial Examiner Hier: This is the actual outlay in money for the year, 1951, for this particular department of the Respondent?

The Witness: That is right, and in totalling the actual departmental expenses, that amounts to $40,102.87, and the total direct labor, which includes the bonus and day work, is $40,094.45, and dividing the expenses by the direct labor gives me a burden rate of 100.2%.

By Mr. Sprowl:

Q. Directing your attention to the item of "Departmental Transfers", is that the same type of transfer items as you testified about yesterday in connection with the burden rate of the shipping department?

A. Yes, it is.

Q. This particular exhibit, I see, is compiled from the 1951 records. Why did you use the records for the year 1951, as opposed to the year 1949?

A. Because any checking which is to be made on these figures would be more easily done than they could be in the year of 1949.

Q. The records for the year 1951 are more readily available?

A. That is right, and also because the processing
1234 of orders was made in 1951, and it follows along that same line.

Q. Was the Coil Department in operation in 1949?

A. Yes.

Q. Was the operations of that department in 1949, as to the number of people working in that department, the size of the department, comparable to the situation there in 1951?

A. To my best knowledge, it was. It began, I think, a year before that, but by 1949, it was in pretty good swing. There have been changes in improvements made since then, but it is running about the same.

Q. You did check the payroll, and it is about comparable in dollars?

A. That is right.

Mr. Sprowl: I would like to have this identified as Respondent's Exhibit No. 38.

Trial Examiner Hier: What do you call it?

Mr. Sprowl: That is the "Effect of 10% Decrease in Sales on Burden Rate of Coil Department".

Trial Examiner Hier: Mark it Respondent's Exhibit 38.

(The paper referred to was marked Respondent's Exhibit No. 38, for identification.)

Mr. Sprowl: I would like to have marked for identification as Respondent's Exhibit No. 39, an exhibit showing the "Effect of 20% Decrease in Sales on Burden Rate of Coil Department".

1235 (The paper referred to was marked Respondent's Exhibit No. 39, for identification.)

Mr. Sprowl: I would like to have marked for identification as Respondent's Exhibit No. 40, the "Effect of 30% Decrease in Sales on Burden Rate for Coil Department".

(The paper referred to was marked Respondent's Exhibit No. 40, for identification.)

Mr. Sprowl: I would like to have marked as Respondent's Exhibit No. 41, a similar exhibit, showing the "Effect of 40% Decrease in Sales on Burden Rate of Coil Department".

(The paper referred to was marked Respondent's Exhibit No. 41, for identification.)

Mr. Sprowl: I would like to have marked for identification as Respondent's Exhibit No. 42, a study showing the "Effect of 50% Decrease in Sales on Burden Rate of Coil Department".

(The paper referred to was marked Respondent's Exhibit No. 42, for identification.)

Mr. Sprowl: I would like to have marked for identification as Respondent's Exhibit No. 43, a graph plotting the relation of the production to the burden rate to the Coil Department.

(The paper referred to was marked Respondent's Exhibit No. 43, for identification.)

Mr. Sprowl: I would like to have marked as Re-
1236 spondent's Exhibit No. 44, for identification, a re-
capitulation purporting to show the cost savings at various levels of production in the Coil Department.

(The paper referred to was marked Respondent's Exhibit No. 44, for identification.)

* * * * * *

1240 By Mr. Sprowl:

Q. Will you take Respondent's Exhibit No. 38, for identification, Mr. Dreyer, which is similar in make-up to Respondent's exhibits 39, 40, 41, and 42, and explain what those figures represent on that exhibit? State where the figures have been obtained from, if you will.

A. The direct labor figure of $40,094.00, appears on all sheets, which is the direct labor of that department for the year.

Q. That is the figure also shown on Respondent's Exhibit No. 37, for identification?

A. Yes, sir. If there is a decrease in the sales of coils, the direct labor would be affected directly. In other words,

for 90 percent of production, it would take very close to 90 percent of direct labor. That is understandable.

The "Total Expense" item of $40,102.87, which appears on the exhibit, pertains to the effect in the decrease of
1241 the sales and was also obtained from Exhibit No. 37.

In estimating the difference for indirect labor, I again figured that would be in proportion to the loss of production in the sales, although in production that isn't quite so.

In other words, the indirect labor has a tendency to go up with the falling off of business, because ordinarily it doesn't pay a company to lay off people or dispose of them too rapidly, so you absorb that expense in indirect labor.

However, for the purposes of this analysis, a direct reduction of 10 percent for indirect labor was taken that would also be reflected in the payroll taxes and insurance for the group insurance and the Workmens' Compensation.

In the other items involved—well, in the establishment of a burden rate—what I am saying is, the other items involved in the establishment of a burden rate—well, many of those are shown in the exhibit as transfer charges, and would include such items as taxes, fuel for heating, light and power, most of which would be unchanged. There would be a slight variation in some of the items—slight increases in some and slight decreases in others, and it would just about balance out in the changes contemplated.

However, the factory supplies for this particular department would probably decrease to some extent, and I took half of that for the 10 percent decrease in sales, which amounts to 5 percent of the total for the year, and
1242 that is shown. By adding up all of the factors which would necessarily decrease with a decrease in production, we arrive at this 10 percent in the sales, at a total of $1,853.48, which would make the expenses for the department as is anticipated with a 10 percent in sales at the figure of $38,249.39. Dividing this figure by the direct labor, at a 10 percent decrease in sales, of $36,085.00, would give you, approximately, a burden rate of 106.3 percent. Similarly, for the other exhibits in this category, which would be through Exhibit 42, the same procedure was gone through and the percentages of the burden rates arrived at for the various decreases in sales.

Q. And Exhibit No. 39 for identification is at a 20 percent decrease in sales?

A. That is right.

Q. And Exhibit No. 40 for identification is at a 30 percent decrease in sales?

A. That is right.

Q. And Exhibit No. 41 for identification is at a 40 percent decrease?

A. That is right.

Q. And Exhibit No. 42 is at a 50 percent decrease?

A. That is right.

Q. And in dealing with those variables of indirect charges, where you have felt that they were variable, you reduced them all to an amount equal in the amount
1243 of production, with the exception of factory supplies, and that is 50 percent in reduction?

A. Not all of them. Those were the ones that were reduced. The others were not changed.

Q. These deal only with those that you consider would drop?

A. That is right, because there are many of them which would remain contant, regardless of the production, and they were not changed.

Q. What was the actual production of the coils in the Coil Department in the year of 1951?

A. 98,527.

Q. For the purpose of facilitating you in working out your computations, have you rounded that out to any one figure?

A. Yes, I took 100,000 as a round number.

Q. I show you Respondent's Exhibit 43, which purports to be a graph showing the relation of the percentage of the 1951 coil production to the burden rate, which I assume, is at the various levels of production. Directing your attention to the double column of figures in the upper right-hand corner, which I assume are the coordinates on which the exhibits are based, where did you obtain those figures?

A. Those were obtained from Exhibits 38 through 42.

Q. Am I correct in assuming that the rest of this Exhibit No. 43 for identification is merely a graphic portrayal of a line plotted on the coordination which those figures were deduced?

1244 A. Yes.

Q. Across the bottom I see the figures 50, 60, 70, 80, 90 and 100. Are those the percentage figures of the total production?

A. In the Coil Department for 1951.

Q. Let's assume a production of 100,000, or 100 per-

cent, and what does that graph portray as to the burden rate at that production level?

A. 100.2 percent.

Q. You obtained that figure in what manner?

A. It was taken from the exhibits.

Q. No, I mean from the graph here, how did you obtain that figure?

A. You would find the percentage of the production, and we used the figure of 100, and follow that upwards through the graph, to the line, and then read the answer in the figure in the right-hand column.

Q. In the right-hand vertical column?

A. That is right.

Q. Or the left-hand column?

A. Either one. They are identical.

Q. Directing your attention to Respondent's Exhibit No. 44, which I stated, when I identified the exhibit, that it was the cost savings at the various levels of production, or conversely, it can be the cost increase at various re-
1245 duction levels of production, would you explain what those figures are and where you have brought them over from other sources, and explain where you obtained them, just generally?

A. The first line shows the percentage of the 1951 production, ranging from 100 down to 50 percent, in steps of ten. The burden rate, on the second line, was obtained from Exhibits 38 through 42, showing a burden rate corresponding to each percentage of the total production of Line 1. The direct labor, in the 100 percent column, was also taken from the previous record for total direct labor. The material was taken from the Niehoff records, on the basis of the 100,000 production, and multiplying the direct labor for the 100 percent production by the burden rate for the 100 percent production would give the burden amount for the 100 percent production, and totalling the direct labor and material and burden, would result in the total cost at 100 percent production, which, in this case, would be 100,000 coils. Dividing $150,121.00 by 100,000 would give you the average cost per coil at 1 percent production of $1.501 cents.

Q. The next column of 90 percent, I see that you have scaled it down, and would you explain the manner in which you have scaled down the direct labor and material and burden items, as they appear there?

A. For 90 percent, or rather, for the 90 percent of the 1951 production, the direct labor would be 90 percent
1246 of the labor shown as over in the 100 percent, and the material would be, also, 90 percent.

Q. To stop there, that figure of 90 percent of direct labor is $36,085.00?

A. That is right.

Q. And that figure also appears on Respondent's Exhibit 38 for identification?

A. That is right.

Q. And here, in this exhibit, you have scaled down the direct labor by 10 percent?

A. That is right.

Q. And where did you get the figure in the "Material" column of $62,868.00?

A. Again, assuming that the material costs would go down, in line with the production, and that is not always necessarily true, but within the range of 100 percent and 90 percent, it probably would show in there, but when it got down to 50 percent, it would likely be different, because a certain condition exists, as you buy at lower levels, the materials cost more per unit. However, by assuming that the material costs would be in proportion to any loss of production, the figures as shown on this Exhibit 44 were obtained.

Q. In other words, this item of "Material," under the column so headed, 90 percent of production is 90 percent of the actual material costs for 1951?

1247 A. That is right.

Q. The burden figure in the second column is the burden figure that you have already testified about in describing Respondent's Exhibit 38 for identification?

A. That is right.

Q. Did you follow the same process in preparing each of the remaining four columns, headed 80, 70, 60 and 50, and therefore, or rather, and there upon Exhibit 44?

A. Yes.

Q. In every case, you scaled the materials down, directly, in the same percentage that the production was dropped?

A. Yes, it is not absolutely correct, but, if anything, it is leaning backwards to be fair about it.

Q. In each case, the direct labor and the burden figures in the column headed "80," for instance, were taken from Respondent's Exhibit No. 39 for identification?

A. Yes.

Q. And in the column headed "70," the direct labor and burden figures were taken from Respondent's Exhibit 40?

A. Yes.

Q. And am I correct in assuming that under the column headed "60," the direct labor and burden figure was taken from Respondent's Exhibit 41?

A. Yes.

Q. And similarly, under the column headed "50,"
1248 all of the direct labor and burden figures was taken from Respondent's Exhibit 42?

A. Yes.

Q. I am assuming that your calculation, appearing on the bottom, on the average cost per coil, at each level of the production, was determined in the same manner as the figures in that column, just as you arrived at this figure of $1.501, under the column headed "100?"

A. Yes, that is by dividing the total cost by the anticipated production.

Q. In each of these cases, I see that you have a decimal point—the figure to the left of the decimal is the dollar, and the figure to the right is the cents?

A. That is right.

Q. 50 percent production would cost you 1.72 per coil?

A. That is right.

Q. According to your calculations?

A. That is right, that would be $1.72.

Q. And the percentage increase in costs, in the last line, is a calculation?

A. Yes, using the $1.501 cents as a basis under the percentage production, and you would divide 1.525 by 1.501, which would result in a net increase in cost of 1.5 percent.

Trial Examiner Hier: Let us go off the record.

(Discussion off the record.)

1249 Trial Exaimner Hier: Back on the record.

Mr. Sprowl: That is all.

Trial Examiner Hier: Let the record show that the following will be cross-examination of the witness, as to the, as to this group of exhibits testified to and identified thus far, namely, Exhibits 37 through 44.

Cross-Examination by Mr. Mayer.

Q. Mr. Dreyer, is this the first type of a burden examination that you have made of the Coil Department for the Niehoff Company?

A. It is the first examination of this type—is that what you mean?

Q. Yes, in determining the burden rate for the Coil Department?

A. Well, I have examined many of the determinations and many of the definitions. They are delivered monthly, and they are all about the same type.

Q. Have you ever prepared any, prior to this one?

A. I did some at one time in the other Coil Department, but at that time there were a number of the departments, and that was any number of years ago, but that was work that was given to the other people, and I haven't done it since then, but it was five or six years ago. Of course, the Coil Department was not in existence then. Probably
1250 I did not make myself clear at the outset of my statement. The Coil Department was not in existence then.

Q. But you have done this type of work for the Niehoff Company before?

A. Yes.

Q. In the various departments of the Niehoff Company?

A. That is right.

Q. And do you know, of your own personal knowledge, that that has been done since then by someone else?

A. Oh, yes, that is right.

Q. To your knowledge, would there be available a unit cost in production of the Niehoff Company in the past few years?

A. Oh, yes.

Q. There would be a unit cost in production—there would be a unit cost by production in existence for the Niehoff Company for the past few years?

A. Yes.

Q. Would there be one in existence for 1948?

A. I can only say that I think so. The same people who developed these costs were also in that same kind of work at that time, and I dare say that they are available, but I do not know of my own knowledge, however.

Q. Do you know the people who made the various estimates to determine this matter?

A. This burden rate?

1251 Q. Yes.

A. Yes.

Q. Who were they?

A. The accountant who works there, Mr. Eldridge.

Q. Was that work done under Mr. Eldridge's supervision?

A. That I couldn't say. I know the man who does it is a high rate man in his line. He is a first-class accountant. What he does in connection with Mr. Eldridge, however, I do not know.

Q. Are there any 1949 or 1948 figures available, other than those that had been used in determining the various burden rates at that time at the Niehoff plant?

A. Oh, yes.

Q. Then wouldn't it have been better for you to use those figures that were in existence and available for that particular year, to determine the savings, or lack of savings, in production costs in 1949?

A. Inasmuch as the payroll was about the same, I don't see where it would make any difference. It is far easier, if you want to check it back, on the sales for 1941, than it would be if you were going to check it in 1949, when the Coil Department was getting into full swing.

Q. Would it be your opinion that the production costs have not increased for the C. E. Niehoff Company in 1951 over 1949?

A. I don't have any opinion. I don't know.

1252 Q. Do you know if the actual salaries have increased in 1951, as opposed to 1949?

A. Oh, yes, the assumption would be that the unit cost has increased—it has in all other departments—and I see no reason why it wouldn't have increased in the Coil Department.

Q. Then wouldn't you be applying the increased unit cost in production in 1951 to the production saving cost in sales in 1949, then?

A. I have no intent to apply anything of any nature.

Q. In your opinion then, Mr. Dreyer, what does Respondent's Exhibits for identification 37 through 44, purport to show?

A. As far as I am concerned, I did that at the request of Mr. Sprowl, to show the projected effect of the decrease in sales. Now, what it purports to show there—I just don't know. All I did was to work out what the effect would be on such decreases in sales on the burden rate and on the final cost.

Q. Is it correct to say, then, that Respondent's Exhibits 38 through 44 are projections of yours, not based on any actual figures in the Niehoff Company?

A. The only figures were the 100 percent production in 1951, as a basis. The others are conjectures.

Q. Directing your attention, Mr. Dreyer, to Respondent's Exhibit 37 under "Labor," there is an item there entitled "Bonus" in the amount of $38,001.32? Can you explain that?

1253 A. That is not actually bonuses. That was money paid to the operators who were working on an incentive plan, which includes both the hourly rate and the extra money they earned.

Q. Do you know then, of your own knowledge, the amount of money in that figure which is bonus money, as opposed to the direct salaries of the employees?

A. No, I don't.

Q. Is it your opinion that the employee would earn the same bonus at a production level of 50 percent as he earned on that production in 1951?

A. No, he wouldn't.

Q. Is that taken into account in the rest of these?

A. No, because the direct labor cost per unit would be the same, although the take-home pay of the operators would be different.

Q. What would the "day work" be?

A. Day work would be any direct labor which is not on an incentive productive basis—not on incentive productive labor.

Q. Who is included in that "Supervision" item under Indirect Labor Expenses?

A. That is the foreman of the department, and towards the end of the year they have two of them.

Q. And has that, as in prior times, been the supervision, or been the supervision of the production in this department?

A. Yes.

1254 Q. And the overtime, does that relate to him?

A. No, that applies to the regular operators and that is the extra money paid by the company for overtime.

Q. What was included in that "Other" item?

A. The "Other" item in any department under labor would include for the year quite a bit of other indirect labor—such as quite a bit of hauling and quite a bit of work done by the regular operators, or production day work.

Q. Does the accumulation of the figure under the

"Other" item in the amount of $8,712.25 result from any compilation of yours, personally?

A. No, that is all off of the records, the only difference being in the question of supervision, which was not on the records for the factory, but on the records for the office, because they were on a monthly payroll, and not a weekly payroll. I make no explanation beyond that, but that is the way it was done. It does not appear as supervision on the compilation shown.

Q. Directing your attention to the "Engineering" item under the Variable Factory Expenses, could you tell us what that item is made up of?

A. I can only give you my opinion. I do not know the actual facts, and by that I mean that the Engineering Department would expend quite a bit of time in that department in the revamping of some of the equipment used
1255 there in some of the production, and particularly so in winding, and how they would arrive at that figure would have to be shown in the breakdown.

Q. Is it your opinion that that item would remain a stable $900.00, even though the production was cut in half in the Coil Department?

A. It might go higher, because the pressure to reduce the cost might increase the demands on the Engineering Department for lower costs, but it might remain the same. It is purely guesswork, but ordinarily, when production goes down, the demand is always for short-cuts, such as better methods and better equipment, and so forth.

Q. If the department, or the Engineering Department, rather, was successful in better equipment and better methods, that would reduce all varied expenses less than the 10 percent portion, as you have related it, to a direct 10 percent decrease in sales?

A. That would be the purpose, as it all follows in line.

Q. But it is purely conjecture, as they go?

A. That is right, there is no way of proving, one way or the other, how much it would cost, or what the results would be, but that is true. As business goes down, the management wants more efforts on cost-saving devices.

Q. It would be as conjectural to have the 10 percent constant in sales directly related to the 10 percent production in indirect labor?

1256 A. The ratio between production and direct labor would be somewhat constant.

Q. More so than the comparison between the engineering and production in sales?

A. The engineering is conjectural.

Q. Perhaps it would be better to have you tell us what books and records of the Niehoff Company you examined in preparing Respondent's Exhibit No. 37.

A. There is only one record, and that is the resume of the expenses for the year.

Q. Prepared by whom?

A. By the accountant on Mr. Eldridge's staff, with the exception of supervision.

Q. Would the "Departmental Transfer" account in that item listed on Respondent's Exhibit 37 contain certain allocations of expenses incurred by other portions of the Niehoff plant, other than the Coil Department?

A. Yes, that would include factory office expenses, too.

Q. And those allocations were made before you come in the picture?

A. That is right.

Q. You took the total of the allocations made by someone else?

A. That is right.

Q. Would you personally, or did you personally examine the Departmental Transfer account to determine if
1257 there might be any duplication between depreciation for machinery and equipment as you have it listed at a fixed expense?

A. There would be no duplication in that particular item. No, I didn't examine it, but there never yet was any duplication in that instance, because that is one fixed expense that is directly allocated to departments.

Q. As I get it, then, the Supervision item appearing under the indirect expense, you took from a source different than the one that you took—

A. (Interposing.) That is right.

Q. Well, I didn't finish, but is there any possibility of a duplication there?

A. I don't believe so.

Q. Did you check to find out if there could be?

A. No, I didn't. That is the information that was not in our own office there, and for that reason I didn't directly check it.

Mr. Sprowl: Whose figures are you talking about?

The Witness: The duplication of the items of supervi-

sion and some in the "Other" group, and so far as I know, there is no duplication.

By Mr. Mayer:

Q. Directing your attention to Respondent's Exhibit No. 34 for identification, and more particularly to the first column under the figure of the 100 percent column, 1258 would you tell us maybe more or less in detail where you got the figure of $69,853.00 opposite "Material"?

A. Only off of the records kept by the Superintendent. He has a complete record for the year of the materials, or rather, of the material cost for the Coil Department, and that is from his records.

Q. Would you tell us again the actual production of the Niehoff Company in the Coil Department in 1951?

A. 98,527.

Q. Then you are assuming the figures of 100,000 actual production as relating to the 100 percent for 1951?

A. The actual production figures for 1951—well, for this case it would be 100,000 or more. Is that what you meant?

Q. Well, in the 100 percent column, if you were relating the total cost of direct material labor and burden—pardon me, of direct labor, material and burden, of $150,121.00, you are relating that to the production of how much?

A. Of 100,000, although the actual cost would be that for 98,000. In other words, these are rounded figures, because when everything is said and done, there is no possibility of projecting things in a smaller percentage any closer than that, and to assume that any projection based on 100,000 would be as accurate as those on a 98,000 or 98,500—well, that was the theory that I worked on.

Q. Then the figures under Direct Labor, Material 1259 and Burden, under the 100 percent column, are the figures, or the actual figures, as they applied to the 98,000 production?

A. That is right.

Mr. Mayer: That is all I have.

Trial Examiner Hier: We will take a five minute recess at this time.

(A short recess was taken.)

Trial Examiner Hier: On the record. You may proceed.

Redirect Examination by Mr. Sprowl.

Q. Mr. Dreyer, going into the question of the availability of the 1949 figures in the Coil Department, as compared to the availability of the 1951 figures, is there anything that would make the 1949 figures, from the standpoint of recollections of the individuals, more difficult?

A. Well, I know that even now it is very difficult to get any information on things that happened even just a few months ago, but to get the information on anything that happened several years ago is almost impossible, although that is not necessarily always so, and then again, there was always a likelihood that the people who originated the information are no longer available.

Q. I worded my question very poorly—what I am getting at is, do the recollections alone of any individual
1260 employees of the Niehoff Company play any part in making a burden computation?

A. No, not particularly, excepting on any of the items where it makes the checking up become particularly difficult and almost impossible, and if the item is several years old—I wouldn't say so, unless it is just a matter of simply cold mathematics.

Q. Then if you find an item for "Supplies,"—such as one that you may want then, how would you determine the character of the supplies from that cold book entry?

A. Well, all you would have to do is try and dig up some of the invoices and see what they were used for.

Q. In the absence of invoices, how would you do it? What, in lieu of the invoices, would you use? Would you ask the employee personally?

A. You could ask, but I doubt if you would get any useful information on things that are several years old.

Q. What about the actual time element involved in preparing such a burden study for the years as recent as 1951, as compared with a similar study for 1947?

A. If you want to make a yearly study—

Q. (Interposing.) You didn't understand my question. I mean by a "time element," the time that it takes to prepare the study. How long did it take you to prepare a burden study, as you have testified about, in the Coil
1261 Department, for the year of 1951 in relation to how much time it would take to prepare a similar study for a three year earlier period?

A. It would take very much longer for the earlier study, because if you checked back on all of the items, it takes a long time to get anywhere; whereas, for 1951, it might take just several weeks. There is always the possibility that something for 1949 would take several months, if you wanted to get any final details on it.

Q. Am I correct in assuming that, as the increased labor rates are reflected uniformly throughout the computation, that your percentage results are not affected thereby?

A. They would not be affected, no.

Q. You could cut the labor rate in half for the purpose of Respondent's Exhibit No. 44 for identification, at all places, and your percentages would remain substantially the same?

A. If you used the same figures throughout, your ratio would be the same, yes.

Q. You stated on cross-examination, in discussing Respondent's Exhibit 37 for identification, that the only figure that was equal was the figure of 100,000, being the number of coils produced. First of all, the figure 100,000 is the number of coil production, and it does not even appear on Respondent's Exhibit 37, does it?

A. No, there is no reason for it appearing there.

Q. The other figures on Respondent's Exhibit 37 1262 are not all conjectural, by any means, are they?

A. On Exhibit No. 37 there is nothing conjectural, the only thing being that the supervision costs was taken from the office payroll record, whereas the other information was taken from the shop records.

Q. They were actually taken from the records of the Niehoff Company?

A. They are all from the Niehoff records, yes.

Q. On Respondent's Exhibits 38, 39, 40, 41 and 42, your direct labor, before debasement, in every case, is actual, is it not?

A. It is.

Q. And the debasement is not conjectural, but it is arbitrary?

A. That is correct.

Q. But it is actually the 10 percent in Exhibit 38?

A. Yes.

Q. And similarly, on each exhibit, the total expenses that you show are in the original amounts, and not conjectural?

A. Oh, no.

Q. And you have already explained how you arrived at that factor?

A. That is right.

Q. So, when you get over to Exhibit No. 43, which is the graph, or the coordination which you have used in that graph—isn't it true that it reflects the previous ex-
1263 hibits' computations appearing in Respondent's Exhibits 37 through 42?

A. That is right.

Q. And again, on Respondent's Exhibit No. 44, in the first column of numbers at the left, and specifically, speaking of the vertical column, are any of those figures conjectural?

A. No, they are not.

Q. With the exception of the 100,000 production figure which you explained was increased from 98,500 to 100,000?

A. That is right.

Q. And then the figures in the various vertical columns extending on to the right are computations that are computed in the manner that you have already testified to?

A. That is right.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

Mr. Sprowl: I would like to have marked for identification Respondent's Exhibit 45, which is a computation of the burden rate in the Plastics Department of the Niehoff Company for the months of May, June and July of 1951.

Trial Examiner Hier: It will be marked as Respondent's Exhibit 45.

(The paper referred to was marked Respondent's Exhibit 45 for identification.)

Mr. Sprowl: I would like, also, to have marked
1264 for identification as Respondent's Exhibit 46 this document, showing the effect of the 10 percent decrease in sales on the burden rate in the Plastics Department.

(The paper referred to was marked Respondent's Exhibit 46 for identification.)

Mr. Sprowl: And I would like to have marked for identification as Respondent's Exhibit No. 47 a document showing the effect of the 20 percent decrease in that rate.

(The paper referred to was marked Respondent's Exhibit 47 for identification.)

Mr. Sprowl: And as Respondent's Exhibit No. 48, I

would like to have marked for identification the document showing the 30 percent decrease on that rate.

(The paper referred to was marked Respondent's Exhibit 48 for identification.)

Mr. Sprowl: As Respondent's Exhibit No. 49, a document showing the effect of the 40 percent decrease on that rate.

(The paper referred to was marked Respondent's Exhibit 49 for identification.)

Mr. Sprowl: I would like to have marked for identification as Respondent's Exhibit No. 50 a document showing the effect of the 50 percent decrease on that rate.

(The paper referred to was marked Respondent's Exhibit 50 for identification.)

Mr. Sprowl: I would like to have marked as Re-
1265 spondent's Exhibit No. 51 a graphic portrayal of the relation of the percentage of production to the burden rate in the Plastics Department.

(The paper referred to was marked Respondent's Exhibit 51 for identification.)

Mr. Sprowl: I would like to have marked for identification as Respondent's Exhibit No. 52 the computations of the burden rate at various levels of production for the FF-40 Rotor.

(The paper referred to was marked Respondent's Exhibit 52 for identification.)

Mr. Sprowl: I would like to have marked for identification as Respondent's Exhibit No. 53 a graphic portrayal of the ratio between the size and the run in thousands of the total cost for an FF-40 rotor in the Plastics Department for the total molding labor cost per hundreds.

(The paper referred to was marked Respondent's Exhibit 53 for identification.)

Mr. Sprowl: I would like to have marked for identification as Respondent's Exhibit No. 54 a recapitulation of the increase in the cost at various levels of production of the DR-55 distributor cap, manufactured in the Plastics Department of the Niehoff Company.

(The paper referred to was marked Respondent's Exhibit 54 for identification.)

1266 Mr. Sprowl: I would like to have marked for identification as Respondent's Exhibit No. 55 a graphic portrayal showing the ratio between the size and run in thousands of this same item to the total molding labor cost

per hundreds, also pertaining to the Plastics Molding Department.

(The paper referred to was marked Respondent's Exhibit 55 for identification.)

Mr. Sprowl: I would like to have marked as Respondent's Exhibit 56 for identification a recap showing the increase in unit cost of the DR-13 rotor, made in the Plastics Department of the Niehoff Company, at various reduced levels of production.

(The paper referred to was marked Respondent's Exhibit 56 for identification.)

Mr. Sprowl: And as Respondent's Exhibit No. 57, a graphic portrayal showing the ratio between the size and the run of the DR-13 rotor in thousands to the total molding labor cost per hundreds.

(The paper referred to was marked Respondent's Exhibit 57 for identification.)

Mr. Sprowl: I would like to have marked as Respondent's Exhibit No. 58 a recap showing the increase in unit cost at various reduced levels of production for an item known as the DR-135-P plate, manufactured in the Plastics Department of the Niehoff Company.

1267 (The paper referred to was marked Respondent's Exhibit 58 for identification.)

Mr. Sprowl: I would like to have marked for identification as Respondent's Exhibit No. 59 a graphic portrayal showing the ratio between the size of a run of such plastic plates in thousands to the total labor cost per hundred.

(The paper referred to was marked Respondent's Exhibit 59 for identification.)

Mr. Sprowl: That is all that we have at this time. If you would like to continue this afternoon with this, I would be willing to go ahead. My only thought was that you might prefer waiting until tomorrow morning for cross-examination, or rather, for the examination of these exhibits that I have had marked.

Trial Examiner Hier: It is now 4:15, and at this time we will adjourn until tomorrow morning at 9:30 A.M.

(Whereupon, at 4:15 p.m., February 27, 1952, the hearing in the above-entitled matter was adjourned.)

1268

Room 1310,
173 West Madison Street,
Chicago, Illinois,
Thursday, February 28, 1952.

Met, pursuant to notice, at 9:30 a.m.

Before: Frank Hier, Trial Examiner.

Appearances:

F. C. Mayer and E. C. Schrup, Attorneys for the Federal Trade Commission.

Charles Sprowl, Attorney for the Respondent, C. E. Niehoff & Company, Chicago, Illinois.

1269 Proceedings.

Trial Examiner Hier: Come to order, gentlemen. You may proceed, Mr. Sprowl.

Mr. Sprowl: We will have further examination of Mr. Dreyer.

LOUIS DREYER resumed the stand and testified further as follows:

Direct Examination by Mr. Sprowl.

Q. Will you look at Respondent's Exhibit No. 45 for identification and tell me, did you prepare that?

A. Yes.

Q. Will you tell me what it represents?

A. This exhibit shows the direct labor and the actual expenses in the Plastics Department, for the months of May, June and July of 1951. From that, the actual burden rate was determined for this three months' period.

Q. And where did you obtain those figures?

A. From the Niehoff records—the payroll records of the company.

Q. What is included in Expenses, actually?

A. Well, those are the same expenses which have been listed under the other burden determinations, including indirect labor, fixed and variable expenses of various
1270 kinds pertaining to this department.

Q. And these are limited to the three months of May, June and July of 1951?

A. That is right.

Q. What type of machinery and equipment is located in the Plastics Department?

A. The chief equipment is a series of molding machines, in which the pellets made from the powder is inserted, with any other thing going into the molds, such as brass inserts, and under extreme pressure, various products are molded.

Q. And from the caption on some of the exhibits, those products are such things as distributor caps and rotors and coils?

A. Yes, they are.

Q. Does that molding machine have a mechanical tempo to the speed with which they operate, or is that determined by the operator?

A. The operator has no control. They are mechanical in their operation. Once the operator starts the machine, there is no way whatsoever in which he can stop it.

Q. And what does the operator do in the course of that machine's operations?

A. He inserts the molds with the pellets or the powders into the machine under the press, and then he pushes a button and the machine does the rest.

Q. And then when they are completed, the ma-
1271 chine opens, and I assume that he takes the completed molded items out of the press?

A. That is right, and in the meantime he has probably prepared another set of molds, or a similar mold, for the next operation, or for the next set.

Q. And he puts that in the machine and then the machine actually takes over?

A. That is right. Of course, it depends upon the type of product made, as to if they are duplicates, and then also, the expense of the molds.

Q. How many of the molding machines are there in that department?

A. Four.

Q. In the Plastics Department?

A. That is right. They are rather large and quite expensive.

Q. When a plastic mold is completed in one of these machines, to what extent is the item a completely finished item and needs no further attention?

A. That again depends upon the product. Some of them are almost complete and others require a little bit

of some other work on them. It is understood that the machine does not make these products in units of one piece, depending on the size. It may be, however, we have a dozen presses made at one time.

Q. A single mold may have many cavities?

1272 A. That is right.

Q. Is that finishing done in the Plastics Department?

A. That is right.

Q. What arrangement does that department occupy, roughly, in square feet?

A. I don't know exactly. It isn't very large. It is probably 50 by 20, plus the additional space outside for storage.

Q. The storage of raw materials and the finished parts?

A. Yes, and we have a breakdown for the operation of that on the floor plan, which I drew up several years ago, but I don't recall the exact dimensions.

Q. I wish you would take up Respondent's Exhibits Nos. 46, 47, 48, 49 and 50 for identification and explain to us what those represent.

A. Exhibits 46, 47, 48, 49 and 50 represent the result of an assumed reduction in production from the 100 percent shown here on Exhibit 45 to 50 percent shown on Exhibit 50, in steps of 10 percent. That is from 100 percent down to 50 percent, assuming 45 to be 100 percent, or normal.

Q. Taking 46 for identification as an example, you just scale the direct labor shown on Respondent's Exhibit No. 45 down by 10 percent?

A. That is right.

Q. And similarly you have scaled the burden rate down by the amount shown under Expenses on Respondent's Exhibit 46?

1273 A. I didn't scale the burden rate. I scaled down the actual expenses.

Q. The expenses that go in the overhead?

A. That is right. It is similar to the procedure that I explained for the Coil Department. That is, the indirect labor and the payroll tax and the Workmen's Compensation and group insurance would decrease it about the same proportion as the direct labor would decrease it, but the other factors, such as factory supplies, would not decrease it the same amount. We know the total expenses for the department, and the other expenses are fixed, so they prob-

ably would not decrease at all. There would be as many increases as decreases, and it is a fair assumption that this type of a method for handling the problem is approximately correct. From these total expenses and the direct labor on the basis of 10 percent decrease in the sales, the burden rate, based on a 10 percent anticipated decrease in sales, was calculated by dividing the expenses by the direct labor and at 10 percent it worked out to be 183.6 percent, and that is similarly the same thing for the other ratio on the decrease side.

Q. You mean those shown in 47, 48, 49 and 50 for identification?

A. That is right.

Trial Examiner Hier: This is off the record.

(Discussion off the record.)

1274 Trial Examiner Hier: Back on the record.

By Mr. Sprowl:

Q. Will you please take up the next exhibit, No. 51 for identification, which is a graphic portrayal, and I ask you if the double column of figures appearing in the upper right hand corner of that exhibit is taken from Respondent's Exhibits 46 through 50 for identification?

A. Yes, the first one, the 100 percent reduction in the burden rate was taken from Exhibit 45.

Q. Making a six cent coordinate?

A. That is right.

Q. Would you explain to me how you plotted that curve that I see there on this portrayal?

A. For each percent of the various percentages of the normal production, starting with 100, the vertical column shows the burden rate on that, a point corresponding to 169.3, for the point agreeing with the 100 percent normal production, which, in this case, would be in the right hand margin. That situation was shown similarly for all the other decreases in the production of 90, 80, 70, 60 and 50, and the point showing the burden percentage, and also it is determined in accordance with the figures shown in the margins in the right and left sides of the graph, and then after those points were determined, a curve was drawn.

1275 Q. Will you please turn to Respondent's Exhibit No. 52 for identification, which is headed "FF-40 rotor," and I ask you if you compiled that tabulation?

A. Yes, I did.

Q. First of all, what is an FF rotor?

A. It is the rotor which is used on Ford automobiles, placed inside of a distributor cap, and is a part of the mechanism,—the controls of a Ford automobile.

Q. It is primarily plastic, with some metallic inserts in the mold?

A. That is right.

Q. Will you explain where you obtained the figures appearing in the first column of figures—the vertical column of figures on the left headed "4600?"

A. According to the records of the C. E. Niehoff Company for an FF-40 rotor, between January 11, 1950, and August 7, 1951, this item was run five times for a total of 23,212 pieces, which makes an average of 4600 pieces per run.

Q. Let me interrupt you there and ask you if the figures which you have just given us actually appear on Respondent's Exhibit 53 for identification?

A. Yes, they do.

Q. Then I assume that the 4600 I see at the top of this vertical column on the left hand side of Respondent's Exhibit No. 45—pardon me, Respondent's Exhibit No. 52 for identification, is the actual average run on these rotors during the seventeen months' period that you just 1276 referred to?

A. Yes.

Q. Rounded out to 4600, rather than 4642?

A. That is right.

Q. You have assumed, I take it, from the 100 appearing immediately under that—that that is a normal run?

A. Yes.

Q. Will you please go on and explain what this computation on Exhibit No. 52 shows?

A. The 4600 run was reduced in steps down to 2300, which is 50 percent of the average run. The percentage of normal for the various steps was calculated on the basis of 4600 being 100 per cent, and the burden rate was obtained for the percentages from Exhibit No. 51. The material cost per hundred was obtained from the Niehoff records and was assumed to be standard all the way through, inasmuch as the Niehoff Company is, at the moment, paying top prices for their plastics. Due to general situations, there would be no possibility of getting them any cheaper, in any phase.

The labor was reduced, in proportion to the percentage

of the normal shown in the second right hand column, and a burden amount obtained by multiplying the burden rate by the direct labor in each instance. By adding the cost in each step for the material and the labor and the burden, the manufacturing of the factory cost of this item is
1277 given as each step was obtained, and then, assuming 4600 to tbe normal, the percentage of the cost increase under the normal was determined as the difference in the cost in dollars and cents was obtained by subtracting the totals of each step from the cost of the normal operation. This shows an increase in the cost over the normal ranges, from 4.9 percent to 89.2 percent of normal, and production to 36.5 percent for 50 percent of normal production.

Q. Will you please turn to Respondent's Exhibit No. 53 for identification, which you have already made some reference to as being the graphic portrayal relating to the FF-40 rotor, and will you refer to the double column of figures in the upper right hand corner of that exhibit and explain to me the source of those figures?

A. Taking the various points for the various runs plotted from Exhibit No. 52—this is off the record.

Trial Examiner Hier: We will be off the record.

(Discussion off the record.)

Trial Examiner Hier: Back on the record.

The Witness: These are the work sheets. In analyzing the labor costs only in the Plastics Department for the FF rotor, from the records the time consumed in the setting up and preparing a run for this particular item was found. In other words, that amounted to 10.85, or $10.85 per setup cost.

By Mr. Sprowl:

1278 Q. Do you show that figure on the face of Respondent's Exhibit No. 53?

A. That is right. I don't know whether I've made myself too clear or not, and then the productive labor cost per hundred was also determined from the record, and that would remain constant per one hundred, regardless of the size of the run, so to determine the figures shown on Exhibit No. 53 the setup time was per hundred, and was calculated for each run in thousands. To that, the fixed productive labor costs was added, and from that the total molding labor costs per hundred was determined.

The figures show, for a run of a thousand, the total molding labor cost per hundred is $3.5460.

Q. The final figure, as shown on your exhibit—I thought you were going to give the components of that figure?

A. If you would like, I can.

Q. I don't think it is necessary, but if Mr. Mayer feels that you ought to break it down further, then you might.

A. It is a simple calculation.

Q. Let me ask you this, referring to Respondent's Exhibit No. 52, in the fourth column of that exhibit, dealing with a run of 3100 rotors, or practically 3000, and then the fifth figure down from the top shows a labor charge of 2.8050 at that level of production. Now, returning to Respondent's Exhibit No. 53, the third coordinate from the top, third, shows a labor cost of $2.82, which is not quite two cents higher than the figure I have just given 1279 in Respondent's Exhibit No. 52 for identification. Would the additional 100 units account for that variation?

A. Yes. In determining the figures for the graph, I thought it would be very simple to determine them and run them in 1, 2, 3, 4, 5 and 6 thousands and so on down the line. But possibly it could have been done a little bit different.

Q. Am I correct in assuming that the method of recalculating the labor on 52 and 53 was the same?

A. That is right.

Q. You have used those figures appearing in the upper right hand corner as coordinates on Respondent's Exhibit 52 for identification to plot the curve on that exhibit?

A. That is right. And I would also like to point out, from the nature of these various curves, that as your production decreases, your molding labor cost increases at an enormous rate. If you have a very short run, your labor cost is very high, and the curve or curves of this nature are very often used by manufacturers to determine what is an economical run. In this particular instance, any run beyond 6,000 would not show a very great saving, but the minute you get over four or five thousand, the rate of the increase is so sharp that the cost to the company is so much higher that it produces a very, very serious matter to the company.

Trial Examiner Hier: There is no quarrel about that.

That is the basic principle in mass production, is it not?

1280 Mr. Sprowl: That is right.

By Mr. Sprowl:

Q. Now, having covered those in detail, I will ask you as to Respondent's Exhibits No. 54 and 55 for identification. Those consist of a similar calculation and the graphic portrayal reflecting the DR-55 distributor cap?

A. That is right.

Q. And there, again, you have your average run taken from the actual production records, and those runs were made between February 20, 1950 and November 30, 1951?

A. That is right.

Q. A period of some twenty-one months?

A. That is right.

Q. And if you were to explain Respondent's Exhibit 54 in detail, your explanation would be comparable to the explanation that you gave with reference to Respondent's Exhibit No. 52?

A. It would.

Q. Excepting for the difference in figures, the method of calculation is the same?

A. That is right.

Q. And your graphic portrayal, which is Respondent's Exhibit No. 55 for identification, was compiled in the same manner as was Respondent's Exhibit No. 53 for identification?

A. That is right.

Q. I notice the curve shown on Respondent's Ex-

1281 hibit No. 55 is not as precipitous as the curve shown on Respondent's Exhibit 53. Now, just for general information, will you explain to me where the high point of efficiency for production would be reached, as indicated by the curve on Respondent's Exhibit No. 55?

A. The highest point of efficiency would be reached at the average run of 13,000.

Q. And would that reduce the run by the accelerated loss—

A. (Interposing.) The curve is rather gradual, and the losses in this case would be rather gradual, but it does break a little sharply below 7,000, as somewhat below the averages of the runs taken by the Niehoff Company.

Q. Now, Respondent's Exhibit No. 56 for identification, and also Respondent's Exhibit No. 57, they are a compila-

tion and a graphic portrayal reflecting the DR-13 rotor made in the same manner as were the previous four exhibits?

A. That is right.

Q. And the production run involved for the average run was determined for a DR-13 rotor and occurred in the period of January 20, 1950, to November 23, 1951?

A. That is right.

Q. I notice the curve shown on Respondent's Exhibit No. 57 for identification in this case seems to flatten out rather apparently after 40,000?

A. Yes, it does. The curve shows that at the
1282 present rate of production for the Niehoff Company, the average rate of 16,000, or rather 10,000, pardon me, is not an economical rate.

Q. They would improve that immeasurably if they could increase the run to 40,000?

A. That is right, but if you decrease it below the figure that I mentioned, the added cost is very great. The reason for the difference in the slope of the curve is not only the difference in the setup or preparation cost, but the number of pieces per mold. In other words, if you make very many at one time, naturally, it affects the cost per hundred very, very much.

Q. Now, the last two exhibits, Respondent's Exhibits 58 and 59 for identification, shows a similar computation and a graphic portrayal reflecting the DR-135-P plate?

A. That is right.

Q. Your computation was made in the same manner as the computations which you have just testified about?

A. That is right.

Q. And the average run was determined for this plate by taking the total number of runs from February 8, 1950, to December 7, 1951?

A. That is correct.

Q. And that, again, appears on the face of Exhibit No. 59 for identification?

A. That is right.

Q. Why did you take, generally speaking, the two
1283 years of '50 and '51 in determining your average run?

A. There, again, I will say it was done because the records were fairly modern, and any questions that would arise in connection with them could be traced back. The same people now are running the department who run it at that time. Previous to that time, the supervision

was different, and it would be rather difficult if anyone came up for a checkup as to the procedures prior to this time.

Q. Was this department in existence in the year of 1949?

A. Yes, it was.

Q. For the entire year?

A. Yes.

Q. And are the production records available?

A. As far as I know, they are.

Q. Would it be possible to time-study the setup time on an operator who was operating that machine in 1949?

A. Well, whether or not there are any records available on a time-study would be impossible, of course.

Q. The operators who are working there now have been there the last year or two?

A. The operators have been there more than that, most of them, but the supervision has changed. Not all of the operators were in service a year ago, though.

Q. Due to the mechanical tempo of the molding machines, there isn't any time-study required on a 1284 plastics line, because the machine runs at a steady pace?

A. That is right. We did make time studies for incentive purposes. Every operation is on incentive rates, and that is how the labor cost is fixed. In other words, they always make out on the rates, no matter if they make 105 percent or 175 percent. As far as the take-home pay per hundred is, the cost to the company is still the same.

Q. As to the setup, I assume that that means taking the old mold out of the machine and putting in the new mold?

A. That is right.

Q. Does that require a time study?

A. It requires a study of the operations, yes. Chiefly, those records on an intricate thing, like the plastic molding in that department—those records are submitted by the foreman and they are accepted, because they are quite intricate.

Q. It takes considerable time to set up one of these machines?

A. Anywhere from six hours on up.

Q. Was the method of the operations of the department in 1950 and '51 the same as its method of operations in '49?

A. I believe it was. I don't recall any difference.

Mr. Sprowl: You may cross-examine.

Mr. Mayer: May we have just a few minutes?

Trial Examiner Hier: We will take a five minute recess at this time.

(A short recess was taken.)

1285 Trial Examiner Hier: On the record, gentlemen.

Cross-Examination by Mr. Mayer.

Q. Mr. Dreyer, directing your attention to Respondent's Exhibit for identification No. 45, in the item of "Expenses, Actual," are there any items included in that item with a result of—which are a result of the allocations by any of the expenses incurred by the entire production facilities of the Niehoff Company in the applied percentages to this particular department?

A. No, they are all taken directly from the records.

Q. These figures, as they are taken from the records, represent allocations?

A. They include all of the items normally included in any burden computation, on the fixed standard charges and the departmental transfers, indirect labor; and so forth.

Q. Those allocations were made by someone other than yourself, and you merely took the figures off of the books as they appeared?

A. That is correct.

Q. Was there any attempt made, Mr. Dreyer, to determine whether this was an average or a typical three months' period of operations by the Plastics Department?

A. No, there wasn't. I chose those because those were the months where the steps were taken, and
1286 that department functions fairly uniformly. It would be very surprising if they weren't the typical, pretty much general, normal months. I believe they are.

Q. Do you have any explanation for the July figures, which show a rather wide spread between the direct labor and the actual expenses incurred during that month?

A. No, I haven't. They are all subject to the analysis by anyone from the records.

Q. Just exactly what is the Plastics Department? What type of work does it perform for the Niehoff Company?

A. They take the various powders, which are either made of the tablets, or used as powders—most of them now are pre-formed into tablets, and through heat and extreme

pressure, these tablets are molded into the various forms, and then they are prepared in rather expensive molds.

Q. Does that result in a complete product, as Mr. Niehoff or the Niehoff Company offers it for sale?

A. No, it doesn't, not usually. Very often it requires a little bit of machining, and very often it requires a little bit of drilling, and so forth. Sometimes there are additional holes to be put in, which are not put in by the molding machine.

Q. Are they sometimes combined with other parts to form a similar, or a final part, as it is sold by the Niehoff Company?

1287 A. Very rarerly. I think in the case of one or two distributor caps they do put in a little additional spring, which doesn't amount to anything.

Q. That spring is purchased as a complete item from some other manufacturer?

A. That is right.

Q. Do you know what percentage of the items manufactured for the Niehoff Company are resold without any additions whatsoever to them and accounted for there in the Plastics Department?

A. No, I don't.

Q. Do you know the percentage of the items manufactured by the Niehoff Company and sold as single items, opposed to the parts which are purchased and then resold parts to the Niehoff Company?

A. I have no definite knowledge of those figures. I know what they were years ago, but I simply haven't checked into that lately, and I just really don't know.

Q. Would it affect your studies concerning the unit cost of the production, or the manufacturing cost—the decrease of sales—would it affect your study at all in the gross rate to the Niehoff Company if, for example, 80 percent of the parts sold by the Niehoff Company are purchased, in their entirety, from someone else?

A. No, I don't believe so. The units which are made in the Plastics Department—all of that particular type

1288 are made up right there, and any other similar types which might be purchased would probably be purchased in its entirety. I am not positive about that, but, of course, I think that is approximately the picture. I don't believe they buy any FF-40 rotor, whatever the sales demands are, because they are made by the Niehoff Com-

pany, but there might be different kinds of rotors which they purchase.

Q. Is it possible that the increased manufacturing costs which we are dealing with here, in proportion to the decrease of sales volume, that that might only apply to 40 percent of the Niehoff business?

A. It would apply only to the manufactured product, and if it was 40 percent of the total sales, it would apply to that. There is practically very little work done on the purchased parts, except repackaging some of those items.

Q. You never made a study to determine just exactly what is the percentage of the parts resold by the Niehoff Company, which are manufactured by them, and the others which are purchased and resold?

A. I did about five or six years ago, but I haven't any late figures, and I wouldn't care to state. At that time I had occasion to check into that, but since then I haven't had occasion to, and I just haven't done so.

Q. Was that about five or six years ago, Mr. Dreyer?

1289 A. My recollection is that about one-third was manufactured, and two-thirds was resold, but I am not positive about that. It is just a dim recollection. I am not positive about it any more at all.

Q. Do you have any reason to believe that that figure has changed since that time?

A. Yes, I believe the percentage of manufactured items has increased quite a bit. I don't know how much. In other words, we have added new departments to make new products to replace those which were purchased, and it would have an effect on the ratio, but I don't know just the exact percentage.

Q. Is this first time that you have prepared an analysis of the Niehoff Company relating to burden rates to the various departments and showing the increased cost of units of production in relation to sales?

A. In this manner, yes, that is the first analysis I have ever made.

Q. Could you tell us if there is any direct relation between sales volume and burden rate, as applied to the various departments?

A. No, I can't say that definitely.

Q. It is rather unusual, but have you ever seen a study before, which shows the direct relation between sales volume and burden rates?

A. I have seen them, not on burden rates, but as applied to the total manufacturing cost.

1290 Q. That would be irrespective to the sales volume, wouldn't it?

A. It depends on the purposes for which the analysis was made. You can get any type of an analysis which you desire, if you have the facilities for so doing. I think very many companies these days do want to know those various relationships by the different companies, and they want to know the different phases of those relationships, and any costs that they might have. In this particular case, we wanted to put the relationship as shown on these exhibits here, and—

Q. (Interposing.) Yes, I know, but on Respondent's Exhibit 46 for identification, and on through Exhibit 50, could you tell us what expenses that you considered remain constant, regardless of the 10, 20, 30 or 40 percent decrease, whichever it may have been, in the sales?

A. Yes, there would be such items as city taxes and interest. Well, now wait just a minute. The depreciation would be the same and your supervision would be the same. Those items involving interest would be the same. There are quite a number of the smaller things that would be about the same, but the major ones are probably in that category.

Q. Directing your attention to Respondent's Exhibit 52 for identification, which, I take it, relates to the runs during the period of January, 1950, to August 7, of 1951, how did you establish the material cost per hundred, as it

1291 appears on that exhibit?

A. Directly from the records.

Q. And was that the effective material costs in August of 1951, or in January of 1950?

A. Well, at about the time of the material run, it would be somewhere halfway between. The material costs on this does not fluctuate very much.

Q. Was there ever a material run of 4600 made on this particular rotor?

A. That I couldn't answer. It is more or less halfway between it, in the time element, more than anything else, and in checking over the material costs, they are roughly averaged in the manner that we have shown. I don't know what exact date it was taken. I called for that from our factory cost department along those lines, and those were the figures which they gave to me.

Q. You can't pin it down, definitely, as to when the cost of materials was made, or when you determined what the cost of material was?

A. No, I can't, that is right. I asked the factory cost department, which I think is in very capable hands, to give me the fair, normal cost for the materials of the FF-40 rotor, and they come up with this.

Q. Well, then, as I understand it, to make it perfectly clear, the material cost per hundred, as it appears on
1292 Exhibit No. 52, is not an actual material cost figure, but is more of an average?

A. I believe so. I don't know whether I corrected my first statement or not, but I did ask for the costs from this cost department—the fair cost of materials, and this was the figure that they come up with, and I believe it was an average, but, of course, there, again, I am not certain.

Q. These costs, then, were applied, or rather, were supplied to you by someone else, at a rather indefinite time? What I am trying to find out is, just how you determined it on Exhibit No. 52, what was the cost of materials on the production on the FF-40 rotor, how you went about it?

A. These costs are all in the factory's office, and I went to the man in charge of that and asked him for the material cost for the period between these dates, and he come up with this figure. As I say, in most instances, the material cost does not fluctuate very much, in this department, over a span of a year or a year and a half, excepting if there is some surge somewhere, but we are paying about uniform prices, which is about top price paid for powders, and in this particular period it didn't change very much. Now, I am not assuring you that those are exactly correct statements, but that was my recollection of the whole affair in the matter, in checking over the material cost with that department.

Q. Did you make any attempt to verify those costs?

1293 A. In some instances, I looked over a number of the sheets, and others I didn't. In this particular case, with the FF-40, I don't recall if I did or not. Some of these cost sheets I even prepared myself, and I know exactly how they were made up and how they were made out, and I laid out the original design of the cost record. I know how those things were obtained. The materials were obtained, and then they were passed on. The method of under-

standing them is based on instructions which I set up, and I assume the results that I got from them are in line with the original thinking, and I believe that that is correct. I think they are line with the same manner in which I would have obtained them myself.

Q. Then, was it your intention to get the average cost of materials during this period to the Niehoff Company in the runs concerning the FF-40 rotor?

A. I asked for the average.

Q. Well, was it your intention in drawng up the exhibit—was it to show the average cost of materials?

A. About an average, yes, for that period involved.

Q. Would you tell me how you determined the cost of labor?

A. Well, it was in the same manner, because, again, I'll have to tell you that came from the same records.

Q. It would be your intention to develop the average cost during the eighteen months' production on this FF-40 rotor in units of one hundred?

1294 A. That is right.

Q. Do you know if there was any change in the labor rate during that period?

A. There probably was, but I have no exact knowledge. I think those are the labor rates which have been changed constantly during the past few years. We all know how that has been.

Q. Do you know what runs were actually made by the Niehoff Company on the FF-40 rotor during that period?

A. That appears on the work sheet, but it does not appear on the face of the exhibit.

Q. Do you have them with you now?

A. They are available. I don't believe I have them. There are so many of the work sheets, but I think they are all in our files.

Q. I take it that you weren't concerned in advance of this minimum of 2800 production?

A. No, small runs are obtained in the company's operations, due to pressure of sales, and small runs are cut off as quickly as the demands are satisfied, in order to get back in the production of more needed items.

Q. Then it would be fair to say that through the years they are occasionally making small runs in the various departments?

A. Yes, that is true. That is true of any run in a plant

of this nature. It is done not because it is desirable,
1295 but because the sales exigencies demand it.

Q. Your explanation concerning material and labor costs would be the same for Respondent's Exhibit 54?

A. I believe so, yes. That would be true of all of the exhibits in this group.

Q. In the production of the FF-40 rotor, is that a complete item manufactured entirely by the Niehoff Company?

A. Yes.

Q. And the distributor cap, is that a complete item manufactured by the company?

A. Yes.

Q. Without any additions from any other manufacturer?

A. Yes. Now, some of them has a spring involved in there, but I don't believe that one has.

Q. Do the exhibits and the charts which you have identified reflect all of the items which are manufactured by the C. E. Niehoff Company?

A. They are only a very small part of them. I think they are a fair cross-section.

Q. Would it be your intention to make studies of all of the other items manufactured by the company?

A. Not unless the company asked for it. I really do believe that it would be well, in some cases, to develop that, though.

Q. Who selected these particular items, Mr. Dreyer?

A. Well, I did call in the foreman of the depart-
1296 ment and asked him to give his judgment on the representative items, and he mentioned these as representing the scope of the department, as well as any other group that could be covered.

Q. That was the foreman in the Plastics Molding Division or Department?

A. That is correct.

Q. With which these are concerned?

A. That is right.

Q. Is the DR-13 rotor a complete item, as it is manufactured by the Niehoff Company?

A. Yes.

Q. How about the DR-135 plate?

A. That is also a complete item.

Q. That doesn't take any additions from any other parts manufactured by someone else?

A. No.

Q. Would your explanation of labor and material costs per hundred be the same for those two items as you gave us in the previous FF-40 rotor item?

A. Yes, it would. That was all done in the same manner.

Mr. Mayer: Could we have just a few minutes now?

Trial Examiner Hier: We will take just a two minute recess at this time.

(A short recess was taken.)

Trial Examiner Hier: Back on the record, gentlemen.

1297 By Mr. Mayer:

Q. Mr. Dreyer, as I understand most of the exhibits which we have had marked for identification, particularly with the exhibits dealing with the effect of the decrease in sales, it is my understanding, then, that those exhibits are projections of yours of what might happen in a hypothetical situation?

A. It is an analysis of what would happen, based on the normal production.

Q. It is not based on any actual instances in which this has happened?

A. No.

Mr. Mayer: That is all we have.

Trial Examiner Hier: Is there any redirect, Mr. Sprowl?

Mr. Sprowl: I have just a very few questions.

Redirect Examination by Mr. Sprowl.

Q. Referring to the Plastics Department, what is the largest item produced in that department? By that I mean not the largest one, physically, but the largest in bulk?

A. I believe it is the distributor cap.

Q. And what is the smallest?

A. It is either a small plate or a small rotor.

Q. Then the medium size items are such things as rotors?

A. Yes, they vary in size. Some are small.

1298 Q. So in the items that you have an analysis, relating to the Plastics Department, you have taken the cap as being the largest and the plate as being the smallest, and some of the rotors being in between?

A. That is right.

Q. Now, the difference between the Plastics Department and the Coil Department is that, in the Plastics Department, when the machine is through with the item in the mold, it is practically finished?

A. Yes, in most cases. In some instances there is just a little bit of work to be done, like maybe drilling of a hole or so, and there's something extra sometimes to be attached to the mold called a "flash," which has to be taken off, but the majority of the labor involved is done by that machine.

Q. The molding machine?

A. That is right.

Q. In contrast to that, will you tell me, briefly, the steps that a coil follows in going through the Coil Department from the time it starts out, from the raw material, to the time it ends up as a completed item, at the other end of the department?

A. Well, there are a number of different items used in building the coil. For instance, there is a steel container that forms the shell, and there is a plastic top, and there are numerous windings that go in that and a number of laminations in steel, which have to be made in the 1299 forge press department, and they would start the various kinds of winding, and they wind the coils, and there are two different coils, also, the primary and the secondary coil. The different wires take different machines, and the different grades of skill in operating the machines.

Q. The coils are wound right there?

A. That is right, they are wound there, and after the various parts needed to build up the inside of the coil, after all that is finished, they are assembled. Then, after the coil is completed, it is sprayed and it is tested. In other words, there are numerous movements in the making of a coil, some of which require a great deal of skill and others just the ordinary mechanical operations.

Q. In contrast, where a single molder in the Plastics Department virtually completes the item he is working on, with the operation of the plastic press, in the Coil Department it takes many steps and many hands and many people to work that coil from its origin, or beginning with its origin, to the completed coil at the end of the line?

A. That is right.

Q. In the scheduling of any production laws, I assume it is desirable to always have a sufficient volume, so that your run is the most efficient?

A. Yes and no. Of course, I will say yes, there are a

lot of factors that goes into that. One is the volume
1300 of sales of that particular item.

Q. If you are just building toward economy of production, you may accumulate a lot of so many of them which might lie around on the shelves for a long period of time, and then all of the factors that enter into sales have to be carefully balanced, and they have to be carefully checked by the people who issue the orders?

A. That is right.

Q. Your losses are not always uniform?

A. No, we have a limited capacity. You said "losses." Is that what you mean?

Q. I beg your pardon. I mean the runs are not always uniform?

A. No, we have a limited capacity. I thought you meant to say a run. Such as in the Niehoff Company, if you have a half a dozen which use the same machine, then you have to see that everything is carefully and properly balanced, so you won't get too many of one kind and not very many of another, and due to unforeseen sales, some items have to be run through in small quantities, cutting in on what is supposed to be a sustained run.

Recross Examination by Mr. Mayer.

Q. In all of these runs which you used in the making of the exhibits, were any of those interrupted runs?

A. It is impossible to check on that. I did ask of
1301 the foreman, as I told you earlier in the hearing, or just a few minutes ago, and he said that these are representative items for the department, and after I received those, I went through the records and found out when they were run and how many were run at a time, and I checked the costs, regardless of anything else that might come up.

Q. Are all of the parts in the Coil Department, which go to make up the final coil, manufactured by Niehoff Company?

A. Well, I don't know. Do you mean everything in the Coil Department?

Q. Yes.

A. The wire, of course, is purchased. The cans, so-called, are purchased, and a certain amount of spot welding is done on them, and then if they are sold with the bracket, the bracket might be purchased, but most of the items that

are essential to the effect of working of a coil are made in the Niehoff Company.

Q. Are the normal runs, or the runs that are normally made at the Niehoff Company, made following specific orders, or are they general runs for stocking purposes?

A. The Superintendent of the working department manufactures the design, or states what he wants, and that is worked in conjunction with the engineers, and then also with the Sales Manager of the Niehoff Company, and they determine what the production schedule is.

1302 Q. Would you tell us whether or not the runs are normally made up for a specific order, or for stock purposes?

A. They are based on the anticipated sales.

Mr. Mayer: That is all.

Mr. Sprowl: That is all.

* * * * *

1304 Room 1500, 173 West Madison Street, Chicago, Illinois,
Monday, June 16, 1952.

Met, pursuant to adjournment, at 2:00 p.m.

Before: Frank Hier, Trial Examiner.

Appearances:

E. P. Schrup, Attorney for the Federal Trade Commission.

Charles R. Sprowl, 134 South LaSalle Street, Chicago, Illinois, Attorney for the Respondent.

1305 Proceedings.

Trial Examiner Hier: You may proceed.

RAY M. RICKETTS was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Sprowl.

Q. Will you state your name?

A. Ray M. Ricketts.

Q. You live in Memphis, Tennessee?

A. That is correct.

Q. By whom are you employed?

A. I am employed by the C. E. Niehoff Company of Chicago.

Q. How long have you been employed by that company?

A. About 15 years.

Q. How long have you been living in Memphis, Mr. Ricketts?

A. Since October 1939.

Q. What are your duties with the Niehoff Company?

A. Well, to cover the territory. Would you like me to name the territory?

Q. Are you a salesman?

A. Yes, sir.

1306 Q. What territory do you have?

A. I cover an area comprised of Arkansas, Mississippi, Alabama, the western half of Tennessee and also east of the Mississippi River in Louisiana.

In addition to that, I also cover Pensacola and Panama City in Florida.

Q. Mr. Ricketts, I would like you to look at what has been marked for identification and admitted in evidence as Respondent's Exhibit 25 and tell me if the area you have just described which is outlined on this map in crayon with a number nine in the middle represents your territory? That is the orange outline.

A. Yes, sir, that would be correct.

Q. Did you serve that same territory in 1949?

A. Yes, sir.

Q. For the Niehoff Company?

A. Yes, sir.

Q. Do you send in regular salesman's expense books to the Niehoff Company?

A. Yes, sir, weekly.

Q. Who makes out that book?

A. I do personally.

Q. When you are through with it, where do you mail it?

A. I mail it to the Chicago office.

Q. What information does that book contain?

1307 A. Well, it consists of the per diem allowance and also the mileage which I travel. I travel my territory in my car between various points, of course, and any other expenses which I may incur such as perhaps telephone calls or telegrams or occasionally some entertainment.

Q. What does it show, if anything, with respect to what town you were in on a given day?

A. Well, each day I put down on my expense book what particular town I stay at. If it happened to be, say, New Orleans, or whatever it may be, why that particular city is put down.

Q. Beyond giving the location or the town in which you were on that day, it has no further detail, does it, in that report?

A. Well, no, it doesn't.

Q. Does it have any customer [illegible]erence in that book?

A. No, sir.

Q. There is some sort of a daily or bi-weekly report you send in on the customers you have called on?

A. That is correct.

Q. That is also sent to the company?

A. Yes. I simply make out a contact report if I call on an account and it is sent in to the company eventually.

Q. Now these expense books I take it are pretty much what the name indicates, they show what you spent
1308 and what mileage you are entitled to, is that correct?

A. That is correct.

Q. And did you request the auditor of the Niehoff to prepare from that expense book or those expense books which you submitted in the year 1949 a memorandum of the locations which are recorded in those expense books?

A. Yes, sir, I did.

Q. Do you have that with you?

A. I have a copy of it in my pocket here.

Q. Now I wish you would use that as a memorandum to refresh your recollection because I want you to explain in some detail with respect to the year 1949 exactly how you covered this particular territory.

Will you take the month of January, 1949, and tell me how you covered your territory in that month.

A. Well,—

Mr. Schrup: Mr. Sprowl, may I have a look at that first?

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Sprowl:

Q. First of all, how many days a week do you ordinarily work your territory?

A. Five days, ordinarily.

1309 Q. That is Monday through Friday?

A. Monday through Friday.

Q. With your memorandum before you which you have had made from your expense books, will you tell me how you covered your territory as to towns in the month of January 1949?

A. I presume this applies to working days, of course?

Q. Yes.

A. Well, you want me to state in detail, I presume?

Q. Yes. I think it would be better that way.

A. Well, I started out in January 1949 on the third and fourth and I worked the city of Memphis.

Q. That was Monday and Tuesday?

A. Yes, the third and fourth.

Then on the fifth I left Memphis, I hope at 8:00 o'clock in the morning, and went on a trip which included Tupelo, Columbus, and on into Meridian, Mississippi.

Q. By the way, do you do that by motor car?

A. Yes, sir.

Then on the next day which must be Thursday, the 6th, anyhow, I spent that day in Meridian, Mississippi.

On the following day, the 7th, on Friday, I left Meridian and worked Laurel and Hattiesburg, Mississippi.

Q. Where did you stay the evening of the 7th of January, did you stay in Hattiesburg or go back to Meridian?

A. I stayed in Hattiesburg. I am not sure whether
1310 it could be an error here or not. I don't remember specifically, but it states here that I went back to Meridian, however.

Q. In any event you didn't go back to Memphis?

A. No, sir.

Q. Now over that weekend were you back in Memphis?

A. No, sir.

Q. What did you do that weekend, the following weekend?

A. Well, the following week I worked Gulfport, Mississippi, Biloxi and finally then on in to Mobile, Alabama.

Q. And you got there on the evening of Monday the 10th?

A. That would be correct, or customary, at least.

Q. The balance of that week I see from the company record, or the copy of this memorandum I have, you apparently worked Mobile and went out of there to Pensacola on a couple of occasions?

A. At least I went to Pensacola.

Q. I notice on two days it shows "Mobile-Pensacola."

A. It so happens that I remember the occasion here. Now I wondered in looking at it why I returned to Memphis.

Q. Mobile, you mean?

A. Yes, finally. I remember that in Pensacola, Florida I had a call from my wife who had to go to the hospital and have an operation on Saturday morning, and
1311 I remember that I came back through Mobile and finally drove into Memphis.

Q. On Saturday the 15th of January?

A. Yes, sir.

Q. Now you spent the following week in Memphis, is that correct?

A. Yes, I did, and I couldn't tell you how much I might have worked for the company in that particular week because my wife was in the hospital and I don't remember specifically.

Q. You might have made some business calls?

A. I possibly did. I expect I did make some business calls.

Q. But you also made some calls at the hospital?

A. Yes, sir.

Q. Now the following week of the 24th of January did you make a trip out of Memphis?

A. Yes, sir, and, in fact, I spent Monday and Tuesday the 24th and 25th in the city of Memphis so I would say apparently that I didn't spend any time in working for the company the previous week while in Memphis.

Then on the 26th of January I left Memphis, worked Forest City, Arkansas, Mariana, Arkansas, and on into Paragoul, Arkansas.

Then on the 28th I worked Rector, Arkansas and returned into Paragoul again.

1312 Q. Did you get back to Memphis that evening, that was a Friday evening?

A. Yes, sir.

Q. That takes care of the month of January except for the following Monday, the 31st, which you apparently spent in Memphis, is that correct?

A. That is correct.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

Please mark this for identification.

(The document referred to was marked Respondent's Exhibit 60-A to 60-L, inclusive, for identification.)

Trial Examiner Hier: Respondent's Exhibit 60-A through -L consists of 12 sheets which are a recap made from the original records of the respondent of the 12 months day by day in 1949 of the expense account of the witness now on the stand, Ray M. Ricketts, and there is no objection?

Mr. Schrup: I want to ask a few questions on it.

Trial Examiner Hier: I understand that.

Before it is offered?

Mr. Schrup: We want to find out just a little more about it, yes.

Mr. Sprowl: All right, it is marked for identification only and offered but no ruling, is that correct?

1313 Trial Examiner Hier: That is right.

By Mr. Sprowl:

Q. Now the month of January you were just testifying about, Mr. Ricketts, is reflected on Respondent's Exhibit 60-A, is that correct?

A. Yes, sir.

Q. Now I notice on the entry on the 5th of January the first town on that date is Memphis followed by Tupelo, Columbus, Meridian. Does the word "Memphis" indicate you worked Memphis any time that day or merely started out from there?

A. That is my starting point only.

Q. Does that hold true for the balance of the exhibit?

A. Yes, sir, it absolutely does.

Q. Where there is another town following Memphis, that means you merely left from Memphis?

A. That is correct.

Q. Where Memphis on a given day is the last town on the entry for that day, that merely means you returned that evening?

A. I returned there that night, that is correct.

Q. And did no work there?

A. No, I did no work there at all.

Q. Now I want to call your attention to 60-B. I notice for the week of February 7th and the week of 14th and

1314 a part of the week of the 21st you were primarily in Nashville with occasionally some other towns in Tennessee.

Do you as a matter of fact work any part of Kentucky out of Nashville?

A. Yes, sir, I do.

Q. Is Nashville far from the Kentucky line?

A. It is approximately 75 miles.

Q. On some of these days that are indicated for the month of February as Nashville only, you did go into Kentucky?

A. Yes, sir, I work out of Nashville and then come back in there at night and make another circuit out perhaps in another direction altogether.

Q. How many of those trips up into Kentucky would be encompassed in this three week interval?

A. Probably two.

Q. In addition to what is shown on this sheet?

A. At least, that would be the normal operation.

Q. Now in notice in the month of March there are two weeks in which the words "not working" appear after the dates.

What were you doing those two weeks, if you know?

A. I frankly do not remember.

Q. At least you were honest enough to put down you were not working, is that correct?

A. Maybe too honest.

1315 Q. You were perhaps on a vacation, ill, or something like that?

A. I must have been ill because I wouldn't take a vacation at that time of year.

Q. I notice your first trip into New Orleans in 1949 occurred in the month of June, you got there on the 11th, which apparently is a Saturday, and spent the following two weeks based at New Orleans. On two of those occasions, on the 23rd it shows Harvey, Louisiana in addition to New Orleans, and I guess that is all in that two week period, but while you are in New Orleans did you cover any part of the territory just across the river?

A. Yes, I do.

Q. What town is that?

A. I work Algiers, Louisiana, and Harvey, Louisiana across the river in particular.

Q. Do you cover any other nearby points or towns out of New Orleans?

A. Sometimes I will work Hammond, Louisiana out of New Orleans and even sometimes go to Baton Rouge out of New Orleans.

Trial Examiner Hier: Do you go as far west as Lake Charles?

The Witness: No, sir, I don't cross the river except to just a few of the adjoining towns there.

1316 By Mr. Sprowl:

Q. Now did you make another trip to New Orleans in 1949?

A. I would have to look at the record but I presume so.

Q. In November I notice you were in New Orleans for substantially a week.

A. Well, in working days I disagree with you a little bit.

Q. I see you got in on a Saturday, Sunday you were there and out of there the following Friday, five days.

A. About four days, that is right.

Q. Well, you were there through the 18th?

A. I left that following morning, the morning of the 18th.

Q. Now in December I notice a trip to Chicago. Chicago is not in your territory, is it?

A. No, sir.

Q. What would that be?

A. Well, probably some sort of automotive show because I think that was the ASI automotive show at that particular time.

Q. The company brought you up here at its expense?

A. Yes, sir.

Q. That is the week of December 4th?

A. Yes, sir.

1317 Q. Now I notice again on the 27th, 28th and 29th you were in Chicago in December, was that a business trip?

A. I wouldn't remember exactly, but I presume it was some sort of a sales meeting called by the company.

Q. I notice you were in Memphis from about the 20th of December until you went to Chicago on the 27th. What is the fact as to whether you try to make calls that close to the Christmas season?

A. Well, normally it is virtually impossible to do much business in this particular field after about the middle of December; consequently, we normally stay around our headquarter base at that particular time.

Q. And your headquarters is Memphis?

A. Yes, sir.

Q. Now when you are in Memphis on a business day, does that always mean you are working in Memphis on that day?

A. Well, not necessarily, inasmuch as it is my headquarters point, and I stay away from home a great deal in traveling, so quite often I will take a part of my time to do some personal business and also to get acquainted with my family on occasion.

And it is true that possibly if I might stay in Memphis a week, I possibly will make three or four calls on my accounts, but at the same time I may take a little time off, actually.

1318 Q. Because you are away a great deal over week-ends on your touring of your territory, I gather?

A. That is correct. I stay out a very great deal and I do like to become acquainted with my family on occasion.

Q. Now how many times a year do you try to get around your territory? First of all, let me ask you this: How many customers do you have or did you have in 1949 in your territory?

A. I would say approximately 50.

Q. How many times a year did you get around your territory in 1949 to call on those customers?

A. Well, I don't think I can answer that specifically, other than to say that I attempt to get around my territory fully three times a year and once in a while I might possibly—there might possibly be an exception, but that is my normal procedure, at least.

Q. Do you ever get around the territory four times a year?

A. I don't think as yet I have ever made it four times.

Q. Your territory is pretty large, is that right?

A. That is correct. Geographically it is very large to cover, it takes a lot of time in order to cover it, and we have to spend a lot of time in an automobile, of course, due to the fact that these accounts are generally speaking great distances apart.

1319 Q. And you spend some time on vacation and at shows, and probably illness part of the time, I assume, in any ordinary year?

A. Well, that is correct. I normally attend three shows a year, and in some cases it wouldn't be but two, which takes up probably at least two weeks of my time.

Q. What is your ordinary vacation?

A. My ordinary vacation period is two weeks.

Q. I direct your attention to Respondent's Exhibit 60-F which is the month of July and I observe you have only one week vacation in that month.

A. 60-F? I don't seem to— Mine seems to vary from that as far as F is concerned, it is June on this one.

Q. G. You are correct, 60-G. Do you have a vacation of one week?

A. That is correct.

Q. Was that different from an ordinary year? That is, would you ordinarily have two weeks?

A. Well, yes, ordinarily. I remember some occasions anyhow when I don't seem to have sufficient time to take a vacation.

Q. Now in covering your territory three times a year, what is the fact as to how many calls you make on each customer?

A. Well, I would like to put it this way: Normally 1320 in all of my outlying districts I have, and I speak of outlying districts out of my immediate headquarters point of Memphis, I try to contact those accounts approximately three times a year, and of course possibly in Memphis, due to some reasons which I stated a while ago, the very fact of being home occasionally, I probably make a few more calls in some cases in the city of Memphis or points close by Memphis.

Q. How about out in the territory?

A. Well, generally speaking, out in the territory, at least in the district any distance away, I would normally work those in the same procedure attempting to call on them three times a year.

Q. I notice in that year you go out to New Orleans twice. Was that somewhat less than customary or more than customary?

A. Well, it is one time less than customary, and I don't know just exactly why at this moment.

Q. You would ordinarily get there three times?

A. Yes, sir.

Q. Would the fact that on one of these occasions you were in New Orleans two weeks have any bearing on that?

A. It might have some, and also I was off a little bit that particular year.

Q. On account of your wife's illness, is that what 1321 you mean?

A. That is correct, yes, sir.

Q. Now by and large, then, I take it you try to go around your territory calling on your customers in order, is that correct?

A. Insofar as possible, humanly possible, I try to keep it in some sort of a routine method.

Trial Examiner Hier: Do you just cover your established customers or do you attempt to get new ones at the same time?

The Witness: Well, I do both. Primarily I would say that I cover my established customers plus I will spend a limited amount of time trying to obtain new accounts.

Trial Examiner Hier: Even though that calls for a separate side trip?

The Witness: No, I wouldn't say that. Actually it is in the regular course or procedure of a trip.

Trial Examiner Hier: I have in mind you say you go up to Hopkinsville, don't you?

The Witness: Yes, sir.

Trial Examiner Hier: Do you go to Bowling Green? Do you have a customer in Bowling Green?

The Witness: No, I do not have a customer in Bowling Green.

Trial Examiner Hier: I have run out of towns in 1322 that area.

What I have in mind, if you go to Hopkinsville and then Bowling Green on one circle through the area, and there is another town that has an automotive dealer in it, and he is not a customer of yours and you have no reason to believe he perhaps deals with a competitor of yours, will you make a separate side trip there to see him each time you go to Hopkinsville and Bowling Green?

The Witness: No, sir, not each time.

Trial Examiner Hier: Once a year, once every two years, or what?

The Witness: Well, it depends. I might. Well, let's see— Let me put it this way: I might learn through a friend or from various sources which we may have, or direct inquiry from the factory, or in some manner of that nature, that there might be a person or a customer up there who is a prospect or perhaps he is dissatisfied with what he may have, or what have you. And in a case of that particular nature, I would make a special trip to see him.

Trial Examiner Hier: Otherwise not?

The Witness: Normally I would not; otherwise, that is correct.

Trial Examiner Hier: Go ahead.

By Mr. Sprowl:

Q. I don't know as I asked you, I think the last
1323 question was in covering your territory you call on your customers in some pattern or order as near as you could with your trips?

A. I try to use a very definite pattern insofar as possible.

Q. Now you are familiar with the 1949 customer classifications of the C. E. Niehoff Company that were used?

A. I think so, yes, sir.

Q. I mean speaking of the classifications as to size?

A. Yes, sir.

Q. They have changed the letters since that time, and in the record we have set it out here on many occasions, but the letters we are using, Mr. Ricketts, are J for the $1200 and under, JA for $1200 to I think it is $2400, and D for $2400 up to your next bracket, and DA is I think up to $6,000, over $6,000 is that it?

Now with regard to those customer classifications, do you call on these customers irrespective of size in order as you make your rounds or do you call on some class of customer more frequently than the others?

A. No, I call on my accounts in rotation. I have to because it would be economically unsound to do otherwise.

Q. Would you make any more calls on a D or DA account than you would on a J or JA account?

A. Not under any normal circumstances, no.

1324 Q. Now I would like you to tell me about the relative time you have to spend with a small account such as a J or a JA account, perhaps, on the one hand, as compared to the larger account of the D or DA classification, on the other, in the ordinary pattern of your calls?

A. Well, I would say that a number of factors are involved in that. First of all I would like to state about the J type account, or the smaller type account, I find that at least generally speaking it is necessary to perhaps spend more time or at least very definitely as much time with that account as you do some of the larger type accounts.

Mr. Sprowl: I would like to interrupt here a moment, Mr. Ricketts.

Mr. Schrup, Mr. Malina is the Chicago salesman and he will be giving somewhat similar testimony. If you would rather he be excluded, I will send him on his way where we can find him later.

Mr. Schrup: I don't think there is any need of that.

By Mr. Sprowl:

Q. You were speaking of the comparative amount of time you spent with the smaller account than with the larger, Mr. Ricketts?

A. I think I was to a point where I stated that I found that it had been necessary or is necessary generally speaking to spend as much time or possibly more in a great many cases with the smaller type account than it is a larger
1325 account, and the reason I think that this is true, and the reason it happens, is possibly because the smaller type accounts, generally speaking, at least, they do not have a perpetual inventory system or a stock control system.

Q. Do you have to do something about the stock?

A. Yes, sir.

Q. What do you do with it?

A. Well, first of all I generally straighten it out for them and then I either check it or take a definite physical inventory of it.

Q. Now is the stock straightening something that must necessarily be done before you can take your inventory?

A. Well, you virtually have to with our type of merchandise, or the type of merchandise we happen to have, due to the fact of packaging, and so forth, being comprised of many small parts.

Q. I didn't hear that. The packages are small?

A. Being comprised of small packages, consequently you almost have to straighten it out properly or you will either over-inventory or you will under-inventory. I find too that you must take that inventory of this stock to the man, generally speaking, who is the smaller type account, and you generally have to take it to the owner himself and oftentimes he is busy or he may be out, or what have you, so that quite often you have to spend a considerable
1326 time with him in that respect.

Now, by comparison, which I presume is the question you asked him, most of the larger type accounts or medium-sized accounts virtually one hundred per cent carry a perpetual inventory or stock record control system.

In this type of account the time is lessened considerably in this respect, namely that of getting an order, due to the fact that they generally have a buyer or a purchasing agent also who has charge of this inventory control, and we can get an order from that within a very short period of time.

That particular type of account, normally, that is, the larger type accounts, they have their own men, stock control,—no, not stock control, but stockmen who handle their stock back in that department, so that I do not have to spend very much time in that respect.

Q. And you straighten stock or take an inventory. How long does that actually take in elapsed time?

A. Well, it varies, of course, but it would be hard to set a fast rule, but I would say an average, a small type account like that would possibly run you, the actual work itself would run around three hours in my case.

Q. Now using as a specific example, are you familiar with Mr. Keifer's location in New Orleans?

A. Yes, sir.

1327 Q. How long would that operation take in his place of business?

A. Well, the actual working part of it I would say it would take about three hours.

Q. That is straightening the stock and taking an inventory?

A. That is correct.

Q. All right.

A. Then I possibly might spend anywhere from a half a day to a full day due to the fact that he is maybe busy or away for a few minutes, or things of that particular nature.

Q. Is he away sometimes?

A. Yes.

Q. And does he wait on the trade there?

A. Yes, he works the counter himself. He is, of course, busy at times, quite a bit of the time.

Q. Then you have to wait and get his ear after you have done all of this preliminary work to discuss your order with him?

A. Yes, sir. I might have to stand for five hours, eventually, to accomplish the deal.

Trial Examiner Hier: While you are in New Orleans, what about Greiner, how long do you have to argue with him about his discount?

Mr. Sprowl: I trust there is no implication in that

1328 your Honor.

Trial Examiner Hier: The implication is this: What little experience I have had in business generally is that the bigger the customer the harder they are to,—what shall

I say,—satisfy orally, at any rate, about the price they are paying. It takes up considerable time.

Mr. Sprowl: I have no experience on that, so I couldn't debate it.

Trial Examiner Hier: Do you take up considerable time on that?

The Witness: Am I permitted to answer?

Trial Examiner Hier: Yes, I am asking you.

The Witness: You asked a specific question about a specific account. I can say to you honestly that they have never brought up the subject to me.

Trial Examiner Hier: Greiner hasn't brought up the subject?

The Witness: No.

Trial Examiner Hier: How long do you spend in Greiner's shops?

The Witness: I would say about three hours.

Trial Examiner Hier: Three hours on one and five on the other, that is your estimate of time?

The Witness: Well, no. By comparison I would say three compared to a full day.

1329 Trial Examiner Hier: All right, go ahead.

By Mr. Sprowl:

Q. Now, Mr. Ricketts—

The Witness: That is, in that particular case.

By Mr. Sprowl:

Q. This is taking an order only?

A. That is correct.

Q. Now do you try to spend any other time with these accounts in, say, working with their salesman or advising them on your new items of equipment or anything like that?

A. Well, yes, it is necessary to go over new items which we have virtually constantly coming out and you have to spend time on that, so naturally you are helping them and of course ourselves.

Q. Now in doing that type of work, however you do it, how much time does that require in working with the smaller jobber as against working with the bigger jobber of your time?

A. Well, there is quite a variance in it, of course. I think it is rather a difficult question to answer in some ways, but again you have the smaller jobber, of course, who is working the counter himself or doing other things of

that nature, and quite often you will have to wait quite some time in order to be able to go over these matters with him.

Q. Now is there anybody in—well, you go ahead and
1330 answer the question.

A. Well, on the other hand, with some of the larger type of accounts, of course they generally have a sales manager, or at least some one who is directing sales, and you can generally talk to these people within a reasonable length of time, at least, and go over the matter, and they in turn present it to their salesmen, and so forth.

Q. In other words, you can talk to the sales manager on the big account, I take it, whom you can get to rather directly, whereas with a small account you have to take it up with the owner himself, as a rule, is that it?

A. That is right, the owner himself, and sometimes, of course, he wants you to talk to his salesmen, too, about the matter.

Q. Now what is the fact as to whether or not you try to get the smaller jobber to increase the volume of your line in any way?

A. That is a very great part of my business due to the manner in which I am compensated. Certainly that is the greatest part of my business is sales promotion, because the more business I do, naturally the more money I make; consequently, I attempt to spend as much time with all accounts as possible in sales promotion in order to get them naturally to do a better job for themselves and I suppose for, from a selfish standpoint, also myself.

1331 Q. Specifically what do you do with the smaller jobber, what do you urge him to do to get more volume?

A. Well, we urge them or I urge them to spend some time in their dealer work in attempting to get stocks of merchandise into the dealer's place whereby they can do that.

Q. What are these stocks of merchandise?

A. Well, we term them service stocks. That is set up in a cabinet and has an inventory control for the dealer automatically on this cabinet, and so forth.

Q. Now does that take some persuading or selling on your part to get the small jobber to get interested in getting out service stocks?

A. Yes, sir.

Q. Do you do that yourself, or do you talk to the jobber with that in view, or what?

If I am the jobber, what would you do if I didn't have any service stocks out, let me put it that way?

A. Well, I would try to sell him on the idea for the reason first of all that it would increase his business very greatly, and naturally, in turn, mine.

And I go over the program with him not only on one occasion but many occasions. We come out quite often with various promotional means in order to help a jobber of that nature or any jobber promote the sale of those units, and every so often we try to go further in the
1332 direction of promotion of those types of units, or service stocks, and we go over that procedure with these accounts, naturally, in egging them on and their men to do a better job in that respect.

Q. Do you ever call on a prospective dealer account with a jobber?

A. Yes, sir.

Q. What is the ratio of frequency with which you do that for a small jobber as compared to a bigger jobber?

A. Well, here is what I do, here is the way I normally work in that respect:

Say I am in a man's place of business, if he has some prospects on some of the service outfits where he thinks he might sell one or two, whatever it is, whatever quantity, why I will be very glad to go with him and see if I can help to close up a deal.

Q. You would go with the jobber or with his salesman?

A. That is correct.

Q. To the jobber's customer?

A. That is correct.

Mr. Schrup: Can we take a short recess?

Trial Examiner Hier: Just a minute. I want to find out if he is anywhere near through with the direct examination.

Mr. Sprowl: No.

Trial Examiner Hier: Very well.

1333 (Short recess.)

Trial Examiner Hier: Proceed.

By Mr. Sprowl:

Q. Do you furnish jobber customers with catalogs and display material and tune-up charts?

A. Yes, sir, very definitely.

Q. What is your experience as to the demand of the small jobber for catalogs as compared to the demand of the large jobber?

A. Well, I would say the smaller jobber has a greater demand for the catalogs and tune-up charts in particular, and I think that would be true due to the fact probably that his customers come in mostly, he doesn't go out too much to try to secure them in direct selling, they come in over the counter there and of course again he is promoting his business, and consequently he will give the man a catalog, and he will also give him one of our tune-up charts, and also various other promotional material in that respect which we furnish jobbers.

Q. That is material that the dealer customer can use in his store?

A. Yes, sir.

Q. What is a tune-up chart?

A. Well, it is a chart which gives tune-up specifications on all cars. In other words, it would give the type 1334 of spark plug you need in an automobile, and the point gap setting of that particular car, and other various specifications of that particular nature.

Q. For all cars?

A. For all cars, yes, sir.

Q. That would ultimately be used by whom?

A. The dealer himself and his mechanics.

Q. In other words, if I drove in with my '47 Studebaker, they could go to that chart and get all of the settings they needed to tune up my car?

A. Yes, sir, that is correct.

Q. Now is that compiled by Niehoff & Company?

A. Yes, sir.

Q. Is it kept up to date?

A. We bring them out yearly. We keep them up to date maybe over a period of possibly ten or twelve years, at least, so that a man has complete specifications for all cars during all those years.

Q. Now, Mr. Ricketts—

Trial Examiner Hier: I don't understand why the small boy would ask for more of those charts than the big boy, because the big boy distributes to the small boys, doesn't he?

The Witness: Well, the only reason I know for it is due

to the fact that I think possibly the smaller fellow
1335 gives them away, I would say, actually promiscuously in a great many cases in probably attempting to bring in more business, I suppose.

Trial Examiner Hier: Doesn't the Niehoff Company expect, in fact encourage, its large distributors distribute its catalogs and these tune-up charts and so on down in the retailing strata that buy from them?

The Witness: Well, we encourage it, yes, to this extent: It is a very costly procedure, of course. I mean by that catalogs are very costly and so is this other material, and we are very glad to furnish this material if it is properly used.

In other words, if the account is actually buying some merchandise from us, certainly we want to give them all of this information in helping him promote his business in turn to the dealer level. But, on the other hand, as I stated, these items such as catalogs and these tune-up charts are very costly as these things are today, and actually I find a great many instances in a smaller place that they will hand them out over the counter to anyone. This fellow may not even have a garage, but still they will hand him a catalog and tune-up chart and the end result is that we have given up so much money, actually, with no results.

On the other hand, I would like to clarify my statement about the larger accounts. On the other hand, as you
1336 put it, actually that is definitely directed through these salesmen to establish the accounts, and it is handled pretty carefully because these larger accounts generally have a man who will be the sales manager or someone in that capacity who will handle that phase of it, and they let these men have it, and these men know that those things cost money.

By Mr. Sprowl:

Q. Let me ask you this: Don't you furnish every account with enough of these for their salesmen as well as their own use?

A. Yes, sir, we do.

Q. Now the big account, that is, the salesman, will carry these catalogs with him to call on the customer, is that correct?

A. That is correct.

Q. But the little fellow, as I understand it, that has no

salesmen out, has to go by the expedient of passing them over the counter to the trade?

A. Well, that is the basis, actually, of my testimony here, or the reason for the fact that a great many of the smaller accounts will give away a lot of these units promiscuously and of course since we can't be there all of the time, naturally you can't control it.

Q. Now within limits, will you furnish any jobber
1337 with catalogs and tune-up charts he requests of you?

A. Yes, sir, unless they are very, very unreasonable.

Q. Now—

A. I will clarify that by saying if he orders fifty or something like that, they would normally be shipped without any question; if he ordered 1500, there would be some question, naturally.

Q. In fact, you wouldn't ship it, is that right?

A. Well, someone would have to be off the beam if they did.

Q. You are familiar with the suggested retail prices in the lists that the Niehoff Company puts out?

A. Yes, sir.

Q. Do you furnish those to your jobber customers?

A. Yes, sir.

Q. Is there any requirement that they follow those prices?

A. No, no requirement.

Q. What is your experience as to whether they do, in fact, follow them in your territory?

A. I think that almost all of my accounts follow them virtually one hundred percent.

Trial Examiner Hier: Is that true since May 18, 1951, in the last year, the last twelve months?

The Witness: I think it is; to my knowledge it is,
1338 anyhow, sure it is.

Q. You aren't there when they make their sales, but you have an understanding that they follow it?

A. It is my understanding that it is, yes.

Q. Are you familiar with the Union Electric account in Memphis?

A. Yes.

Q. Do you sell that account?

A. I do.

Q. Is that the account that Mr. Fenberg is connected with?

A. That is. Mr. Fenberg is the owner, yes, sir.

Q. And you were present in the hearings in this case when he testified, were you not?

A. Yes, sir.

Q. At Memphis?

A. That is correct.

Q. Does he handle any other line than the Niehoff line of ignitions?

A. Yes, sir, he handles Auto-Lite, and he handles also Delco-Remy, and he also handles Holley.

Q. Holley is—

A. Holley is a Fort parts line and he handles a certain amount of that particular line also.

Q. Do you sell the complete Niehoff ignition line
1339 to Mr. Fenberg's organization, Union Electric?

A. No, sir, he buys nothing from me other than my Ford parts.

Q. Where does he get his general motor ignition parts from?

A. He buys those from United Motor Service.

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1342 By Mr. Sprowl:

Q. Now are you familiar, Mr. Ricketts, with the company called Automotive Electric Service in Memphis, Tennessee?

A. Yes, sir, I am.

Q. Did the Niehoff Company sell that company any products manufactured by the Niehoff Company in 1949?

A. No, sir.

Q. Are you familiar with Bowers, Inc. in Memphis, Tennessee?

A. I am.

Q. In the year 1949 did the Niehoff Company sell that company any products?

A. None whatsoever.

Q. Are you familiar with a company called A & B
1343 in Memphis? That is the correct reference as it was used by the previous witness.

A. Well, the record must be wrong because I know of no such account in Memphis.

Q. Well, if there is such an account did you sell them any Niehoff products in 1949?

A. No, sir.

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Q. Now I ask you if you sold any of those three
1344 companies any Niehoff items and you said you did not.

Did anyone from the Niehoff Company sell those three companies any Niehoff products in 1949?

A. No, I am positive they did not.

Q. Now I want you to direct your attention to the year 1949 and I want to ask you if the jobber customers which you called on to sell them the Niehoff ignition line were offered ignition line parts by any competitor of the Niehoff company in that year?

A. Yes, very definitely.

Q. Were they offered those parts at a higher or lower price than the Niehoff Company?

Mr. Schrup: I will object now, Mr. Examiner, we are getting into hearsay.

Trial Examiner Hier: What?

Mr. Schrup: We are getting into hearsay now on the question as to whether or not the prices were higher or lower. What prices they were offered at is a matter for those particular buyers to testify to.

Trial Examiner Hier: I don't know yet what the basis of his answer is going to be. If it is hearsay, it will go out.

Mr. Sprowl: I know that. I don't want any hearsay, I just want an equal amount of hearsay.

Trial Examiner Hier: He can answer it.

1345 By Mr. Sprowl:

Q. Were those ignition parts offered to the jobbers which you sold at a higher or lower price than you could offer the Niehoff parts?

A. At a lower price.

Q. And will you name the companies in the ignition field that did offer those to your jobbers at a lower price?

A. Well, the names of those who have done so—

Mr. Schrup: Further objection. The best evidence would be to bring in the lists of those people.

Trial Examiner Hier: Just a minute. I am going to find out the basis of his answering. Go ahead and finish it.

The Witness: The names of those who have done so are Tungsten, Guaranteed Parts, Sorenson and Valley Forge, Preferred, which is primarily all that I can recall.

Trial Examiner Hier: Now how do you know that?

The Witness: Well, in some cases I have definitely been shown by my jobber.

Trial Examiner Hier: Did you say "shown?"

The Witness: Yes, sir.

Trial Examiner Hier: Shown what?

The Witness: Well, when they submit a contract, for instance, which gives the definite discount and so forth that they will give, I would say that I have been shown it.

1346 Trial Examiner Hier: Go ahead, and in other cases?

The Witness: Well, in other cases I personally have seen the price sheets that these people had, I mean my jobber had, and he showed me, at least, that it was cheaper, and again I would say from the price sheet structure that I had definitely seen it.

Trial Examiner Hier: Is any of this testimony as you have given it, these last three answers, based in any respect on what jobbers have told you, just simply told you uncorroborated by visual evidence?

You understand my question?

The Witness: I believe you said "any evidence—"

Trial Examiner Hier: You understand what I mean, to make an assertion, a customer of yours to make an assertion that so-and-so offered him—

The Witness: Oh, yes, he offered five and twenty, some such statement, I know what you mean there. No, the cases I speak of are where I have been shown either price sheets or by contract.

Trial Examiner Hier: Then the objection is overruled.

By Mr. Sprowl:

Q. Now have you ever lost any of your jobber accounts to any of these competitors, you have named because of the lower price?

1347 Mr. Schrup: Same objection.

Trial Examiner Hier: Objection that it would be hearsay?

Mr. Schrup: No, it is calling for a reason which can only be given by the jobber himself as to why he did change, if he did change.

Trial Examiner Hier: Read the question.

(The reporter read the question as follows:

"Question: Now have you ever lost any of your jobber accounts to any of these competitors you have named because of the lower price?")

Trial Examiner Hier: Well, yes, you have got in that "because of lower price." Now certainly he may testify

as to whether or not he lost any accounts to such-and-such if he knows that of his own knowledge.

Now if he has seen documentary evidence, on the other hand, that it was because of the prices—

Mr. Sprowl: I will put it the other way around.

I will first ask the witness if he has lost any jobber accounts to these five competitors, any of these five competitors he has just named?

The Witness: This testimony is about the year 1949, or where am I here?

Trial Examiner Hier: 1949.

Mr. Sprowl: If you want to limit it to 1949.

1348 The Witness: Well, I have lost accounts to some of the people who I named, very definitely.

By Mr. Sprowl:

Q. Did you lose any in 1949?

A. I don't remember specifically whether some of them were in '49 or whether they were in some other year.

Trial Examiner Hier: Well, it is understood it is a fluid proposition. I mean, somebody makes an offer at the end of '48 and the loss occurred in '49, or they make the offer in '49 and the loss may not occur until '50, '51, even, that is understood.

By Mr. Sprowl:

Q. In the last years, '48 to '50, did you lose any?

A. Yes, I had.

Q. About how many?

A. I have lost about five accounts.

Q. Did you gain any accounts in that same period from any of these competitors?

A. One account.

Q. Now the five accounts you lost, why did you lose them, if you know?

Mr. Schrup: Same objection.

Trial Examiner Hier: If you know.

Let's not have what a jobber told you now, let's—that is the objection.

1349 The Witness: Well, I don't know how to answer that one, I'm afraid.

Trial Examiner Hier: Mr. Sprowl, if you want that evidence in merely to show,—not as proof of the fact, but merely to show what he reported to his company as a basis for your client's action in revising its price structure

or maintaining the same price structure, or something else, that is, as I understand, permissible, but for the trust of the statement when it rests on what some jobber told him, I don't believe—

Mr. Sprowl: I am not asking what some jobber told him, I will get to that in a moment, but I want to know the witness' answer to the question;

Why did you lose these five accounts, if you know?

The Witness: Well, at least I was under the impression that I lost them because of price. I mean, for various reasons I was under that impression, as I stated, from the jobber, after his showing me these prices, and so forth, and comparing them with ours, stating that that was the reason, why naturally after such a procedure I had no reason to disbelieve the man.

By Mr. Sprowl:

Q. He showed you the competitive prices?

A. Well—

Mr. Schrup: Just a minute, let him finish his an-
1350 swer so I can make a motion to strike that answer as being hearsay, conjectural and not the best evidence.

Trial Examiner Hier: Let him finish.

The Witness: I have.

Mr. Sprowl: Had you finished?

The Witness: Yes.

Trial Examiner Hier: The answer is based partly on hearsay and partly on visual evidence.

Mr. Schrup: And partly on conjecture.

Trial Examiner Hier: Partly from his deduction, from a hearsay statement heard and a document seen, and if I understand it, that is what his answer rests on, is that right?

The Witness: Yes, sir.

* * * * *

1351 By Mr. Sprowl:

Q. Now, Mr. Ricketts, when you lost these accounts and ascertained in whatever manner you had available to you what you considered the reasons why you lost them, did you pass that information on to the home office in Chicago?

A. Simply that I had lost the account, because I would

like to verify that and say that I have been in my
1352 territory for a good many years, and perhaps it is not justified, but they do seem to let me run that particular end of it to quite some degree, and consequently I simply stated that I had lost the account to a certain company.

Q. Did you know whether or not the home office was acquainted with that certain company's pricing?

A. Well, I know that they are because they normally also get these price sheets, they have them, I think, possibly, so that they should know price structures of these companies.

Q. Well, from your standpoint it was sufficient to advise them you had lost it and to whom you had lost it?

A. That is correct.

Q. Now in the city of New Orleans, how many automotive jobbers are there in that town, if you know?

A. Well, I don't know the exact number; however, there are approximately 35 automotive jobbers, or 40.

Q. Does that include authorized automobile dealers?

A. No, sir.

Q. That is in addition to them?

A. That is in addition to that type account.

Q. If you included those, how many jobbers would there be in New Orleans?

A. I would say at least a hundred.

Q. How many accounts did you sell the Niehoff ignition line to in New Orleans in 1949?

1353 A. Two accounts.

Q. And that was the Greiner account and the Keifer account?

A. Yes, sir, that is correct.

Q. What is Keifer's company name?

A. Automotive Wholesalers.

Q. When you get to New Orleans, do you make any more calls on Greiner or Keifer than you do on the other?

A. No, sir.

Q. The calls are equal in number each time you get there?

A. That is correct.

Q. And you have other accounts in Algiers, and that is across the river?

A. Yes, sir, Algiers and Harvey across the river.

Q. Do you call on them the same number of times you call on Keifer and Greiner?

A. Yes, sir.

Q. In other words, you don't make your calls in New Orleans any differently than you do in any other part of your territory?

A. That is correct. In any area I would work all of the accounts within that particular area when I covered it.

Q. Now you testified about missionary calls, that is, calls on prospects. About how many prospects will
1354 you call on each month as distinguished from established accounts?

A. I would estimate about 15 a month, on an average, possibly 20.

Q. That has to be, as you indicated earlier, something that would indicate to you the prospect might be interested?

A. Yes, very definitely.

In a case of that kind I talk to the jobber and the sales manager or whoever is in charge of such a set-up, and if he has any prospects, why I will be glad to spend that amount of time with him men or with him or whoever it takes to go out and talk to these particular prospects.

Q. Now I don't mean the jobber or dealer prospects, I mean a new jobber prospects.

Trial Examiner Hier: Niehoff prospects.

Mr. Sprowl: I think you and I are confused.

The Witness: I beg your pardon, I was entirely off the beam there, I misunderstood your question.

By Mr. Sprowl:

Q. You are testifying about giving aid to the jobber himself in calling on a prospect?

A. That is correct. I misunderstood your question.

Q. Now what I am talking about, Mr. Ricketts, is how many prospective jobber accounts that the Niehoff Company hasn't sold but perhaps would like to sell who aren't listed as regular customers would you say you call on in a month?

1355 A. Normally about five.

Q. Now how would you get it? What would make you decide to go call on such a prospect?

A. I believe I stated something about that earlier. However, it is through several sources, one of them is through various friends in this particular type industry who may learn something about an account who is dissatisfied, or it may be by direct inquiry to the factory.

Q. Would that be sent back to you?

A. That would be sent back to me and I would in turn at my convenience call on them.

Q. Would some of them be perhaps new jobbers just starting in business?

A. Some of them would be new jobbers starting in business; sometimes people leave their own jobber and go in business for themselves, and I find out about the matter in that way. All of those things of that nature are how we get out prospects with this type account.

Q. In other words, as I get the bulk of your testimony, it is that you want some indication ahead of time that perhaps this prospect is interested and ready to take on the Niehoff line before you go and see him?

A. That is correct. Unless there is some sort of indication, I do not go to see them at all.

Q. In the parlance of the street, do you just go
1356 door bell ringing?

A. No, I don't do that.

Trial Examiner Hier: Selective courtship.

Tell me this, do you and the other Niehoff territorial salesmen get a flat percentage of dollar volume of sales in your respective territories, regardless of the amount or the type of customer, or the bracket they happen to be in?

In other words, is it five per cent of sales, or two per-cent? I don't care about the amount.

Mr. Sprowl: Yes, Mr. Examiner. I think Mr. Frank Guyer already testified about it but it is a quota system. Perhaps you would like the witness to explain it in his territory.

The Witness: Well, yes, they set up a quota system per year, and if we—well, we in turn are paid a salary, expenses, and then after we make our yearly quota, why of course we have a further incentive from the commission set-up.

Trial Examiner Hier: Is that commission, or the percentage, the same sum, it doesn't vary no matter how high you go?

The Witness: Well, after we reach a certain figure it does increase very slightly from there on up.

Trial Examiner Hier: Well, now, do you get any extra compensation either by way of commission or bonus
1357 or any other way for new business over and above what you get on ordinary old business?

The Witness: No, sir, it is all lumped together.

Trial Examiner Hier: And the accounts are all lumped together?

The Witness: Yes, sir, the accounts are all lumped together for quota or commission or total sales.

Trial Examiner Hier: One other question: Is it harder to regain a former customer lost than it is to gain a new customer away from a competitor in your experience?

The Witness: Well, I believe I would say it is harder to regain a customer lost.

Mr. Sprowl: Off the record?

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Sprowl:

Q. Mr. Ricketts, I have just handed you a memorandum prepared by Mr. Murphy of the office of the Niehoff Company in Chicago as to your 1948, 1949 and 1950 trips to New Orleans shown by the same expense book, and I would like you to use that memorandum to if necessary refresh your recollection and tell me when you made your trips to New Orleans in 1949 and 1950?

First of all, do you recall how many times you
1358 went to New Orleans without looking at that memorandum in 1948?

A. No, I wouldn't know exactly other than the fact I attempt to make it three times a year.

Q. Mr. Schrup will be through with that in a minute and you try to refresh your recollection.

Mr. Schrup: Of course we have had to speculate all of the way through on this, but Mr. Steele had looked at the figures in 1949 so we had some opportunity of verification. Mr. Steele has never seen the figures on 1948 or 1950.

Mr. Sprowl: Well, these were taken from the same source of books. If you have any concern about them, we will certainly make them available.

Trial Examiner Hier: The only possible technical objection I could see is the memorandum wasn't prepared by the witness.

Mr. Schrup: That is right.

Trial Examiner Hier: I don't see it makes any difference.

Go ahead and answer the question.

Mr. Sprowl: I think you had better study that, Mr.

Ricketts, and see if it does refresh your memory. If it doesn't, we will I think have to go about it some other way. I think the rule is he has to really have his memory refreshed.

Trial Examiner Hier: That is right. Refreshed 1359 and not supplied.

The Witness: Well, I couldn't refresh my memory definitely on that point. I can't remember specifically all those years what I did, of course, aside from the records here.

Mr. Sprowl: Well, we will have to supply that by Mr. Murphy or the records themselves.

Trial Examiner Hier: What is it you want to establish?

Mr. Sprowl: I merely want to show—

Trial Examiner Hier: When he went according to the company's books?

Mr. Sprowl: According to the company's books, in 1948 he was there.

Trial Examiner Hier: How long?

Mr. Sprowl: January 12 through January 27th he was in New Orleans, June 5th through June 11th, November 13th through November 17th, and that in 1950 he was there from January 20 through January 24, May 5 through May 14, and October 7 through October 14.

Trial Examiner Hier: Well, Mr. Schrup, do you have any reason to doubt that?

Mr. Schrup: No, not so much that, except for the 1949 we had a comparison of it, an overall yearly comparison.

Trial Examiner Hier: I understand that is in the record.

1360 Mr. Schrup: But in 1948 and 1950 we have nothing like that before us.

Trial Examiner Hier: I understand that, but do you have any reason to suspect that the facts just related by Mr. Sprowl are not as related according to the company's books? If you don't have, I am going to let it in subject to check and correction.

Mr. Schrup: I think subject to check and correction will be satisfactory.

Trial Examiner Hier: All right.

Then what Mr. Sprowl has just dictated may be accepted as evidence in this case subject to check by counsel in support of the complaint if they so desire. If they do not desire to do so, and do not check, it will be accepted as a reflection of what the company's official record shows.

By Mr. Sprowl:

Q. Now as I understand your earlier testimony, and as I recollect your earlier testimony, Mr. Ricketts, it was in January of 1949 that your wife was ill?

A. Yes, sir.

Trial Examiner Hier: Do you want to offer that in evidence while you have got it in your mind?

Mr. Sprowl: Yes, I will offer Respondent's Exhibits 60-A through L.

Trial Examiner Hier: Do you have any objection?

* * * * *

1362 *Cross-Examination by Mr. Schrup.*

Q. Mr. Ricketts, you testified I believe that in the territory you have covered you have approximately fifty accounts?

A. That is about correct, yes, sir.

Q. And they fall into four classifications, is that correct?

A. I did not testify as to the classifications.

Q. Well, what classifications do those 50 accounts fall into generally? Do they embrace all four Niehoff classifications?

A. Yes, that is correct.

1363 Q. Well, now, would you tell us approximately how many accounts you have in the J classification?

Mr. Sprowl: What year are you speaking of?

Mr. Schrup: Well, we are directing your attention to 1949.

The Witness: I don't recall. I would say about two.

Trial Examiner Hier: Now wait a minute, let's not get this witness confused. Are you talking about this whole territory or New Orleans or Memphis?

Mr. Schrup: I am asking this. He said he had about fifty accounts in the whole territory he covers.

Trial Examiner Hier: And out of those 50—

Mr. Schrup: I asked him how many would fall into the J classification.

Trial Examiner Hier: Do you understand what he is after, Mr. Witness?

The Witness: Yes, I do.

May I have the classifications repeated for that year, the classifications of accounts?

Mr. Schrup: As I understand it, they are jobber classifications, which is the lowest, jobber with agreement, which is the second lowest, the distributor, which is—excuse me, jobber is the lowest, jobber with agreement is the next highest, the distributor is higher than the jobber with agreement and the distributor with agreement is the highest.

1364 The Witness: Well, I would still say that I had in the neighborhood of possibly three or four J type accounts.

By Mr. Schrup:

Q. And how many JA type accounts did you have?

A. I should think about 12, I would say.

Q. And how many distributor accounts would you have?

A. About four, I would imagine.

Q. Well, that gives us 20 accounts, then there would be 30 accounts left. Would they be distributors with agreements?

A. Well, I would assume so but I don't definitely know.

Trial Examiner Hier: What is the purpose in having this witness guess at something that is in the record.

If you are trying to test his recollection of what goes on in his territory, that is one thing, but I don't think that is what is going on here.

Mr. Sprowl: We can count it all up in the exhibit if you want to know precisely.

By Mr. Schrup:

Q. Now, Mr. Ricketts, with reference to the jobber classification of which you state you had four in your territory, about how much stock or inventory would one of those jobbers carry?

A. In the neighborhood of about $400.00.

1365 Q. To check that, how would that inventory be carried, in a service cabinet of some sort?

A. No, normally it would be carried on a shelf, in a regular stocking procedure of some sort on a shelf.

Q. About how much space would that take up on a shelf?

A. Well, it would take a space of approximately, oh, about nine feet wide and about six feet high, I expect.

Trial Examiner Hier: It would occupy all of that space?

The Witness: I think it would.

Trial Examiner Hier: All of the shelves in that space?

The Witness: Yes, there are a lot of little parts, and it takes a lot of space to get them all out.

Trial Examiner Hier: Yes, but I want to be sure I understood what your answer implied.

By Mr. Schrup:

Q. Do you check inventory stock for the other accounts as well as the jobber accounts?

A. What other accounts do you refer to?

Q. Your accounts, sir, the ones you service in your territory.

A. Well—

Mr. Sprowl: When you are using the word "jobber" you mean the J classification accounts?

The Witness: Some of them, as I testified before.

1366 By Mr. Schrup:

Q. Do you check the inventory of jobber with agreement accounts?

A. In some cases, perhaps, and in some cases they will have a perpetual inventory system.

Q. And would the same apply to distributor accounts, would you check the inventory there?

A. In some cases, yes.

Q. And in the case of a distributor with agreement would you also check inventory there?

A. I can't think of any case at least where they don't have a perpetual inventory system.

Q. Referring, then, to the jobber with agreement, about how much time would you spend in checking inventory there?

A. That is a JA classification?

Q. That is right, sir.

A. I would say that 75 per cent of my accounts are accounts where I definitely have to check stock, as I outlined in my earlier testimony of that type of classification.

Q. What about the balance?

Those that you would check I understand are 75 per cent?

A. That I would have to definitely check, take a physical inventory of it.

Q. Of 75 per cent of your jobber with agreement accounts?

1367 A. Yes, sir.

Q. Now how much time would you spend doing that with any jobber with agreement account?

A. Well, I would spend probably, oh, anywhere in the neighborhood of five hours upward.

Trial Examiner Hier: If I understand correctly, you have to check or feel you should check, and in fact do check the inventory of any account regardless of classification where a perpetual inventory system is not used, and they do not have a stockman, is that correct?

The Witness: That is right.

Trial Examiner Hier: And the situation is that the J accounts are almost without exception in the latter situation whereas there are a few JA accounts and a few D accounts which do not have perpetual inventory or a stockman, and therefore you check those, is that a fair summarization?

The Witness: Well, I would say so, both J and JA type accounts.

Mr. Schrup: Maybe I misunderstood you, but I thought your testimony was that of the JA accounts about 75 per cent of those you actually checked.

The Witness: That is right.

Trial Examiner Hier: That is right, three out of four.

The Witness: Actually taking the physical inventory.

1368 There is a difference between taking physical inventory and just checking the stock.

By Mr. Schrup:

Q. In what way do you operate differently in a jobber account that is a J classification then you do in a jobber with agreement account?

A. Well, I operate primarily the same way with those type accounts who don't have a perpetual inventory system.

Q. With those accounts that have a perpetual inventory system do you check the record there?

A. That is correct.

Q. How much time do you spend there on an average?

A. Normally about two hours.

Q. Mr. Ricketts, you testified that you lost some accounts solely on the basis of price alone.

Trial Examiner Hier: Now wait a minute. Are you getting off the subject? You were going to ask general questions about 60-A through -L. Are you through with that subject?

Mr. Schrup: No, I am coming into some more of it.

Trial Examiner Hier: You are going into the 2-B matter.

I want to get that exhibit disposed of one way or the other. It has been tendered here.

1369 By Mr. Schrup:

Q. With relation to your calls on the various jobbers classifications, that is, the J, the JA, the D and the DA, during 1949 did you keep any actual record of the time you spent with each account?

A. No, sir, I did not.

Q. One other question, Mr. Ricketts: What proportion of your volume of sales in your territory in 1949 was obtained through sales to the DA classification accounts?

A. I couldn't answer.

Trial Examiner Hier: That is all a matter of record.

Mr. Sprowl: We have got it here in the sealed exhibit. Do you want to stop and add it up?

Trial Examiner Hier: It is just a matter of adding up what is on that page, is it?

Mr. Sprowl: We will concede it is probably quite substantial because the Cotton States members were in this territory.

Mr. Schrup: We have no objection to 60-A through -L into evidence.

Trial Examiner Hier: Without objection, Respondent's Exhibit 60-A through -L is admitted in the record.

(The documents referred to, heretofore marked for identification RESPONDENT'S EXHIBITS 60-A through -L, were received in evidence.)

1370 Trial Examiner Hier: Now you may go ahead with the rest of your cross-examination.

By Mr. Schrup:

Q. Now, Mr. Ricketts, how long have you been traveling the territory known on the map, Respondent's Exhibit 25, as Territory 9?

A. I have been traveling the geographical territory outlined on that map as I stated before since October 1939, I believe it was.

Q. Now, Mr. Ricketts—

Trial Examiner Hier: The boundaries have been changed once or often since then?

The Witness: The boundaries have been changed here and there.

By Mr. Schrup:

Q. Did you pioneer that territory?

A. Well, I wouldn't say that, no.

Mr. Sprowl: I think Daniel Boone got there first.

By Mr. Schrup:

Q. How many actual accounts did you have when you entered that territory?

A. Oh, I just don't know, I don't remember.

Q. Well, would you say you had half of the accounts you have today?

A. I think so, yes.

1371 Q. And since 1949 you have increased your accounts in that territory?

A. Since '49?

Mr. Sprowl: '49?

Mr. Schrup: Yes.

The Witness: By one account, as far as I can remember.

By Mr. Schrup:

Q. So that it just follows, then, that in 1949 you had twice as many accounts as you had in 1939 in that territory?

A. That could be possible. As I said, I am not certain about what transpired in 1939.

Q. You stated that you had lost some accounts to competitors of the C. E. Niehoff Company on the basis of a lower price alone, is that correct, as I understand it?

A. I stated that that was what the jobber showed me and told me was the reason for it, yes.

Q. And could you give us the names of those jobbers that you lost on that basis?

A. I lost the Edwins Auto Supply.

Q. Where are they located?

A. Gulfport, Mississippi.

Q. What classification was that account?

A. He was under a J classification.

Q. What, sir?

1372 A. I am sure it was a J.

Q. J classification?

A. Yes.

Q. When did you lose that account?

A. I am sure it was in 1950.

Q. 1950. And what other account now?

A. I lost the Hanna-Gray Company. Do you want them by name?

Q. Yes.
A. The Hanna-Gray Company.
Q. Where are they located?
A. Fort Smith, Arkansas.
Q. What classification was that?
A. They were on a JA classification.
Q. When did you lose them?
A. I believe that was also in 1950.
Q. Any others?
A. I am trying to remember some more.

Trial Examiner Hier: I think you said previously there were five you lost and one you gained.

The Witness: I can't remember who they were.

Trial Examiner Hier: Give him that sheet and let him look at it, maybe it will refresh his recollection.

Mr. Sprowl: Of course it wouldn't have anything he lost prior to '49.

1373 Mr. Schrup: Just those he gained.

Mr. Sprowl: It would have those.

The Witness: Here is one, the first one on the list, the Davis Whitton Parts Company, Albertville, Alabama.

By Mr. Schrup:

Q. What classification are they?
A. It is J. I don't have to guess at this one, it is here.
Q. When did you lose that?
A. Again I am not positive of that, but I think that was also in 1950.
Q. By the way, the Edwins Automotive Supply Company, to whom did you lose that customer?
A. Filko.
Q. Filko?
A. Yes.
Q. Where are they located?
A. F & B Manufacturing Company of Chicago.
Q. I neglected to ask also to whom you lost the Hanna-Gray account?
A. I lost them to Standard Motor Products.
Q. And Davis-Whitton, who did you lose them to?
A. The next one is—
Q. Davis-Whitton, who did you lose them to?
A. Oh, I beg your pardon, I lost that to Guaran-
1374 teed Parts Company.

The next account is Nunnally's Auto Supply at

Gadsen, Alabama, the classification is J and I lost it to P & D.

Q. When did you lose it?

A. I would have to guess again at 1950, that must have been my good year.

Q. Did you lose any in 1949?

A. I don't remember. I couldn't remember specifically without looking at the record.

Q. Aren't you looking at the record for 1949 there?

A. I know, but—

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

The Witness: In other words, here I have Nunnally's Auto Supply of Gadsen, Alabama, and it shows $139.00, and apparently that is for the year.

Mr. Schrup: That is as I understand it, and that was a customer of C. E. Niehoff Company in your territory for the year 1949?

The Witness: Yes.

Mr. Schrup: So you have all of the customers for 1949 in front of you?

The Witness: Yes.

Trial Examiner Hier: By virtue of Commission's 1375 Exhibit 48-A through -E, is that right?

Mr. Schrup: That is right.

The Witness: Then I would say it is quite obvious I lost this particular account in 1949 because the record here will indicate its purchases were only $139.00.

Trial Examiner Hier: What the witness means is that looking at the exhibit, the purchases are only $139.00, and it is obvious to him the account was lost in 1949, otherwise the purchase volume would have been much higher, is that right?

The Witness: That is correct.

Mr. Schrup: We had better look to see if Edwins is on there.

Mr. Sprowl: It is on there, I looked it up.

By Mr. Schrup:

Q. Examining Exhibit 47-A through 1-E, Commission's Exhibit 47-A through -E for the year 1949, is there any customer you had for the year 1948 that does not appear on that exhibit?

A. I cannot give you the answer to that, it is impossible.

Q. Well, now—

Trial Examiner Hier: What do you mean by "Is there any customer in 1948 that doesn't appear?"

Mr. Schrup: I am trying to find out what cus-
1376 tomers he lost in 1949 as a result of his pricing in 1949.

Trial Examiner Hier: I see, here is '49, and what customers he had in 1948 not appearing on this exhibit, and the inference would be that he lost them along in the latter part of '48 or some time along in '49, is that right?

Mr. Sprowl: I submit you should pursue what you have been asking, because he said obviously he lost Nunnally's in 1949, and I assume if you go back and ask the question about Davis-Whitton—

Mr. Schrup: I would like to have the witness answer the question pending.

Trial Examiner Hier: He did answer it. He said he didn't know, he couldn't tell.

The Witness: I said it was impossible.

By Mr. Schrup:

Q. You have named four. Name the fifth customer you lost.

A. Wait just a minute here. I would like to answer the question. You asked me a question a while ago and I would like to now answer that question about the accounts which I lost in '49.

Q. Pardon?

A. You asked me a question a while ago, what accounts I lost in 1949, is that correct?

Q. That is right.

1377 A. And I answered one of those accounts which I said was obvious because of the record I now have before me, if I can just check the record,—

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

From an examination of Commission's Exhibit 47-A through E, particularly the amount of the annual volume of purchases shown thereon, the witness states, or has stated off the record, that the Davis-Whitton Parts Company, a J account, must have been lost during 1949 because of the low volume of purchases, this account in his experience having produced a higher volume of purchases than is shown on the exhibit annually.

The same is true of the Hanna-Gray account, a JA account in Fort Smith, Arkansas, for the same reason.

The same is true of the Nunnally's Auto Supply, a JA account in Gadsen, Alabama.

And that also in 1949 he lost the Wein Auto and Implement Company, a JA account in Greenville, Kentucky.

To whom?

The Witness: I don't remember that particular one.

Trial Examiner Hier: They are going to ask it so I might as well put it in here.

The Witness: I don't believe I have got the dope 1378 in my head at the moment on that one.

Mr. Schrup: What classification?

Trial Examiner Hier: Their classification is JA, and the same is true of the Edwins Auto Supply, a J account at Gulfport, Mississippi.

Now I think that summarizes the off the record discussion. I don't know if there is anything to be added to it.

By Mr. Schrup:

Q. Mr. Ricketts, what account did you gain in 1949?

A. I don't remember of any.

Q. I thought you testified you gained one, or was that in '50 you gained that account?

A. 1951.

Q. 1951?

A. Yes, sir.

Q. What account was that?

A. The Tupelo Products Company, Tupelo, Mississippi.

Q. What classification are they?

A. DD, I am sure, today, under the present classification.

Q. He is what?

A. DD classification.

Mr. Sprowl: What would that be?

The Witness: The same as a D was before.

1379 By Mr. Schrup:

Q. Who did you gain that account from?

A. I gained that account from Guaranteed Parts Company.

Q. During the year 1949 how many times did you call on the Edwins Auto Supply Company?

A. Well, I would say I must have called on them three times. I am not positive.

Q. How about the Hanna-Gray Company?

A. About the same amount, it should be.

Q. Davis-Whitton Parts Company?

A. It should be about, I believe, the same amount, or three times.

Q. Nunnally?

A. However, I couldn't have called on them very much in '49 after I lost them, so after I lost the account, naturally I would eventually quit calling on him.

This applies to the other accounts in question, too, such as Hanna-Gray, or these other accounts I lost, Nunnally, I wouldn't call on them afterwards.

Q. How many times, by the way, did you call on Tupelo Products before you gained them as a new account?

A. One time.

Q. About how much time did you spend with them?

A. As I remember it, anyhow, about two hours, that was in selling.

1380 Q. How large an initial order did they place with you?

A. $1100.00.

Trial Examier Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

We will adjourn at this time until 10:00 o'clock tomorrow morning.

Are you almost through, Mr. Schrup?

Mr. Schrup: No.

Trial Examiner Hier: All right, we will adjourn until 10:00 o'clock.

(Whereupon, at 5:00 o'clock p.m., June 16, 1952, the hearing in the above-entitled matter was adjourned.)

1381 Room 1500, 173 West Madison Street,
Chicago, Illinois,
Tuesday, June 17, 1952.

Met, pursuant to adjournment, at 10:00 a.m.

Before: Frank Hier, Trial Examiner.

Appearances:

E. P. Schrup, Attorney for the Federal Trade Commission.

Charles R. Sprowl, 134 South LaSalle Street, Chicago, Illinois, Attorney for the Respondent.

1382 Proceedings.

Trial Examiner Hier: Go ahead.

RAY M. RICKETTS resumed the stand and testified further as follows:

Cross-Examination by Mr. Schrup (Continued).

Q. Mr. Ricketts, in the sale of Niehoff products in your sales territory during the sample year 1949, what companies were your principal competitors?

A. Well, United Motor Service, which is Delco-Remy, Auto-Lite and Standard.

Q. That is Standard Motor Products?

A. Standard Motor Products, Guaranteed Parts Company and Tungsten.

Q. Where are they located?

A. I think it is either New York or Long Island.

Mr. Malina: Union City, New Jersey.

The Witness: That is correct.

And Tasco.

By Mr. Schrup:

Q. Do you know where they are located?

A. In the east, I think it is New York.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

1383 Trial Examiner Hier: On the record.

The Witness: And Holley.

Mr. Schrup: Holley?
The Witness: H-o-l-l-e-y, and Wells.

By Mr. Schrup:

Q. Do you know where they are located?
A. Fond du Lac, Wisconsin.
Those are the principal competitors in my territory.
Q. United Motor Service competes with you on what? That is, the Niehoff Company.
A. On our ignition line.
Q. And Auto-Lite the same?
A. The same.
Q. Guaranteed Parts the same?
A. The same.
Q. Tungsten?
A. The same, yes, sir.
Q. Tasco?
A. Yes, sir.
Q. Holley?
A. Yes, sir.
Q. And Wells?
A. Yes, sir.
Q. Now what other competitors do you have in your territory?
A. I would say that we very definitely have competition from General Motors Corporation selling to their 1384 car dealers who are operating as jobbers.
Q. I am referring now to seller competition, what other manufacturers do you have that compete with the Niehoff Company in sales in your area?
A. Well, I still contend that that is a competitor.
Q. Please name the other manufacturers that are competitors. Now you have named 1, 2, 3, 4, 5, 6, 7, 8 manufacturers who compete in the sale of the ignition line with the Niehoff Company in your sales area.
Now are there any other manufacturers that compete in your sales territory?
A. Yes, Surehead Products.
Q. Do they compete with you in the ignition line?
A. Yes, sir.
Q. Where are they located?
A. At Waukegan, Illinois.
Q. Any others?
A. That virtually completes my competition from that standpoint.

Q. I believe yesterday that you mentioned that you lost the Nunnaly Auto Supply Company to a competitor?

A. Yes, I overlooked one apparently in my testimony just now. I overlooked one which is P & D Manufacturing Company.

Q. And that is the ignition line?

1385 A. Yes, sir.

Q. Do you know where they are located?

A. Either New York or Long Island City.

Q. You mentioned yesterday a concern by the name of Filko. Does that have another name?

A. F & B Manufacturing Company.

Q. Are they not a competitor of yours?

A. Yes, sir, I overlooked that one this morning.

Q. Is it in the ignition line?

A. Yes.

Q. Do you know where they are located?

A. Chicago.

Q. I couldn't remember as to the competitor you stated you lost the Wein Auto & Implement Company in Greenville, Kentucky, to?

A. I am unable to remember that.

Q. You didn't state that yesterday, did you?

A. No.

Q. Now these competitors are all in the ignition line. Do you have any other competitors on any other products of Niehoff, hydraulic brakes, for instance, in your territory?

A. Yes, I have competition on hydraulic brake parts.

Q. Who would they be?

A. Wagner Electric Corporation, United Motor Service, again with Delco, Supco Products.

Q. Where are they located?

1386 A. In the east. I think it is New York again.

Q. Where is Wagner Electric located?

A. St. Louis.

Eis.

Q. Where are they located? Is that the full name?

A. Yes, sir, Eis Manufacturing Corporation, Middletown, Connecticut.

Thermoid Rubber Company.

Q. They are in Trenton, New Jersey, I believe?

A. That is correct, also a brand by the name of Pilot. I can't give you the location of the firm.

We also have competition in my territory from Shefford-Master.

Q. Where are they located?

A. At Fairfield, Illinois.

Q. Do you have any competition down there from E. Edelmann & Company?

A. No, sir.

Q. No, sir.

Q. That completes the list of competitors?

A. Yes, sir, that would complete the list of competitors.

Q. The competitor you described as Pilot, is that the brand name?

A. Yes, sir.

Q. Do you know the name of the manufacturer?

1387 A. I don't remember the name of the manufacturing company.

Q. Now referring to the competition of the Niehoff Company on the ignition line, which of these sellers has a higher jobber list price than Niehoff?

A. Well, none at all to my knowledge except United Motor Service.

Q. Which of these competitors, again referring to the ignition line, had a lower jobber list price than Niehoff? Understand that is before any discount is taken from it.

A. Again I think I could go right down the line, it would be Tungsten, B & D, Surehead, and Filko, Tasco, in fact all of the accounts or all of the competitors which I named there.

Q. How about Auto-Lite?

A. Well, that is practically the same.

Q. The same. Standard Motor Products?

A. Standard Motor Products practically the same.

Q. Guaranteed Parts?

A. It is lower.

Q. Holley?

A. Holley is virtually the same.

Q. Wells?

A. Wells is lower.

Q. Now referring to the hydraulic line, which of

1388 the companies that you have mentioned as competitors have a lower or have a higher jobber list price than Niehoff?

Maybe I could help you by reading off the companies. Wagner Electric?

A. It is the same.

Q. United Motor Service?
A. Again it is the same.
Q. Supco Products?
A. It is lower.
Q. Eis Manufacturing?
A. It is lower.
Q. Thermoid?
A. It is also lower.
Q. Pilot?
A. Very much so, very much lower.
Q. Shefford Master?
A. Lower.
Q. Now referring to the various competitors of Niehoff in your sales area on the ignition line, I will ask you which of these competitors, if any, had a higher net cost or higher net jobber cost price, that is, the list price after all discount is taken.
United Motor Service, if you know?
A. United Motor Service does have.
Q. That would be higher?
1389 A. Yes, sir.
Q. Auto-Lite?

• • • • •

By Mr. Schrup:

Q. Coming back to my question, Mr. Ricketts, as
1390 regards the ignition line, and to help you I will read off the companies you have established as competitors of the Niehoff Company in your sales area, and I will ask you which of these companies had a higher net jobber cost price than the Niehoff Company?
United Motor Service?
A. Yes, sir.
Q. That is higher.
Auto-Lite?
A. About equivalent.
Q. Standard?
A. It would be lower.
Q. Guaranteed Parts?
A. Lower.
Q. Tungsten?
A. Lower.
Q. Tasco?
A. Lower.
Q. Holley?

A. Equivalent.
Q. Wells?
A. Lower.
Q. Surehead?
A. Lower.
Q. P & D?
1391 A. Lower.
Q. F & B?
A. Lower.
Q. Now turning to the hydraulic line, Wagner Electric?
A. Slightly higher.
Q. United Motor Service?
A. Slightly higher.
Q. Supco Products?
A. Lower.
Q. Eis Manufacturing Corporation?
A. Lower.
Q. Thermoid?
A. Slightly lower.
Q. Pilot?
A. Very much lower.
Q. Shefford?
A. Very much lower.
Trial Examiner Hier: Off the record.
(Discussion off the record.)
Trial Examiner Hier: On the record.

By Mr. Schrup:

Q. Mr. Ricketts, now with reference to the four jobber classifications of the Niehoff Company during 1949, that is, the J classification, the JA classification, the D classification and the DA classification, the jobber list price
1392 to all of those classifications was the same?
A. That is correct.
Q. The variation in price occurred in the net jobber cost price to these jobbers, that is, the discount from list price? The discount or rebate?
A. That would be correct.
Q. Now with reference to your testimony with regard to the various competitors of the Niehoff Company in your sales area in the ignition line, those competitors which you have described as having a lower net jobber cost price than the Niehoff Company, does that apply to all of the jobber classifications of the Niehoff Company?
A. In my territory it does, very definitely.

Q. Well, did any of these companies to your knowledge have any comparable classifications as the Niehoff Company did of customers?

A. They have such contracts, yes, but in the cases which I have run across it has been a very definite discount arrangement whereby many of these contracts have been by-passed.

Q. What do you mean "by-passed?"

A. Well, I mean by that perhaps maybe they would give them straight 20 off of the price. In other words, from the jobber price they would give them a straight 20, say.

Q. That leads me to ask you this: You testified yesterday that you lost five accounts during 1949, three in
1393 the jobber classification, that is, the J classification, and two in the JA classification. Were those lost to competitors of the Niehoff Company on the basis of the published list prices and discounts from list prices of those competitors?

A. Well, if you want me to be specific, I will be.

The Hanna-Gray Company, for instance, in Fort Smith, Arkansas, was lost to Standard due to the fact that they joined a buying group and are now getting a 20 per cent discount, according to what they have shown me, at least.

In the case of Edwins Auto Supply at Gulfport, Mississippi, in that case it was a price sheet setup. In other words, it was definitely due to the price structure of the price sheets themselves without a further discount.

Q. That is the actual price list of that competitor?

A. That is correct.

Q. Now without a discount of any kind?

A. Yes, sir.

Mr. Sprowl: It was lower?

The Witness: Yes.

By Mr. Schrup:

Q. That is, their list price to the jobber before discount was lower than the list price of the Niehoff Company before discount of after discount?

The Witness: Will you please restate that?

Mr. Schrup: Read it.

1394 (The reporter read the question as follows:

"Question: That is, their list price to the jobber before discount was lower than the list price of the Niehoff Company before discount or after discount?)

The Witness: I would say after discount.

By Mr. Schrup:

Q. What about Davis-Whitton Parts?

A. The same applied there.

Q. To your knowledge did they purchase on a list price without discount?

A. I don't want to say definitely. As I remember that particular case, they got 20 off of the price sheet for that particular company.

Q. How about Nunally's Auto Supply?

A. That was a price structure.

Q. What do you mean by that, sir? What is that?

A. That was off of price sheets.

Q. Nunnally's Auto Supply Company you testified was lost to a competitor. Now did they purchase from this competitor on the basis of the list price without discount?

A. Yes, in that particular case.

Q. What about the Wein Auto & Implement Company?

A. I don't recall, as I stated before, in that particular case.

1395 Trial Examiner Hier: Were these losses that you testified to before of four or five customers solely due to price competition or other types of competition?

The Witness: Well, at least they stated so and showed me some of the figures, the reason that they changed. They always gave that reason, very definitely.

Trial Examiner Hier: No, I don't mean that.

Mr. Sprowl: Was it price?

Trial Examiner Hier: Was it price, or was it service and price, or was it service?

The Witness: They stated price.

By Mr. Schrup:

Q. Now what about the Davis-Whitton Company, did they join a group, a buying group?

A. No, sir.

Q. And you stated that you lost them on the basis that they bought from the list price of that competitor minus a 20 per cent discount?

A. I stated that I wasn't positive about the 20 per cent, but I believe that it was. I can't remember definitely.

Q. Now do you recall what group the Hanna-Gray Company joined?

A. Southwest Distributors.

Q. Now referring to the customer you gained, Tupelo

Products Company, who were they purchasing from?

1396 A. Guaranteed Parts.

Q. And on what basis were they purchasing from Guaranteed Parts?

A. They were buying on one of their regular type contracts, actual setups.

Q. What type particularly?

A. Well, I couldn't give the specific one.

Q. What discount were they obtaining from list price?

A. They were obtaining according to them 15 per cent from—

Q. From list price?

A. Yes.

Q. When you obtained them, what did you offer?

A. I offered them 10 per cent.

Q. From list price?

A. Yes, sir.

Q. And what is the actual net cost jobber price they obtained their merchandise for from C. E. Niehoff Company as a result of your offer, was it higher or lower than the net merchandise price they were paying your competitors from whom you obtained them?

A. Well, it would run somewhat higher.

Q. That is, the price they paid you, the net price would be higher?

A. That is correct.

1397 Trial Examiner Hier: Then why in your opinion did they proceed to buy from you instead of from the former source of supply?

The Witness: Well, in that particular case I think it was service.

Trial Examiner Hier: You got them on service competition rather than price competition?

The Witness: That is right.

Trial Examiner Hier: Service in what respect? Do you furnish them shelving or cabinets or displays or more frequent trips or quicker delivery, what?

The Witness: I think it was probably more the lack of service on the part of the competitor in that particular case.

Trial Examiner Hier: What type of service, that is what I am trying to get at.

The Witness: Calling on the account and taking care of the account. I believe that he was possibly neglected somewhat.

Trial Examiner Hier: Go ahead, Mr. Schrup.

By Mr. Schrup:

Q. Now, Mr. Ricketts, with reference to the prices you have testified to as regards the competitors of Niehoff Company in your sales area in both the ignition and hydraulic lines, and with reference to the highest prices
1398 and the discounts from list prices that obtained in your sales area with reference to the Niehoff products, would the ignition line and the hydraulic line in 1948 and 1949 be substantially the same as they are today?

Excuse me, I withdraw that.

Were they substantially the same in 1948 as they were in 1949?

A. I couldn't answer your question on that, I am not positive.

Q. Had there been any changes in discount in 1949 that were not present in 1948?

A. Well, again I can't answer your question, I am not sure.

Q. You are certain as to your competitors, but not as to your own products?

A. Well, of course when I spoke of my competitors, I am talking about what is going on today, naturally, when my memory is fresh.

Q. You are not certain as to 1948 or 1949 as regards your competitors?

A. Well, I am substantially so, yes, sir.

Q. Well, then, but you still can't tell me as regards your own products for the year 1949?

A. I wouldn't say that we did or didn't have a slight change in our program because we do from year to
1399 year sometimes.

Q. Did you have any changes from 1949 to date in your discount schedules?

A. I think that is correct.

Q. There have been some or there have been no changes?

A. There have been some.

Q. There have been some, and in what classifications have they been?

A. In the JA classifications, it is either '48 or '49, there has been a change in the classification of JA which has been reduced somewhat from the requirement. In other words, I think at this time that it was $1800.00 and today

it is $1200.00, and there has been a slight reduction in that along the line.

Q. That is, the reduction in the amount of merchandise that you bought to obtain a certain discount?

A. That is correct.

Q. The discount structure did remain the same, did it not? The discount rate?

A. Yes, sir.

Q. Now in making sales of the Niehoff products in both the ignition line and the hydraulic line in your territory in 1949, that was made on the basis of prices available to all customers?

A. Yes, sir.

Q. That is, a published list price and a published
1400 discount list price?

A. Yes, sir.

Q. Published discount from list price, I should say.

Mr. Sprowl: The answer is?

The Witness: The answer is still yes.

By Mr. Schrup:

Q. That was true in 1948?

A. As far back as I can remember, as many years as I have been down there.

Q. The jobber list prices and the discount from list prices made to the customers in your sales area are on the basis of published list price and on published discount from list price?

A. I don't quite understand your question.

Q. Well, as I understand it, your sales in 1948, and your sales in 1949, and since, today, have always been made on the basis of a published list price available to all jobbers?

A. That is correct.

Q. And a published discount from list price which is available to various jobbers according to their classification by the C. E. Niehoff Company?

A. That is correct.

Mr. Schrup: May we have just a short recess?

Trial Examiner Hier: What for?

1401 Mr. Schrup: The package we sent for has arrived and we would like to open it.

Trial Examiner Hier: All right.

(Short recess.)

Trial Examiner Hier: Go ahead.

By Mr. Schrup:

Q. Mr. Ricketts, during your direct examination yesterday, Mr. Sprowl directed your attention to the fact that Mr. Fenberg of the Union Auto Electric Service, Memphis, Tennessee, had stated that the Automotive Electric Service, Bowers, Inc., and A & B of Memphis, Tennessee were competitors of the United Auto, or Union Auto Electric Service, in the resale of automotive products.

I believe you stated that they did not purchase any products from C. E. Niehoff Company.

A. That is correct.

Q. Have you made any calls on those people?

A. I have but it has been quite a long time ago.

Q. Did you make any calls during 1949?

A. No, sir.

Q. Now in the same city he also stated he had as competitors the J. B. Cook Company and Stratton Warren.

Mr. Sprowl: I object to that. That isn't what the witness stated. He testified "And possibly J. B. Cook and Stratton Warren."

1402 Trial Examiner Hier: Let's look at the record. Instead of fooling around, pass it up there and use the phraseology which is in the record.

Mr. Schrup: I will amend it to adopt his phraseology "And possibly J. B. Cook Company and Stratton-Warren Sales."

Do they purchase products from the Niehoff Company?

The Witness: Yes, J. B. Cook Company and Stratton-Warren Sales Company.

By Mr. Schrup:

Q. Now are those the only jobbers that you call on in Memphis? Are those two the only jobbers?

A. No, sir. I call on the Union Auto Electric Service; I call on the Chelsea Auto Parts Company.

Q. Are there any others?

A. No, that is it. Those are my accounts in Memphis that I call on.

Q. Those are the four accounts in Memphis that you call on?

A. Yes.

Q. And each of these accounts, how many times a year did you call on them in 1949?

A. Between three and a half and four times.
Q. You don't make a half a call, do you?
A. Well, it will average out that way, that is what I am getting at.
1403 Q. It is your testimony, then, that for the year 1949 you called on the J. B. Cook Company not in excess of three times or four times?
A. Not in excess of four times in the normal routine of business.
Q. And Stratton-Warren Sales, you called on them not in excess of four times?
A. I think that is correct.
Q. Are you basing that on what you call normal routine or are you basing that on your actual knowledge?
A. No, on my normal routine of business with those accounts.
Q. Now take this year, for example, your memory would be pretty fresh on that, would it not?
A. Yes, I think it would.
Q. How many times so far this year have you called on the J. B. Cook Company?
A. On official business about twice.
Q. What do you mean by "official business?"
A. Well, occasionally I will stop by if I am in town. As I mentioned in my earlier testimony, when I am in Memphis I do kill some time, naturally, with my family, and so forth.
Q. Well, how many times have you called on the J. B. Cook Company this year up to now officially or unofficially as you term it?
1404 A. Possibly altogether, unofficially and on business, I would say four times.
Q. And the same would apply to Stratton-Warren Sales?
A. About an equal amount, yes, sir.
Q. What about the other two accounts you sell in Memphis?
A. About the same type of routine.
Q. Now on each of these official calls that you make, I believe you stated you make two official calls on the J. B. Cook Company?
A. Yes, sir.
Q. How much time did you spend on each call?
A. Oh, to my recollection about four hours on each call.

Q. What did you do during those calls?

A. Made up an order with them through their card system.

Q. Referring to the Stratton-Warren Sales Company, you made how many official calls?

A. The same thing.

Q. That is, we are talking about this year, how many times or how much time did you spend on each call with them?

A. The same amount of time.

Q. That is four hours each. And what did you do?

A. Again made up an order from their card system.

1405 Q. And the Chelsea Company, you called about how many times?

A. About two times.

Q. Two times.

A. Yes.

Q. Officially?

A. Yes.

Q. And how much time did you spend during each call?

A. Well, I spent something over a half a day, I would say, altogether, possibly six hours, or six and a half hours.

Q. What did you do?

A. In that case I took the physical inventory of their stock and went to the owner and finally made up an order.

Q. What about the other company?

A. Well, Union Auto Electric Service?

Q. Yes.

A. In that case—

Q. How much time,—no, first how many calls did you make this year?

A. I made two officially.

Q. Now did you make unofficial calls at those other concerns, too, the Chelsea Company and Union Auto?

A. Yes, sir, I have.

Q. What do you do during these unofficial calls?

1406 A. Well, I kill a little time, actually.

Q. You attempt to make no sales?

A. Visit a little bit.

Q. Do you ever describe your products or attempt to make sales, to further the promotion, to help merchandise?

A. Very seldom, anyhow. I may go out and have some coffee, what have you.

Q. Coming back to the last company, you stated you

made two calls this year and you spent how much time each call?

A. I don't understand your question.

Q. The last company, I think it was the Union Electric in Memphis. You made two calls this year?

A. Yes.

Q. How much time did you spend each call?

A. I would say in that case about three hours and a half.

Q. What did you do during that time?

A. Also in that case made up an order.

Q. Now that is what you described as your normal procedure?

A. Yes, sir.

Q. That would apply during the year 1949 as well as this year?

A. Yes, sir.

Q. Incidentally, these four companies you have described as your customers, does each one of these customers make over the counter sales?

1407

A. Yes, they all do.

Q. Now with reference to your normal procedure of calls, I direct your attention to the year 1949 in the city of New Orleans.

How many times did you visit the city of New Orleans in 1949, would you say?

A. I testified yesterday twice.

Q. How many days did you spend during each visit to New Orleans?

A. That of course I am not certain of.

Mr. Sprowl: Do you want that exhibit to refresh your memory?

Mr. Schrup: If you would like to refresh your memory, you may.

The Witness: Yes, I would like to. I don't remember specifically.

Mr. Schrup: Do you have a copy to give him, Mr. Sprowl?

Mr. Sprowl: Yes, I will give him my copy.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

The Witness: On one visit I spent 16 days; on the second visit I spent seven days.

1408

By Mr. Schrup:

Q. The first visit was June 10th through June 25th, 1949?

A. That is correct.

Q. The second visit was November 11th through November, 17, 1949?

A. That is correct.

Q. The first visit being 16 days and the second visit 7 days?

A. That is correct.

Trial Examiner Hier: According to the record of the company and not according to the recollection of the witness?

Mr. Schrup: That is correct, sir.

Is that right?

The Witness: That is correct.

By Mr. Schrup:

Q. Now during your first visit—

Mr. Spowl: I wish to suggest, Mr. Hier, in your statement that that company record we are speaking of was made from the witness' own travel books.

Trial Examiner Hier: Yes, I understand. I think that is all covered. I think it was all covered yesterday, I don't know what the purpose of this reiteration is.

By Mr. Schrup:

Q. Now during your first visit of 16 days, what 1409 did you do in New Orleans?

A. In that particular case I spent some time with my jobbers in doing work with them on some prospects which they had for dealer type cabinets or service stocks.

Q. Would you be more specific? What jobbers did you spend some time with and about how much time with each jobber?

A. Well, again I don't think I can answer that except that I spent some time with Greiner Auto Parts Company and I spent some time with Automotive Wholesalers, and if my memory serves me correctly, also with the West Side Auto Supply at Algiers and Harvey, Louisiana.

Q. Now those two wholesalers you mentioned in New Orleans during this 16 day interval, how many days did you spend with each one of those?

A. Well, again I couldn't answer that question specifically. I just don't remember.

Q. Well, as I understand it, would your testimony be that you spent an equal amount of time with each one of those two wholesalers?

A. Well, I possibly spend,—I may have spent more time with one account on dealer calls than I did another because of the number of prospects he may have had, which I entirely base that upon.

Q. Now by the number of prospects, do you mean
1410 you accompanied the salesman of the jobber to call on prospective customers?

A. That is correct.

Q. How many salesmen does Greiner have?

A. Greiner has four salesmen?

Q. Did you accompany each one upon those calls?

A. No, sir.

Q. One or two?

A. Mr. Greiner personally generally does that with me, so I don't have to spend all of this time.

Q. Do you call on an equal number of prespects for the Greiner Company as you do for Automotive Wholesalers, or how does that work?

A. Well, again, as I stated before, there is only one manner in which you can handle that, and that is from the actual number of prospects a jobber has.

Q. Mr. Ricketts, as I gather, the purport of your testimony is that you spent an equal amount of time with the small wholesaler, the small wholesaler down in New Orleans, as you do with the very large customer you have in New Orleans, is that the purport of your testimony?

A. That is correct, in normal procedures.

Q. And your normal procedure never varies?

Trial Examiner Hier: I don't understand that. The gentleman has said three times within the last twenty
1411 minutes that he doesn't know how much time he spent with each account in 1949 on these various visits. Now this answer comes along which confuses the matter still more.

By Mr. Schrup:

Q. Well, Mr. Ricketts, as a matter of fact, did you not during this interval, June 12th and 13th through June 19th, conduct a school for Greiner's salesmen in New Orleans according to the official records of your company?

A. Well, that is very possible; if it was a school, how-

ever, it was one of very short duration on voltage regulators, it takes about thirty minutes to do it.

Q. You mean very short duration of one week?

A. No, sir.

Mr. Sprowl: He said thirty minutes.

The Witness: I said thirty minutes.

By Mr. Schrup:

Q. Well, as a matter of fact, was this school not conducted from June 13th through June 18, 1949?

A. No, it could not be. It is an impossibility.

Q. Did you not submit that material to the C. E. Niehoff Company, I believe on your expense accounts?

A. That again would be impossible for me to submit what you so state.

Mr. Schrup: Mr. Sprowl, will you make those records available to us?

1412 Mr. Sprowl: Well, what is it you want?

Mr. Schrup: I base that on the fact that Mr. Steele's work sheets disclose the information that I have questioned him about.

Mr. Sprowl: I move that remark be stricken as not evidence, and if you want these books, we will get them out.

Trial Examiner Hier: We will disregard it, it certainly isn't evidence.

Mr. Sprowl: As we have always said, our records are available in every instance. You have seen them already and you can see them again.

Trial Examiner Hier: All of these questions and answers by you about your visits to New Orleans in 1949, I don't know how much faith to put in those answers because some of them seem to be guess work on your part, some of them seem to be speculation, and one or two appear to be firm recollection of the fact.

Now do you have a clear and present independent recollection of your trips to New Orleans, and by "independent" I mean independent of normal routine, not basing it on what you usually do, but a clear fresh recollection of what you did in New Orleans, when you did it, how much time you spent with each person, and so on, in 1949, or not?

The Witness: I couldn't be specific about the amount of time that I spent with each account.

1413 Trial Examiner Hier: All right.

Mr. Sprowl: In 1949?

The Witness: In '49.

By Mr. Schrup:

Q. Do you call on accounts in Nashville, Tennessee?

A. Yes, sir.

Q. Do you recall now, would your memory serve you as to whether or not you observed what you call "normal procedure" on your various visits to Nashville, Tennessee?

A. Will you state the question again, please?

Mr. Schrup: Read it.

(The question was read by the reporter as follows:

Question: Do you recall now, would your memory serve you as to whether or not you observed what you call "normal procedure" on your various visits to Nashville, Tennessee?)

The Witness: I think I did, yes.

By Mr. Schrup:

Q. Do you recall whether or not you conducted any sales meetings in Nashville, Tennessee for the salesmen of the J. B. Cook Company?

A. I don't remember specifically, no.

Q. Do you recall accounts in Montgomery, Alabama?

A. Yes, sir.

Q. During 1949 does your memory serve you as
1414 to whether or not in calling on these accounts that you always observed what you term "normal procedure"?

A. Yes, I did.

Q. Now would you recall whether or not you conducted sales meetings for four days in April in Montgomery, Alabama for salesmen of the Harrison Motor Supply Company?

A. Well, I can only answer that by saying I couldn't have conducted one for four days.

Trial Examiner Hier: Why not?

The Witness: Well, first of all the account would not have a sales meeting except on Saturday, and we certainly have nothing to offer which you could talk for four days on to a group of salesmen.

Trial Examiner Hier: You are not long winded, you mean?

The Witness: No, sir, I am not, not that long winded.

By Mr. Schrup:

Q. Mr. Ricketts, I direct your attention to Respondent's Exhibit 60-A through -L. It would appear that during the

year 1949, excluding Saturdays and Sundays, and side trips from Memphis, that you spent 49 days, full working days, in Memphis, Tennessee.

Mr. Sprowl: I don't think that is what the exhibit shows.

The Witness: I cannot agree with that either.

1415 Mr. Schrup: Well, check the exhibit yourself and see.

Mr. Sprowl: We will take a recess and do it, you may be right.

Trial Examiner Hier: It is a deduction to be made, isn't it, from the exhibit? Why have the witness perform that?

Mr. Sprowl: If he is counting vacation time and working time, he may be right.

Mr. Schrup: Let's find out.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: The witness has checked the exhibit. Now what is the answer?

The Witness: Well, apparently, according to the figures here, it is 44 days that I actually spent in Memphis.

Mr. Schrup: I will accept the correction.

Trial Examiner Hier: 44 days you spent where?

The Witness: In Memphis.

By Mr. Schrup:

Q. Mr. Ricketts, does the C. E. Niehoff Company have a customer in Anniston, Alabama?

A. Anniston, Alabama?

Q. Yes.

A. No, sir.

Q. Did you make a trip to Anniston, Alabama

1416 during the year 1949 to visit any prospective customer?

A. I couldn't answer that question.

Q. Does the C. E. Niehoff Company today have a customer in Bay Monett, Alabama?

A. No, sir.

Q. Do you recall whether you made a trip in 1949 to Bay Monett, Alabama to visit any prospective customer of the C. E. Niehoff Company?

A. No, sir, I cannot answer that question.

Q. Well, does the C. E. Niehoff Company have a customer in Dothan, Alabama?

A. No, sir.

Q. Do you recall whether during 1949, specifically in April, you made a trip to visit any prospective customer of the C. E. Niehoff Company in Dothan, Alabama?

A. I may possibly have.

Q. Do you remember who it was?

A. No, I do not.

Q. Now does the C. E. Niehoff Company have a customer in Batesville, Arkansas?

A. No, sir.

Q. Do you recall whether or not you made three trips during the months of May, November and December to Batesville, Arkansas to visit any prospective customer of the C. E. Niehoff company?

1417 A. I don't remember specifically, no.

Q. Does the C. E. Niehoff Company have a customer in Conway, Arkansas?

A. No, sir.

Q. Do you recall whether or not during the months of March and October of 1949 you visited Conway, Arkansas to obtain a prospective customer of the C. E. Niehoff Company?

A. In March, you say?

Q. March and October.

A. Apparently I did from this exhibit.

Trial Examiner Hier: You mean 60, Exhibit 60?

The Witness: Yes, sir.

Trial Examiner Hier: Well, the gist of the situation is this: If that exhibit or any other exhibit shows you made a trip to a given town at a given time, you undoubtedly did, but you now don't remember why, for what purpose, or whether you did, is that right?

The Witness: Well, I did make a trip there to see an account.

Mr. Sprowl: Now will you check on the other ones he is talking about, because if it is on the exhibit, as I understand it, you made the trip?

The Witness: That is correct.

Mr. Sprowl: Now the purpose of the trip, that is something else, but—

1418 Mr. Schrup: The purpose of the trip is very material.

Trial Examiner Hier: I mean the point about it is if he doesn't remember why he went there, that is the end of it as far as this witness is concerned.

By Mr. Schrup:

Q. Who was the prospective customer you visited in Conway, Arkansas?

Mr. Sprowl: I object to the question. That assumes he visited a prospective customer.

Trial Examiner Hier: I think that is a fair statement, yes. I don't think that question is proper, he hasn't said he visited a customer in Conway, Arkansas, that I know of.

Mr. Schrup: I will ask if he did make a trip to visit a prospective customer of C. E. Niehoff Company in Conway, Arkansas.

Trial Examiner Hier: That is a different question. That is all right.

The Witness: Yes, I did.

By Mr. Schrup:

Q. What was the name of the prospective customer?

A. Newberry Parts Company.

Q. N-e-w-b-e-r-r-y?

A. That is correct.

Q. Will you refer back to Anniston, Alabama, did you have a prospective customer that you visited in Anniston, Alabama?

1419 A. I did at some time, yes.

Q. What was the name of that customer?

A. That I don't remember.

Q. Would you remember the name of the prospective customer in Bay Monnett, Alabama?

A. No, sir.

Q. Also I questioned you with relation to a trip to Dothan, Alabama in April of 1949. Did you visit a prospective customer at that time?

Mr. Sprowl: What town was that?

Mr. Schrup: Dothan, D-o-t-h-a-n.

The Witness: Yes, sir, I did.

By Mr. Schrup:

Q. What was the name of the prospective customer there?

A. I can't remember them.

Q. I did ask you also about Batesville, Arkansas, with reference to three trips there in 1949. Would you recall the name of the prospective customer there?

A. The Automotive Parts Company.

Q. Did you state the name of the prospective customer n Conway, Arkansas?

A. Yes.

Trial Examiner Hier: Newberry.

I thought you were about through?

Mr. Schrup: No, sir.

1420 Trial Examiner Hier: Then we will have a recess.

(A short recess was taken.)

Trial Examiner Hier: Proceed.

By Mr. Schrup:

Q. Mr. Ricketts, does the C. E. Niehoff Company have a customer in Fayetteville, Arkansas?

A. No, sir.

Q. Does the C. E. Niehoff Company have a customer in Forest City, Arkansas?

A. No, sir.

Q. Does the C. E. Niehoff Company have a customer in Hot Springs, Arkansas?

A. No, sir.

Q. Does the C. E. Niehoff Company have a customer in McGhee, Arkansas?

A. Yes, indirectly, a branch of the J. B. Cook Company out of Little Rock.

Q. Do you call on that customer in McGhee?

A. Yes, sir, I would if I went there.

Q. Does the C. E. Niehoff Company have a customer in Marianna, Arkansas?

A. No, sir.

Q. Does the C. E. Niehoff Company have a customer in Morrilton, Arkansas?

A. No, sir.

1421 Q. Does the C. E. Niehoff Company have a customer in Paragould, Arkansas?

A. No, sir.

Q. Does the C. E. Niehoff Company have a customer in Rector, Arkansas?

A. No, sir.

Q. You have the Respondent's Exhibit 60-A through -L before you, have you not, Mr. Ricketts?

A. Yes, sir.

Q. Maybe that will refresh your memory.

A. Yes, sir.

Q. I questioned you on the various cities in Arkansas starting with Batesville, Arkansas, and I believe you will

find that Respondent's Exhibit 60 will show that you made three trips in which you visited that city in May, November and December of 1949.

Do you recall any prospective customers that you may have called on in that city, the names of the customers?

A. Automotive Parts Company.

Q. Conway you have already testified about.

Fayetteville, Arkansas. Check Exhibit 60 for August and October of 1949?

A. Yes.

Q. Do you recall any of the names of prospective customers you may have called on in that city?

1422 A. No, sir. That is normally a stopping point, I think, for me.

Q. What about Forest City, Arkansas?

During the month of January on Respondent's Exhibit 60-A—

Mr. Sprowl: What did the witness state about the last town, that it was a stopping point?

The Witness: Yes.

By Mr. Schrup:

Q. In Fayetteville you have no customers?

A. No, sir.

Q. You never call on jobbers and attempt to get customers in Fayetteville, Arkansas?

A. I have in years gone by, yes.

Q. Did you do it in 1949?

A. Not to my knowledge.

Q. You have no customers there today?

A. No, sir.

Q. Do you still continue to call on prospective customer there?

A. No, sir, I stop there overnight and I have an account at Springdale, Arkansas which I work out of there.

Q. I believe I asked you as regards Forest City, Arkansas?

A. I stop there en route from Memphis to Little

1423 Rock, you see.

Q. Do you have any customers there?

A. No, sir.

Q. Do you call on any prospective customers there?

A. No, sir.

Q. What about Hot Springs, Arkansas?

A. Hot Springs?

Q. Do you have any customers there?
A. No, sir, I do not.
Mr. Sprowl: I think I can understand why he would stop there, too.

By Mr. Schrup:
Q. Do you have any customers in Hot Springs?
A. Yes.
Q. What would the names of the customers be?
A. Auto Bearings & Parts Company, I believe it is.
Q. In Little Rock I believe you said you have the J. B. Cook Company?
A. That is correct.
Q. That is a branch of the J. B. Cook Company?
A. Yes, sir.
Q. Now in McGhee, Arkansas, do you call on any prospective customers there?
A. No, I have a branch of the J. B. Cook Company there.
Q. At McGhee?
1424 A. Yes, sir.
Q. What about Marianna?
A. I have no customer there.
Q. Do you call on any prospective customers there?
A. No, sir.
Q. Mr. Ricketts, referring to Respondent's Exhibit 60-A, January 26th, I note the name Marianna, Arkansas. Did you not call on a prospective customer there?
A. I made a special trip down there on personal business, actually.
Q. Would the same hold true as to—if you go to Respondent's Exhibit 60-L, December 13th, I note that you also visited Marianna, Arkansas.
Did you call on a prospective customer at that time?
A. Well, sometimes you know we have friends in places.
Q. Well, go to Morrilton, Arkansas, did you call on any prospective customers in Morrilton, Arkansas?
A. Yes, sir, I believe I testified to that a while ago.
Q. What are the names of those customers?
A. Automotive Parts Company, I think it is.
Q. Is that the same company as was in Batesville?
A. No, sir. No, I beg your pardon, it is Morrilton Auto Supply.
Q. I beg your pardon?

A. Morrilton Auto Supply, that is the name of it.

1425 Q. Turn to Paragould, Arkansas, did you call on any prospective customers there?

A. Yes, sir.

Q. What were the names of those customers?

A. Oh, I don't remember, except it is an APA jobber there.

Q. What about Rector, Arkansas?

A. Yes, sir.

Q. What would be the name of the prospective customer there?

A. McNeil Auto Supply Company.

Q. Now we will take up Panama City, Florida. I note you made two trips there in 1949, according to Respondent's Exhibit 60. Did you call on prospective customers in Panama City, Florida?

A. No, I have a branch out of Andalusia, Alabama there.

Q. A branch of what firm would that be?

A. The F. T. Taylor Parts & Supply Company.

Q. What about Tallahassee, did you call on prospective customers there?

A. I don't go to Tallahassee. At least I don't on normal business.

Q. Is there such a city as Tallassee?

A. Yes, sir.

Q. Is that one of your places you call?

1426 A. No, sir, I called on a prospective account there.

Q. In Tallassee, Alabama?

A. Yes, sir.

Q. What is the name of that account?

A. I can't remember that.

Q. Turning to Franklin, Kentucky, have you called on any prospective customers in Franklin, Kentucky?

A. Yes, sir.

Q. Would there be more than one customer there?

A. Yes, there are two, but I don't recall the names.

Q. You don't recall their names?

A. I can't.

Q. You have no actual customer, though, in Franklin, Kentucky?

A. No, sir.

Q. Turning now to Hopkinson, Kentucky, do you have any actual customers in Hopkinson, Kentucky?

A. Yes, sir, I have a branch of J. B. Cook out of Nashville.

Q. I see. How long have you had that branch as a customer?

A. Well, ever since—I think ever since I have been in the territory.

Q. What about Hopkinsville, Kentucky?

A. I thought that was just what you asked me.

Q. No, I said Hopkinson, Kentucky.

1427 A. I don't know of any such place.

Mr. Schrup: I beg your pardon, July 13th, Hopkinsville, Kentucky.

You testified to that a few minutes ago with regard to the J. B. Cook branch?

The Witness: Yes, that is right.

By Mr. Schrup:

Q. Directing your attention to Murray, Kentucky, do you have any actual customers in Murray, Kentucky?

A. Yes, sir, I have a branch out of Mayfield, Kentucky.

Q. What branch is that, what firm?

A. It is the B & W Auto Parts Company.

Q. How long has that branch been a customer?

A. Quite some time.

Q. Was it a customer in 1949?

A. Yes, sir.

Q. Who is your customer in Algiers, Louisiana? Do you have a customer there?

A. Yes, sir.

Q. What is the name of that customer?

A. West Side Auto Supply.

Q. How long has that firm been a customer of C. E. Niehoff Company?

A. Well, ever since I have had that particular territory.

1428 Q. Was it a customer during 1949?

A. Yes, sir.

Q. Does the West Side Auto Company have another office at Harvey, Louisiana?

A. Yes, sir, they do.

Q. Which is the main office?

A. Harvey has been the main office.

Q. Do you have any customers in Biloxi, Mississippi?

A. No, sir.

Q. I direct your attention to Respondent's Exhibit 60 for the month of January. Did you call on any prospective customers in Biloxi during that time, January 1949?

A. No, that is a very wonderful stopping point for me.

Q. What about Clarksville, Mississippi, do you have any customers there?

A. Yes, I have a branch of D & N Auto Parts out of Greenwood, Mississippi.

Q. How long have you had that branch as a customer?

A. Ever since I have had the territory.

Q. Cleveland, Mississippi?

A. Yes, sir. Again that is a branch of D & N Auto Parts.

Q. Columbia, Mississippi?

A. Columbia?

Q. Yes.

1429 A. I have the Hart Supply Company.

Q. When did you obtain them as customers?

A. Ever since I had the territory.

Q. Is there a Columbia, Mississippi?

A. Yes. I thought that was what you just asked me about.

Q. Yes, sir, and you have there a branch of—

A. I have the Hart Supply Company there.

Q. Well, are they also at Columbus, Mississippi?

A. No, sir.

Q. Where is the Milton Supply located in Mississippi?

A. They have a store in Columbus, Mississippi, and also one in Meridian, Mississippi.

Q. And the Hart Supply Company that you testified about, where are they located?

A. Columbia, Mississippi.

Q. Do you have any customer in Hattiesburg, Mississippi?

A. Yes, I have a branch of the Hart Supply Company of Columbia, Mississippi.

Q. You have had that branch for how long?

A. Oh, a good many years, anyhow.

Q. Did you have them in 1949?

A. Yes, sir.

Q. What about Indianola, Mississippi?

A. I have a branch store there of the D & N Auto Parts Company.

1430 Q. Do you have a customer in Leland, Mississippi?

A. No, sir.

Q. Do you call on prospective customers there?

A. No, sir. I would possibly stay overnight there.

Trial Examiner Hier: Do all of these places bear on Respondent's Exhibit 60-A to -L?

Mr. Schrup: Yes, sir.

By Mr. Schrup:

Q. What about New Albany, Mississippi, do you have a customer there?

A. Yes, sir.

Q. What is the name of that customer?

A. G. W. Harwell.

Q. When did you obtain that customer?

A. I am not certain. It was, I think, in 1950.

Q. Tupelo, Mississippi, do you have a customer there?

A. Yes, sir.

Q. What is the name of the customer?

A. Tupelo Products Company.

Q. That is the one you testified you obtained in 1950?

A. I believe so. No, just last fall.

Q. What is the name of the customer in New Albany?

A. G. W. Harwell.

Q. Yazoo City, Mississippi, do you have a customer there?

A. No, sir, I don't.

1431 Q. Did you call on prospective customers in Yazoo City?

A. I have.

Q. Turn to Respondent's Exhibit 60, September 15th, Respondent's Exhibit 60-I, and give us the name of the prospective customer in Yazoo City.

A. I can't remember the name of it.

Q. Do you have a customer of the Niehoff Company in Columbia?

A. Yes, sir, I have a branch of the J. B. Cook Company.

Q. Have you had them for a considerable time?

A. Yes, sir.

Q. What about Dixon, Tennessee?

A. No, I don't have a customer there.

Q. Do you call on prospective customers in Dixon, Tennessee?

A. Yes, I have.

Q. Do you recall the name of any customer?

A. Adcock Auto Parts.

Q. What about Dyersberg, Tennessee?

A. I have a branch of J. B. Cook.

Q. J. B. Cook?

A. Yes, J. B. Cook Company out of Memphis there.

Q. Eagleville, Tennessee? Do you have a customer there?

A. No, I have a prospective account there.

Q. What is the prospective account there?

1432 A. I can't get it. I don't remember.

Q. Well, go to Gallitan, Tennessee, do you have a customer there?

A. No, sir.

Q. Do you have a prospective customer there?

A. Never have called on one, to my knowledge, at all.

Q. Is Gallitan adjacent to Nashville, Tennessee?

A. Well, yes, it is something like 50 miles, I believe, I am not sure.

Q. What about Franklin, Kentucky, is that close by, too?

A. Well, I think it is possibly 75 or 85 miles from Nashville, Tennessee.

Q. Do you have a customer in Franklin, Kentucky?

A. No, I stated that a while ago.

Q. What about Humboldt, Tennessee?

A. No, sir, I don't have a customer: I have never called on a prospect. I don't think there is any such thing there.

Q. Just a town?

A. There is a town, yes; but not a prospect or anything of that nature.

Q. Lafayette, Tennessee?

Do you have a customer there?

A. No, sir.

Q. Do you have a prospective customer?

A. No, sir.

1433 Q. Have you ever called on any prospective customers in Lafayette, Tennessee?

A. No, sir, I don't think there are any there.

Q. What do you mean, you don't think there are any there?

A. I mean I don't think there is any jobber there at all. You know sometimes you have to make these expense accounts come out, too.

Trial Examiner Hier: I certainly hope there is some purpose to all this dreary detail.

All right, go ahead.

By Mr. Schrup:

Q. Do you have a customer in Milan, Tennessee?

A. No, I do not.

Q. Do you have a prospective customer?

A. No.

Q. Have you ever called on a prospective customer there?

A. I think I did one time years ago when there was an account there who finally went out of business.

Q. I thought you were there in 1949.

Did you call on a prospective customer there at that time?

A. I couldn't be sure. I remember this account went out of business back in those years.

Q. What about Murphysboro, Tennessee, do you have an account there?

1434 A. Yes, sir, I have a branch of the J. B. Cook Company there.

Q. Shelbyville, Tennessee, do you have an account there?

A. I also again have a branch of the J. B. Cook Company.

Q. Do you call on all of the branches of the J. B. Cook Company when you visit the cities where they are located?

A. Well, occasionally, yes.

Q. Well, do you have any other account in that city?

A. No, sir, I don't.

Q. Do you call on prospective accounts in that city?

A. No, sir, I haven't.

Q. I would like to get this a little clear in my mind, Mr. Ricketts:

Turning to Respondent's Exhibit 60-A which you have before you, under the column "itinerary", now where a single city appears, that means you spent your entire day in that city which is named opposite it?

A. No, sir, that does not.

Q. What does that mean?

A. Well, that means that either that was my headquarter point or I left that city or returned to that city from some place.

Q. Well, for instance take January 3, 1949 on Respondent's Exhibit 60-A, and January 4, 1949.

A. I think maybe I misunderstood your question there.

1435 Q. What does that mean?

A. You mean a single city such as that particular one?

Q. Yes.

A. That would mean that I spent the day there, yes.

Q. Then going to January 5, 1949—

A. Wait, I want to qualify what I just said.

Maybe in Memphis that would mean I spent the day there, and also in some cases also in some other cities. In some cases I headquartered in a city and I worked out of the city, and I would drive in and out of the city during the day and return at night.

Q. Would that mean—well, what would be a typical example of that on Respondent's Exhibit 60-A?

Trial Examiner Hier: Nashville, he has testified to that, he worked the territory out of Nashville.

Mr. Schrup: Well, I was referring to 60-A and Nashville doesn't appear on 60-A.

Tral Examiner Hier: All right, is there an example on 60-A?

The Witness: No.

By Mr. Schrup:

Q. Opposite the date of January 5th, that means you left Memphis?

A. That is correct.

Q. And you stopped in each of those cities that
1436 are opposite Memphis for January 5th, and you come to rest on January 6th in Meridian, Mississippi, is that correct?

A. That would be correct.

Q. And when you stopped in those cities you made a call either on a customer or a prospective customer, is that correct?

A. Yes, normally.

Trial Examiner Hier: Well, there were some instances where you just stayed overnight?

The Witness: Well, that is right, surely. Of course in this particular case I did stop in Meridian, Mississippi finally.

By Mr. Schrup:

Q. That is right, the end city would indicate you spent the night there?

A. Yes, but we vary these expense accounts a little, you know, we have to, or at least I do. I am trying to come out at the end of the year. Just like I hold sales meetings, well there is a record over there but certainly—

say New Orleans, it costs a little money to stay in New Orleans, and certainly sometimes I hold a sales meeting in New Orleans on my expense account. I don't care who knows it. I don't like for my company to know it, but aside from that I don't care. I don't know how you could get away from some of those things, at least I simply can't do it.

1437 Mr. Schrup: I am not asking for a lot of voluntary statements, there is no question pending.

Trial Examiner Hier: Let him finish his answer.

Mr. Schrup: There is no question pending, if your Honor please.

Trial Examiner Hier: I don't know that there wasn't. It was a question put by you that could call for the long answer.

Go ahead and finish your answer.

The Witness: Well, in any event, in certain cases where I hold, as I just stated, some sales meetings, where perhaps maybe I don't happen to spend any money on the account, again with the high cost of living and so forth in certain areas, why it is certainly necessary at times to perhaps go to Fayetteville or some other place, because at least personally I hope I don't have to operate in the red too much on my expense account.

Mr. Schrup: You are in the same trouble as the government employees.

The Witness: Consequently I try to figure out as I go along, more or less, and keep up with it.

Mr. Schrup: Well, as I understand it, after the noon recess we will get the expense accounts?

Mr. Sprowl: They are on the way now.

Mr. Schrup: Maybe we could have a recess now.

1438 Trial Examiner Hier: Are you through with the cross-examination?

Mr. Schrup: No, but we will be as soon as we get the documents after the noon recess.

Trial Examiner Hier: The whole thing has got to be held up for that?

Mr. Schrup: We can't operate in a vacuum.

Trial Examiner Hier: I thought we could get rid of this witness before the noon recess.

Very well, 2:00 o'clock.

(Whereupon, at 12:00 noon, a recess was taken until 2:00 p. m., this day.)

1439 Afternoon Session.

2:00 p. m.

Trial Examiner Hier: All right. The record may show that the documents requested by counsel in support of the complaint have been furnished by respondent and have now been examined.

Mr. Schrup: The documents that have been submitted over the noon recess are the weekly expense books submitted by Mr. Ricketts to the C. E. Niehoff Company for the weeks ending February 19, 1949, June 18, 1949 and July 16, 1949, which I will hand to Mr. Ricketts.

Mr. Sprowl: I would like to amend the statement of Mr. Schrup in that we have furnished expense books for every one of the 52 weeks of the year 1949 and he has selected three of them from that group to show to the witness.

Mr. Schrup: Yes. Well, those are the particular ones we are interested in at this point.

Trial Examiner Hier: All right, go ahead.

RAY N. RICKETTS resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Schrup.

Q. Mr. Ricketts, if you will also turn now to Respondent's Exhibit 60-B, I note from that exhibit that you
1440 were in Nashville, Tennessee from February 7 to February 25, 1949.

Now how many customers do you have in Nashville, Tennessee?

A. I have two.

Q. And I understand you have one customer in Clarksville, Tennessee?

A. That is correct.

Q. Am I correct in my understanding that you have no customers in Eagleville, Tennessee, Dixon, Tennessee, or Old Hickory, Tennessee?

A. That is correct.

Q. Shown on Respondent's Exhibit 60-B?

A. That is correct.

Q. Now will you refresh your memory from this salesman's statement before you and tell us whether you con-

ducted any sales meetings with the J. B. Cook Company salesmen at Nashville, Tennessee?

Trial Examiner Hier: When?

Mr. Schrup: During the period February 7 through February 24, 1949.

Trial Examiner Hier: All right.

The Witness: Yes, my expense book shows that I conducted one.

By Mr. Schrup:

Q. Now will you turn to Respondent's Exhibit 60-G.

1441 A. What month is that?

Q. That is July 1949.

According to this exhibit you were in and out of Nashville during the period starting July 12, 1949 to July 21, 1949.

Now would you look at your expense statement submitted to the C. E. Niehoff Company for the week ending July 16, 1949 and refresh your memory as to whether you conducted any sales meeting with J. B. Cook Company salesmen in Nashville, Tennessee?

A. It shows that I did.

Q. Now if you will please turn to Respondent's Exhibit 60-F, which is the period for June 1949, now that exhibit discloses that you were in New Orleans, Louisiana commencing June 11, 1949 to June 26, 1949.

Would you please look at your weekly expense books submitted to the C. E. Niehoff Company for the week ending June 18, 1949 and state whether that refreshes your memory to the effect then as to whether or not you conducted sales meetings with the Greiner Auto Parts salesmen in New Orleans during that time?

A. Well, I don't know, it looks like Mr. Murphy caught on to me on this sales meeting.

Q. I don't understand.

A. It would look like from my expense book here

1442 that even Mr. Murphy had caught up with me on my expense book here on sales meetings. I notice he has scratched it off entirely in this particular book.

Trial Examiner Hier: Let me see one of those expense books.

The Witness: In other words, I submitted the book and he did not allow it, so apparently he scratched it off.

By Mr. Schrup:

Q. But you did report to him that you conducted a sales meeting for Greiner Auto Parts salesmen in New Orleans, Louisiana during the period in question?

A. Yes, sir, according to that book.

Trial Examiner Hier: There is a lot of red penciling going on here, isn't there?

The Witness: Entirely too much red penciling. Toll bridges, they won't allow toll bridges, and we started this procedure that year on this per diem, and we couldn't get them to agree to a great many things about it, and consequently they would no longer allow such things as storage and all of the various things which are involved in traveling.

Consequently, I myself was trying to work out some manner or means in which I could personally come out on such a type of expense account.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

1443 Trial Examiner Hier: Proceed.

By Mr. Schrup:

Q. Mr. Ricketts, do you furnish contact reports to the C. E. Niehoff Company?

A. Yes, sir.

Q. What is the purpose of that?

A. Well, to advise my company of the contacts I make.

Q. Did you fnrnish contact reports during the year 1949?

A. Yes, sir.

Q. Have you retained any of those copies?

A. No, sir.

Q. One final question, Mr. Ricketts: With reference to your four customers in Memphis, Tennessee, which you stated before lunch made over the counter sales, am I correct in understanding your testimony that in connection with these over the counter sales that J. B. Cook and Company and Stratton-Warren were furnished a lesser number of catalogs and tune-up charts than your other two smaller customers in Memphis, Tennessee?

A. Well, with the exception of Union Auto Electric Service, that would be true.

In other words, in the case of Chelsea Auto Parts Company who do not have a salesman out at all, they try of course through some of my own efforts in boosting them

up into a further volume of business, why they do
1444 pass out a great deal of this type of literature and material.

I know they always want such things as tune-up charts and I can understand that quite readily and we normally freely send such things to them.

Q. But a lesser number are sent over a year, say the sample year of 1949, to the J. B. Cook Company and Stratton Warren Sales than to these other two concerns?

A. Well, I would say about an equal amount between the two accounts.

Q. I note the J. B. Cook Company has numerous branches. Now are you taking into account the tune-up charts and sales catalogs furnished by the C. E. Niehoff Company to the J. B. Cook Branches?

A. Well, yes, I was. I think I was, at least. In fact I know I was, rather.

In the case of the Cook branch operation, again they have a salesman who operates out of these and again they do not to my knowledge give away very many of these type units across the counter at all, they carry their own sales catalog, and, consequently, do not use too many catalogs of ours.

Q. Well, the J. B. Cook branches would be comparable in size, would they, to the two smaller jobbers in Memphis, Tennessee?

A. Well, I would say they are larger than the small accounts. And, too, they definitely have a salesman
1445 on their operation who carries the catalog and sells directly to the trade.

Q. But of course neither you nor the Niehoff Company has a record of the number of catalogs and the number of tune-up charts that are furnished your customers in Memphis, Tennessee?

A. Well, I do not have a record, or I don't know whether or not the company has, but I don't keep a record, I base my thinking in that matter upon the ones which I personally take care of and write up for my accounts.

Q. Well, in furnishing these tune-up charts and these catalogs, are they generally furnished on the basis of a written request from the customer?

A. Well, in most cases, as far as my territory is concerned, I personally write up the orders for them and check that material just the same as I would my stock.

In other words, they have a definite place to keep these

catalogs and the price sheets and the tune-up charts, and all of the other promotional type material.

Q. Now all of that data you have just described, in every instance you write up the order for the J. B. Cook Company, or for the Stratton-Warren Sales?

A. They possibly could write in directly for it, yes.

Q. Do you know whether or not they do write in directly for it?

1446 A. I cannot recall any specific instance.

Mr. Schrup: I think that is all.

Redirect Examination by Mr. Sprowl.

Q. Mr. Ricketts, in speaking of your principal competitors on ignition in your territory, you named certain companies and you omitted the name of Sorenson, but would they or would they not be a competitor?

A. Yes, they are. I overlooked that particular company.

Q. And is their jobber's list price higher or lower than the Niehoff jobber list price?

A. It is lower than ours.

Q. What about their discounts and rebates which they offer at various levels of purchase, are they more favorable to the jobber or less favorable to Niehoff?

A. It is more favorable to the jobber or lower in price.

Q. What about Preferred Electric whom you didn't mention, are they or are they not a competitor?

A. Well, I haven't had too much direct competition from them, they only have one or two very small accounts that I know of in my territory.

Q. You don't run into them very often?

A. No.

Q. In the hydraulic field did you ever hear of a company called Brake Parts Company?

1447 A. Not in my territory, no.

Q. Now directing your attention to the facts which we stipulated in the record which showed—first of all I want to ask you, how many times would you normally go to New Orleans in the course of a year?

A. Three times per year.

Q. And according to the facts which we stipulated you did go there three times in 1948 and three times in 1950.

Was there any reason why you only got there twice in 1949?

A. Well, I was off considerably from work according to my itinerary here.

Q. When would you normally have made your third trip?

A. Well, normally I make that trip as a rule around the first part of the year, perhaps in January.

Q. Was there anything that occurred in that time of the year that made it difficult or impossible for you to get there?

A. Well, my wife was in the hospital, and sick, and consequently I was off work, and I noticed after looking at this exhibit here—

Q. You are speaking of 60?

A. 60. I finally have recalled why I did not work for two weeks on 60-C here, and at that time my mother-in-law died and she had been seriously ill with cancer for quite some time, and due to the fact that my wife was in pretty bad shape from it, I finally took her away, and as a
1448 matter of fact, came through Chicago here.

Earlier when I was talking I couldn't quite fill in that vacancy.

Q. You are speaking of the two weeks that show you not working on 60-C?

A. Yes. In other words, from March 13th to March 27th.

Q. All right. Now is there anything that occurred in January that interrupted your itinerary?

A. Well, as I stated before, in January I was off work due to my wife being sick and in the hospital one full week at least here.

Q. I think in the second week of January, under 60-A, you were in Mobile and Pensacola. Where did you go from those two locations?

A. Well, that is when I returned home because of my wife's sudden illness in which she had to go to the hospital, and from that point I normally would have probably definitely gone on in to New Orleans and made that particular area.

Consequently, I would say that that particular year, for various reasons just mentioned, I was unable to make my third trip to New Orleans.

Q. Let me ask you this: If you missed your early in

the year trip, did that mean more or less to do when you finally got there for the fist time in '49?

A. Well, it would make more to do due to the fact
1449 that I had neglected the accounts quite considerably up to that particular point, and Mr. Kiefer down there I recall had some prospects that he wanted me to work on, and so did West Side Auto Supply there, and so did Greiner Auto Parts Company there.

Q. May I see the expense book for June?

May I see that?

Mr. Schrup indicated in one of his questions on cross examination that you spent a week conducting a sales meeting with the Greiner Company during June of 1949. Is there anything in that book that shows that there was a sales meeting of a week's duration?

A. No, there isn't.

Q. What is the only entry in that book respecting any sales meeting?

A. It shows I was to have had a sales meeting on Friday the 17th of June at the Greiner Auto Parts Company.

Q. I notice in this book you have put $15.00 for that, and there is a red mark through it. What does the red mark indicate?

A. It means that I never received the $15.00.

Q. That red mark was put on at the plant of the Niehoff Company?

A. Yes, sir, it is not my writing at all.

Q. By the auditor?

1450 A. Our auditor who audits our expense book.

Q. That charge that you tried to make was cancelled?

A. It was definitely cancelled.

Q. On the same day that this sales meeting appears for Greiner, I notice a toll bridge of 26 cents. Would that indicate anything to you as to what you were doing on that day?

A. Well, I would have to go across the river in New Orleans to go across the toll bridge. I probably went over to Algiers or Harvey, Louisiana.

Q. Now is it a fact that you do work with the salesmen of all of your jobber customers?

A. That is correct.

Q. And what is the purpose of those meetings?

A. Well, it is to further promote our line and the selling of our service stocks to the dealer type accounts.

Mr. Schrup: I am going to enter an objection here, I think it was all covered on direct examination. I don't think it is proper redirect examination, it has all been gone over on direct.

Mr. Sprowl: I submit that it wasn't.

Mr. Schrup: Well, if you missed it—

Trial Examiner Hier: Overruled.

Mr. Schrup: If you missed it, Mr. Sprowl, it is not my fault, it is improper redirect.

1451 Trial Examiner Hier: You went into it.

Mr. Schrup: On cross examination I may have covered some of it, but I don't know, he is not my witness.

Trial Examiner Hier: He has a right to go into it. Go ahead.

By Mr. Sprowl:

Q. Now in addition to these sales meetings, in addition to urging salesmen of your jobbers to get out service stocks, do you cover any new items that might be in the line or new equipment items that might be in the line?

A. Definitely that is a part of my job is to go over all new items with the jobbers, and of course with the smaller jobbers, to go over the items with the manager himself, and as many of the salesmen as I can possibly contact or wait and see.

Q. Now in your cross examination you in referring to one town called it a stopping point. I believe you referred to two towns as stopping points. What do you mean by a stopping point?

A. A point where I would stay overnight, and from which I would probably leave the next morning.

Q. And a point where you would not make any calls?

A. Normally I would not, that would be very true.

Q. Some place you might like to stay because you like the accommodations?

A. Well, such as Biloxi, I don't have an account 1452 there, and as far as I know no possibility of ever getting one, but I like the atmosphere and consequently I do stay around there quite a bit.

Q. Now you counted up the days on Exhibit 60 that you spent in Memphis in 1949, business days, 44, and what is the fact as to whether or not you work all of those business days that you are in Memphis?

A. I don't know whether I stated before or not, but quite often I will come in to Memphis maybe on Thursday night, or something of that nature, and the next day of course I have personal things that I like to do, and also my wife seems to find things for me to do, so I will generally take a day off. If I have been on a long trip, it becomes very tiresome, naturally, all of this traveling, and you do have to slow down a little bit on occasion.

Q. I notice you are away, according to Exhibit 60, a good many weekends during the year, is that right?

A. Very definitely so. In fact, entirely too many to suit me.

Q. All right. Of the 44 days that you spent in Memphis in '49, what would you estimate were actual working days in percentage?

A. Well, after looking over the record here, I would say approximately 50 per cent of the time.

Q. Now you mentioned a sales meeting you held 1453 on March 8th, on February 18th, 1949, with the Cook people. What would be the duration of such a meeting?

A. Well, at the very outside it would be two hours, at the very outside.

Q. In that meeting you would cover what subjects?

A. Well, I would cover our merchandising set-up and our product set-up and perhaps something on price, and things of that nature, as well as our promotional materials, as well as new items, things along that line.

Q. Would that same answer apply to the sales meeting of July 15, 1949 with the Cook people?

A. It would almost have to.

However, maybe I was a little short of money on that second meeting.

Q. In other words, if it was held, it was the same thing and the same time?

A. Well, it doesn't sound reasonable, of course, that I would hold a second meeting on the same subject, and I would assume that I tried, as I have practiced to a degree, to make up some items on my expense account such as car storage, which I have no compensation for, and I have to find some means if possible to try to get that money back.

Q. Now speaking of your unofficial calls that you mentioned you made on your Memphis customers, of what would they consist?

1454 A. Well, I make a certain amount of calls just purely on a friendship basis, as far as that is concerned. I stated before, I think, that I got a cup of coffee, killed a little time while I was downtown, and had a little visit in that respect.

Q. Now do you make those calls equally on all of your Memphis customers?

A. Yes sir.

Q. That includes Femberg and the other account as well as Cook and Stratton-Warren?

A. Yes, sir, it would.

Q. What would your actual number of official calls be for each customer in your territory during your regular year?

A. Anywhere from three to three and a half depending upon the year.

Q. By three and a half I assume that is an averaging figure?

A. That is right. In other words, it may vary a little bit from year to year due to the fact that I have such an extensive territory that I sometimes will perhaps call on an account the first of the year and again at the last of the year, consequently it may turn out to be an average of three and a half.

Q. You take your accounts in order, do you?

1455 A. Very definitely, I try to take it in a completely routine manner, that is the reason for the lap-over, say three and a half calls on an average.

Q. Well, if you took more than a year's span, you would call on them in seriatim?

A. Very definitely. Through the years you would find it averages out.

Q. Would it average out the same number of calls for each jobber?

A. Yes, sir. I might attempt to expand that just a little bit.

The gentleman sitting in the room, Mr. Schrup, over here, for instance I was in Memphis one time after a hearing last year in New Orleans, and I came back to Memphis and I stopped by the J. B. Cook Company for a minute or two, and I think I had a cup of coffee with him, and as far as any official call on the account, I was simply standing out in front and we had a cup of coffee.

Mr. Schrup: I think if I recall it correctly you were behind the counter looking at some stock when I saw you.

The Witness: Well, as I remember, I met you at the front door.

Mr. Schrup: As I recall, you came to the front door to let me in. I recall the incident.

Mr. Sprowl: I suggest if Mr. Schrup is going to testify he first be sworn.

1456 The Witness: I will state definitely—

Trial Examiner Hier: Go on with the examination, Mr. Sprowl.

Mr. Sprowl: I move his voluntary remark be stricken.

Trial Examiner Hier: They will be disregarded, they are not evidence.

By Mr. Sprowl:

Q. Now apparently your memory was not too specific in '49. When was the last time you were in New Orleans?

A. I just returned from a trip to New Orleans.

Q. I assume your memory is reasonably fresh as to what you did on this last trip.

A. On this occasion it is very fresh.

Q. First of all, how long were you in New Orleans on this occasion?

A. I was in New Orleans three days.

Q. Who did you call on?

A. I called on Automotive Wholesalers.

Q. That is Mr. Kiefer?

A. Yes. Greiner Auto Parts Company. Mr. Kiefer was the first account, Greiner, and the West Wide Auto Supply Company at Harvey and Algiers, Louisiana.

Q. All right. How much time did you spend with Mr. Kiefer's account?

A. I called on Mr. Kiefer and spent a full day's time with him.

1457 Q. All at once?

A. No, sir, half a day one day and a half a day the next.

Q. What did you do in that time?

A. I went in first and straightened out his stock and took a physical inventory. He had some items in his stock, for instance, which were becoming slow moving, and I automatically gave him a return on those, and then I waited to see Mr. Kiefer until about 5:30 that evening, and I never did get to talk to him because he was busy on the counter there, waiting on his trade, and so forth and so on. So I have to sit back in the back and hold my hands or something

like that, and then the next morning I went back again, and again he was very busy. I stayed there until noon, and he actually didn't need any merchandise, so he didn't want to place a further order at this time.

Q. Did you leave a suggested order?

A. No, I just had my physical inventory there and Mr. Kiefer said things had been pretty slow with him, and he said his stock was pretty good, and he just had received a shipment, and that—

Q. He had just received a shipment of Niehoff products?

A. Yes, sir, and he wanted to wait also because he felt that there would probably be a price decline in merchandise, so that he would not wish to place a further order
1458 at that particular time.

Q. Well, how much time did you spend with Greiner?

A. I spent about three and a half hours.

Q. What did you do in that time?

A. Well, a similar procedure in a way. I got an order from their cards. I waited a few minutes when I first went in so I could talk to the buyer, and then I got an order from their cards and took off in about three or three and a half hours time.

Q. Did you call on another account over in Algiers?

A. Yes.

Q. How much time did you spend with that account?

A. The account across the river in Algiers has two stores, and I spent a full day between the two stores.

Q. Doing substantially the same thing you did with the others?

A. In that case again I went in and straightened out their stock and actually took a physical inventory of both of the particular stores.

The buyer, the man who owns the business, was out, and I finally found out he would not return until about three days later, so I left a suggested order which I surely hope they send in.

Q. And did you do any other work while you were in New Orleans these three days?

1459 A. No, that is about all I did except to talk to Mr. Kiefer a while about some of the new service stocks we were coming out with, and he had thought he had a prospect which we stopped to see, and it turned out that at least neither one of us could sell him.

Q. You said "We stopped to see," who was with you?
A. Mr. Kiefer and myself.
Q. That was included in the day's time you spent with him?
A. Yes, sir, that was included in the day's time.
Mr. Sprowl: That is all.
Trial Examiner Hier: Any more questions?
Mr. Schrup: Just one or two short questions.

Recross Examination by Mr. Schrup.

Q. How many trips have you made to New Orleans this year, sir?
A. Two.
Q. Do you expect to make a third one?
A. Yes, sir.
Q. How many days did you spend on your first trip to New Orleans?
A. I spent about a week that time.
Q. Seven days. How many did you spend on your last trip?
1460 A. You mean previous to—
Q. No, that is the first trip, the seven days?
A. Yes. The last trip I just made I spent three days.
Q. That is ten days so far in New Orleans this year?
A. That is right.
Q. Did you submit to the company a written record of the time you spent with each company visited?
A. No, sir. I contacted the account and that is all.
Q. In other words, we depend on your statement here today that your estimate of time you spent with each account is correct?
A. Yes, sir. They do not request any written record as to the amount of time we spend.
Q. I take it you submitted no written record of the time spent with each account in the year 1949 to the C. E. Niehoff Company?
A. No, sir.
Mr. Schrup: That is all.
Trial Examiner Hier: That is all?
Mr. Sprowl: I forgot to ask Mr. Ricketts one question.
Trial Examiner Hier: Very well.

Redirect Examination by Mr. Sprowl.

Q. When you call on your jobber customers you
1461 said that on occasion you saw competitors' prices and contracts.

Was that true in 1949?

A. Always. That has always been true.

Q. And was it true in 1948, say?

A. Yes, sir.

Q. And what was your practice, if any, in transmitting that information to the company where you do so?

A. Well, I have always done that because I try to keep up with competitors' prices personally, and such a case happened just several weeks back. It happened to be a brake parts price sheet, and I sent it in, sent this price sheet in to the company because these people had lowered their price considerably on brake fluid, and that threw me out definitely, out of competition on the thing.

Consequently, I sent those price sheets in like that and maybe somewhat from a selfish standpoint, because I try to get my company to get in line at least as near as they can, or whatever that situation may be.

Q. Now you get these price sheets from your jobber customers?

A. Yes, sir, that is the only source I have.

Trial Examiner Hier: Any questions on this?

Mr. Schrup: No.

Trial Examiner Hier: The witness is excused.

(Witness excused.)

1462 Mr. Sprowl: I will call Mr. Malina.

LEONARD L. MALINA was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Sprowl.

Q. Will you state your name, please?

A. Leonard L. Malina.

Q. Where do you live, Mr. Malina?

A. I live in Bensonville, Illinois. That is located about ten miles west of the factory.

Q. Of the Niehoff Factory?

A. Yes, sir, the Niehoff factory.
Q. That town is northwest of the Loop of Chicago?
A. That is correct.
Q. By whom are you employed?
A. I am employed by C. E. Niehoff and Company.
Q. In what capacity?
A. As a salesman.
Q. What is your present territory?
A. My present territory is bound on the east by Lake Michigan, on the north by Zion, Illinois, on the northwest by Woodstock, on the west by Elgin and Geneva, and on the south by Madison Street, and includes the suburbs therein.

1463 Q. But you don't go south of Madison Street extended to the west?

A. No, except where it would divide a suburb such as Oak Park, for example, that would not be divided, I would have the suburb of Oak Park.
Q. Does another salesman work in the Chicago territory?
A. Yes, Harold Selvick covers the south side of Chicago.
Q. He covers south of Madison Street?
A. That is correct.
Q. Over to Lake Michigan?
A. That is right.
Q. And does his territory include the suburbs around that southwest area?
A. That would be correct.
Q. When you entered that territory in 1949 that was the same situation?
A. That is right.
Q. And you started that system in the late summer, wasn't it, of 1949?
A. That is right, the late summer of '49.
Q. How many customers are there in your territory?
A. I have approximately 50 accounts that I call on.
Q. Now using the 1949 classifications and directing your attention to 1949, will you tell me the number

1464 of accounts you had by J, JA, D and DA classifications?

A. I had 28 J accounts, 18 JA, 6 D and 2 DA, but one of those DA's at that time was just a D. In other words, in 1949 he did approximately $4,000 that year and in '51 he did approximately $8,400.

Q. So in 1949 there would have been one DA and 7 D accounts?

A. That is correct.

Q. Who are the two accounts that are presently DA's?

A. Automotive Wholesalers and General Wholesalers.

Q. And which one was it that was a D in '49?

A. General wholesalers.

Q. And is Automotive Wholesalers Sidney Goodman's company?

A. That is correct.

Q. By the way, a man named Bomar—is there a Bomar in your territory?

A. That is correct.

Q. What is the name of his company?

A. Bolmar Auto Parts.

Q. Is that spelled differently from his name?

A. His name is Richard Boland and his company's name is Bolmar, B-o-l-m-a-r, Bolmar Auto Parts.

Q. But they are one and the same company?

A. That is correct.

1465 Q. Now would you tell me, do you call on your customers in rotation?

A. Yes, sir.

Q. How long does it take to cover your territory completely?

A. Oh, I would say ten to fifteen days.

Q. Those are business days?

A. That is correct.

Q. Now will you describe for me in the record the typical manner you would go about covering your territory completely?

A. Well—

Q. That is, one turn about the territory.

A. Well, it would work approximately like this: I would start in Zion, that is the northernmost part of my territory, where I have one jobber, and then work Waukegan that same day, and then go into North Chicago which is adjacent to Waukegan.

That would constitute one day's work.

I would work Woodstock and the suburbs in that district the second day.

Q. Now what are the suburbs around there?

A. Fox Lake.

Q. McHenry?

A. McHenry.

Q. All right.

1466 A. Another day would be in Geneva and Elgin, Illinois, and that would constitute a day's work.

Q. Now they are quite a ways west?

A. That is right, the western end of my territory. Then I would work Bensonville, Elmhurst, Melrose Park.

Q. Does that territory out there include, say, Lombard and Schiller Park? Would they be included in that?

A. That is correct.

Q. Could you hit that all in a day?

A. Approximately so because there is probably only one account in each.

Q. Where is Mr. Kater?

A. Mr. Kater is located in Franklin Park under the name of the Franklin Park Auto Supply.

Q. Would he be covered in a day such as you would devote around that area, Schiller Park, Lombard and Elmhurst?

A. Yes, he would.

Q. Do you ever get up to Highland Park, in that direction?

A. Yes, I do, following down through, I would say, I would make Highland Park, Kenilworth and Evanston.

Q. Would you do all of those in one day?

A. Well, that depends. Evanston requires a little additional time because there is more potential in Evanston, but ordinarily, yes.

1467 Q. That would be the fifth day of your program?

A. That is correct.

Q. What would you do then?

A. Then I would work the city by spending one day working along North Avenue from the lake west probably to Crawford Avenue.

Q. That would take a business day?

A. That would.

Then I would take another day working off of Chicago Avenue. In that particular case, working off of Chicago Avenue, that would include Automotive Wholesalers, and that would constitute a day's work.

Q. Now Chicago Avenue is an east and west street, is that correct?

A. Yes.

Q. It is right near Madison Street, is that right?

A. That is right, it is not too far from Madison Street.

Q. All right.

A. Then I would spend the third day of that week going north on Ashland Avenue.

Q. What would you do, cover jobbers adjacent to Ashland Avenue?

A. That is right, on Ashland or adjacent to Ashland.

Q. From where south on Ashland to where North?

A. From Madison Street north to Tuohy.

Q. I assume that would cover in this section up here of Broadway, Bryn Mawr and Ridge?

1468 A. That would be included off of Ashland Avenue because Broadway is near Ashland at that point further north.

Q. Now on the next day which would be about the ninth—

A. The ninth day.

Q. By the way, where is Boland located?

A. That is in Elmwood Park. I work Elmwood Park when I work Harlem Avenue which is the dividing line between Chicago and Elmwood Park at certain points, and I work along Harlem Avenue and the adjacent neighborhood.

Q. What about those suburbs along Harlem like Maywood?

A. There is Maywood to be included, Oak Park would be included in that.

Q. And the tenth day?

A. The tenth day I usually use to pick up slack ends, to make certain replies, perhaps, to telephone calls, to take up the odds and ends of anything that might have materialized as a result of my routine calls, and if I did get behind in my calls, in my routine work, I would make them up on that tenth day if I possibly could.

Q. Now can you always cover your territory in ten business days?

A. No, I can't.

Q. How long in reality does it take as you progress along that ideal schedule?

A. Well, the trouble is you might get a call from
1469 an account who might need some assistance in consummating a sale of service stock that would interrupt your itinerary, or routine, and, as a result, that condition would vary.

Q. How many times could you get around your territory in a year?

A. I would say fifteen to seventeen times a year.

Q: That allows for vacation time and other time off?

A. That is right.

Q. Now what you are telling me about, I presume, are personal calls on the customers?

A. That is right, that is just the calls that I make, personal contacts.

Q. Do you ever contact them by telephone?

A. Very frequently, almost an equal number of times, or they contact me.

Q. What is the purpose of the telephone call contacts?

A. The purpose of the calls is either to give instructions, perhaps, on testing equipment, or they might want some information regarding how to consummate a sale of some nature, or perhaps they want permission to return some merchandise, or it might be any number of things of that nature. It is merely, I would say, a point of information, or some such thing, on which they want some help.

Q. Do they ever make inquiry about any special orders they want made up at the plant?

1470 A. Yes, they do, that happens quite frequently when they might want some special attention given to a certain order, or they might want something rushed out very urgently, and they will direct this to my attention, so that I can expedite it, expedite the dispatching of that particular order.

Q. Now can those accounts in this area usually arrange to pick up a special order at the plant or do you have to send it to them?

A. That varies with the operation in any particular territory. I have more small jobbers there. There are more small jobbers in Chicago than there are large jobbers, and a lot of these small jobbers do not have the facilities for picking up, and sometimes it is an inconvenience for them to do so, and we either have to send it out through mail, or if it is on my way home, I may even drop it off for them, if it is practical.

Where they have to have it, and need it urgently, they will come to the factory and pick up a shipment.

Q. The bigger accounts might have a truck of their own they can use?

A. In every case I know of, all of the larger accounts that I have have a pick-up truck.

Q. Now do you make any calls on prospective accounts?

A. Not too many, I would say about three or four a month.

Q. How do you determine what prospective accounts you will call on?

1471 A. By the interest shown in the line. These prospects are called to my attention either through a direct phone call into the office or else I get the information through our sales manager or I might also get it through some other stores, like perhaps another jobber, one of my jobbers might tell me of a new place that is going into business, or of a company that is dissatisfied with their present line.

I contact them and feel them out and if there is any interest shown I would make repeat calls on them. If there is no interest shown, I would mark it down on my report and discontinue repeat calls.

Q. You do mention prospects in your reports you send in to the company?

A. Yes, sir, that is right.

Q. Is there any follow-up?

A. There definitely is. Mr. Geyer, our sales manager, does follow it through on these reports.

Q. Now what is the fact as to how many times you call on each jobber account in your territory each year in relation to how many times you might call on the other accounts in the same territory?

A. It has—well, I don't understand that question.

Q. Well, do you call on one account more frequently than you call on another account, or is it the same number of times?

1472 A. No, that is the same throughout the territory. It has to be that way because my territory is so competitive where jobbers are in groups so close together, the jobber demands his share of attention and you have to treat them equally.

Q. Well, now, from the standpoint of the time which each call consumes, can you give any comparison between a call you would make on a larger jobber as compared to a call on a smaller jobber?

A. That could be done very easily in this respect: In the case of Automotive Wholesalers, let's say, Sid Goodman's account, I have his stock arranged so that there are tabs on his shelving indicating the part number and a suggested quantity for him to carry in stock.

When I call on Mr. Goodman to get an order, we can go through his stock to make up the order in approximately fifteen minutes or so.

Q. Is that marking of the stock done by some one in his organization?

A. No, I do that.

Q. You keep it?

A. I keep his stock up. Of course, I spend an hour or two straightening out his stock before we take the order, but when it comes to actually checking the stock and taking the order, that can be done in 10 or 15 minutes because he has the inventory control right on the shelves.

1473 With the smaller jobber they don't have the space or the shelving, adequate shelving to keep this inventory control, and as a result there is not only stock straightening out to do but also an inventory has to be taken.

The smaller jobber's inventory has to be watched more closely for turnover, and you watch that he doesn't order too heavy and not too lightly, and, as a result, it might take two or three hours actually to check the smaller jobber's stock, and to go very thoroughly over new items with him, and things of that nature.

Q. Is there anyone in the larger jobber organizations that does part of the stock straightening?

A. Yes, most of the larger jobbers do have stock men or stock boys, and when shipments come in, they put the stock away and at the same time they do keep the stock in some semblance of order.

Q. Now do you ever explain the uses of various Niehoff items to your jobber customers?

A. Yes, I have a very particular case of that which happened very recently. I have an account in Geneva, Illinois called Valley Auto Parts, and they had sold a voltage regulator tester to one of their customers, and this customer wanted some instruction on how to operate this voltage regulator tester, and I made a special trip out there to Batavia, Illinois, to demonstrate this particular tester.

1474 I don't know if I mentioned this account in Geneva, it is about a $1900 a year account, and yet I did make this particular trip. This was, I would say, in the past 60 days or so.

Q. Well, do you find you spend more or less time in that type of work with the small jobber as compared to the large jobber?

A. Very definitely, I spend much more time with the smaller jobber.

Q. Why is that?

A. The smaller jobber has no man or sales manager that can do that kind of work; the big jobber has a man educated for that purpose who can go out and specialize in those things and instruct them and help the jobber salesmen sell and consummate these deals. As a result, it is my job or my duty to help the smaller jobber promote more of these sales and educate them and help them sell a service stock and a piece of test equipment and have it remained sold.

Q. Do you spend any time with your jobber accounts in interesting them in promoting service stocks?

A. Very much so. I have a case in Park Ridge, Illinois. When I took on the territory in 1949 this particular account, Park Ridge Auto Parts, did $1200 worth of business on the Niehoff line. I told the proprietor of this company that if he had any prospects in selling cabinets
1475 that I would be glad to go out and help him and work with him and help him build up his volume.

In almost every case where he did get a prospect, I went with him and he now has about nine or ten Niehoff cabinets out and his volume last year ran $2400.

Q. You do that for all of the small jobbers?

A. Absolutely.

Q. Do you have to do that with the larger jobbers as much or less?

A. Less.

Q. Why is that?

A. The smaller jobber, I would say 90 per cent of my accounts among the smaller jobbers don't have any salesmen, and the larger jobbers do have salesmen, and those salesmen can go out and promote their own sales because they have been educated to it and they are equipped to do the work.

Q. Do you make available to your jobber accounts such things as catalogs and so forth that are made up by the Niehoff Company?

A. Yes, we furnish catalogs, price lists and tune-up charts.

Q. Now what is your experience between the small jobber and the larger jobber as to their requirements in these catalogs, tune-up charts and the like?

A. I do find that the smaller jobber requires more catalogs and more tune-up charts in my particular terri-
1476 tory than the big jobber does.

Q. Why is that.

A. In one particular case, referring to Automotive Wholesalers again, he makes up his own catalog and we supply him with cuts, and he uses his own catalog in the promotion of the sale of parts of Automotive Wholesalers.

Trial Examiner Hier: That is Sidney Goodman?

The Witness: That is right.

By Mr. Sprowl:

Q. These are the same cuts you have made up for your own catalog?

A. That is right, and consequently he will use his own catalog and incorporate it in with his other lines.

Q. What about the smaller jobbers?

A. Now the smaller jobbers in my territory have the trend to give a catalog and give a tune-up chart to anybody who may ask for it, whether it be a garageman, repair shop, a car owner, or whatever the case might be. The smaller jobber is more susceptible to retail trade than the bigger jobber, and, as a result, he has an influx of more counter sales than the bigger jobber and he will be turning over the counter more catalogs and more tune-up charts than the bigger jobber would.

Q. In other words, is he using this material as kind of a solid salesman as he puts it in the hands of the customers?

1477 A. That is correct, to keep his name in front of the customers.

Q. What about display material?

A. I don't understand.

Q. Do you have display material that you furnish to any of your accounts?

A. We have window decals, signs, is that what you are referring to?

Q. I suppose, or anything they can set up on the counter.

A. Yes, we have a window display, and we have window decals, outdoor metal signs, everything we can possibly do to identify that particular jobber or garageman as a Niehoff customer.

Q. What do you find is the comparison in the use of such material between the small jobber and the big jobber in your territory?

A. Well, the smaller jobber has to use everything he possibly can to get all of the business he can in his particular area; consequently, he will take advantage of every bit of sales promotion and advertising that we can offer

him, and I find it is my experience that the small jobber will avail himself more quickly of any sales promotion items that we have than the larger jobber will.

Q. Is there any reason why a larger jobber handling a great many lines might not use your display material?

A. For the reason he has too many lines. If he
1478 had all of the display material from all these lines, he just couldn't possibly handle it all.

Q. Now, are the answers you have given applicable to the period you were in this territory in 1949 as well as the period since that time?

A. Yes.

Q. Now from what you have observed, Mr. Malina, in the time you have been in this territory, what is your opinion as to the ability of the small J account to compete against the larger accounts in that same area and thrive in their business?

Mr. Schrup: Objection.

1480 Trial Examiner Hier: I am going to sustain the objection.

Mr. Sprowl: All right. I offer to prove by this witness that on the basis of what he has observed since he has been in this territory since the late summer of 1949, that in his opinion the small jobber is not only able to compete with the larger jobber on the Niehoff parts but is actually growing and taking business away from the larger jobber, and has been and continues to do so.

Trial Examiner Hier: As a matter of fact, you put some evidence in on that point, didn't you, from this fellow Boland?

Mr. Sprowl: I put it in from the customers, and it seems perfectly silly to have to bring in 52 customers. I have brought in three customers and I have got the witness here that knows all of the rest of them.

Trial Examiner Hier: I will let the ruling stand, I think it is right.

Mr. Sprowl: That is all.

Cross-Examination by Mr. Schrup.

Q. Now, Mr. Malina, with reference to your testimony—

Mr. Sprowl: Might I interrupt so I don't get caught
1481 on the technical hook?

As I understand Mr. Schrup's objection it was

not to the form of the question, it was merely to the fact that this man from what he has observed in this territory in the time he has been on it is not qualified to give such an opinion?

Trial Examiner Hier: I presume that was his objection. I stated the reason for ruling.

Mr. Sprowl: I don't want to get up some place and argue this point and find that if I had restated the question at that point when it is too late that I might have gotten an admissible question.

Trial Examiner Hier: As far as I am concerned, no such technicality as that exists.

By Mr. Schrup:

Q. Mr. Malina, you have used the expression "smaller jobber" in your testimony. Will you please define to us what you mean when you state a "smaller jobber?"

A. I would classify the smaller jobber as the J or JA.

Q. What is the upper limit or the dividing line in your opinion or in your use of the term "smaller jobber" when the smaller jobber becomes a larger jobber?

A. Well, I would say when he is in a position to have salesmen out and when his volume of business warrants that he doesn't have to call on me for every little item, every little need as he graduates or grows, and as he be-
1482 comes more and more self sustaining.

Q. Perhaps I didn't state my question clearly to you. I understand when you use the terminology "smaller jobber", you are applying that to those jobbers who are classified by the C. E. Niehoff Company as J or JA accounts, that is, during the year 1949?

A. That is right.

Q. Now what is the top limit of purchases from the C. E. Niehoff Company before a JA jobber becomes a D jobber, using the 1949 terminology.

A. I don't know what it was. I think it was $3600.

* * * * *

1483 By Mr. Schrup:

Q. Mr. Malina, I understood you said in using the terminology "smaller jobber," you applied that to any jobber who was classified by the C. E. Niehoff Company as either a J or JA account during 1949?

A. That is right.

Q. I ask you what is the upper limit of a JA account before he becomes a D account, or what was it in 1949?

Trial Examiner Hier: Now that is a matter of record in this case, why ask this witness, unless you seek to impeach his memory.

Mr. Schrup: I want him to check that, I want to find out from him because I have another question I want to ask him.

Trial Examiner Hier: I just don't see any sense in stopping these proceedings and having him look all through here when it is a matter of record.

The Witness: $3600.

By Mr. Schrup:

Q. Now your definition, then, of a small jobber is anyone who purchases up to $3600 from the C. E. Niehoff Company, is that correct?

A. That is correct.

Q. Immediately when a jobber purchases over $3600.00 from the Niehoff Company he becomes what you call a large jobber?

1484 A. That is right.

Q. Now you make that statement irregardless of what this jobber may purchase from other companies?

A. Well—

Q. In other lines?

A. No, that is what I had in the back of my mind when I said that, because in most instances in my territory where the volume has increased on our line, I have noticed it also increased on other lines. They will grow proportionately.

Q. Does every jobber in your territory who purchases $3600 worth of merchandise from the C. E. Niehoff Company purchase $3600 worth of merchandise from every other line he carries?

A. No, sir.

Q. Now, Mr. Malina, do you keep a record of the time that you spend with each account?

A. I send in reports to the office. I keep no personal record.

Q. You send a report to the office just with the names of the account you contacted or the amount of time you spent with each account?

A. The number of times I contacted them, but no terminology of hours.

Q. Now I believe you stated that it was your opinion that each of thes maller jobbers in your territory required

more catalogs and tune-up charts than the larger 1485 jobbers in your territory.

A. That is right.

Q. Now how many larger jobbers do you have in your territory under your terminology of a larger jobber?

A. Approximately 8.

Q. Does each one of those 8 jobbers require the exact number of catalogs and tune-up charts?

A. No, sir.

Q. Now, with reference to your smaller jobbers, how many smaller jobbers do you have in your territory?

A. About forty.

Q. Does each one of those 40 smaller jobbers require the exact number of catalogs and tune-up charts that each of the others require?

A. No, that would vary.

Q. Do you keep any record of that?

A. No, I don't.

Q. I think you stated also that you called on each of the jobbers in your territory regardless of whether he fell in the terminology of larger jobber or smaller jobber an equal number of times?

A. That is right.

Q. About how often was that, sir, a year?

A. About approximately 15 to 17 times a year.

Q. Now I believe you also mentioned that Sid 1486 Goodman of Automotive Wholesalers is one of your customers?

A. That is right.

Q. Do you consider him one of your good customers?

A. Yes, sir.

Q. How often do you call on him?

A. Approximately the same time I call, or approximately the same number of times I call on my other jobbers, approximately 15 to 17 times a year.

Q. How many other salesmen of the C. E. Niehoff Company call on Sid Goodman of Automotive Wholesalers?

A. I am the only one.

Q. Have you, before testifying in this proceeding, read the record of this case?

A. No, sir.

Q. Mr. Goodman, at page 806 of the record, testified that the Niehoff salesmen called at his place of business almost every Monday.

A. I am happy I impressed him with that kind of service.

Q. Do you wish to change your statement as to how many times you called on Mr. Sidney Goodman with regard to that?

A. No, I do not wish to change my statement.

Q. Now in using your terminology of larger jobber or smaller jobber, what classification does Mr. Goodman of Automotive Wholesalers fall into?

A. He comes in the larger jobber classification.

1487 Mr. Schrup: I think that is all.

Redirect Examination by Mr. Sprowl.

Q. Mr. Malina, as I understand your testimony, then, notwithstanding the fact that Mr. Goodman seems to think you come in there almost every Monday, you, in fact, don't come in there that often, but you there about 17 times a year, is that correct?

A. That is right.

Q. But that you do talk to his organization on the phone an equal number of times?

A. I would say yes.

Q. And that phone contact with customers in your territory is the same for all other jobbers as it is for Goodman's account?

A. Absolutely correct.

Mr. Sprowl: That is all.

Recross Examination by Mr. Schrup.

Q. So that apparently according to the testimony between you and Mr. Goodman, one of you is in error, is that right?

Trial Examiner Hier: Now that is an improper question. It doesn't make any difference what he thinks as to error, we will decide that as to who is right or wrong.

You needn't answer.

1488 I will sustain an objection on my own motion.

Is that all?

All right, Mr. Malina, thank you very much.

(Witness excused.)

Trial Examiner Hier: Do you want to start with Mr. Dreyer this afternoon?

Mr. Sprowl: We might as well.

LOUIS DREYER resumed the stand and testified further as follows:

Direct Examination (Continued).

Trial Examiner Hier: Show Mr. Louis Dreyer resuming the stand, having been previously sworn.

You are reminded of the obligation of the oath you took previously, Mr. Dreyer.

By Mr. Sprowl:

Q. Will you state your name?

A. Louis Dreyer.

Mr. Sprowl: I should like to have this document marked Respondent's Exhibit 61, also 62, 63, 64, 65, 66, 67 and 68.

Trial Examiner Hier: What do you call 61?

Mr. Sprowl: 61 is a burden rate computation respecting the coil department; 62 is a cost of production computation concerning AL-170 coil; 63 is a cost of production 1489 computation respecting coil FF-170.

Then Exhibit 64 is a similar computation on coil FF-173; 65 is a burden rate computation respecting the plastics department; 66 is a cost of production computation on an item called R-13 rotor; 67 is a similar computation on a DR-55 distributor cap; and Respondent's Exhibit 68 is a similar computation on an FF-40 rotor.

(The documents referred to were marked Respondent's Exhibits 61, 62, 63, 64, 65, 66, 67 and 68 for identification.)

By Mr. Sprowl:

Q. Mr. Dreyer, will you take up Respondent's Exhibit 61 for identification and explain to me what that computation represents?

1491 The Witness: First, for the 73.6 per cent, in 1949 there were 241 accounts on a D basis with total sales of $540,038; there were 98 accounts on a DA basis totaling $997,707.

Mr. Schrup: May I interrupt for a moment? I mean, those figures don't even appear on this exhibit.

Mr. Sprowl: They are already in the record, and I will dig them out for you.

Trial Examiner Hier: That is what I was going to ask him myself, if that wasn't on some other exhibit.

The Witness: The total 1949 sales for 866 accounts was $2,086,499.

Mr. Schrup: What exhibits are you referring to, please?

The Witness: I have these figures on another sheet of paper.

Mr. Schrup: Just give us the exhibit number you are referring to.

Mr. Sprowl: It is not an exhibit number, it is oral testimony.

The Witness: I have to dig that up, I got these from somewhere.

Mr. Sprowl: I have it. It appears at pages 309 and 310 of the record wherein the total sales to jobbers and distributors' accounts was given in dollars, and the percentage of those sales by jobber classifications is also given in direct testimony.

1492

Mr. Schrup: Wait a minute, the testimony of the witness was as to the number of the accounts, and this testimony is on a percentage basis.

Mr. Sprowl: It also has the number of accounts, and this is as to the dollar volume sold to those accounts. If you want to take 25 per cent of $2,086,499, and 47.8 per cent, we will do so. That is what he has done.

Trial Examiner Hier: It also ties in, Mr. Schrup, with Respondent's Exhibit 38 for identification.

Mr. Schrup: 38?

Trial Examiner Hier: Well, at least those direct labor figures would. Well, take 38 through 42, and take different percentages of decrease in sales.

Mr. Schrup: You mean Respondent's Exhibits for identification?

Trial Examiner Hier: Yes.

Mr. Sprowl: May I explain one thing at page 309 and 310 of the record. The testimony of Mr. Niehoff shows that of their total volume of sales in 1949 to jobber and distributor accounts, 25.8 per cent was made to the distributor classification and 47.8 to jobber with agreement classification, and if you add the two you get 73.6 per cent, and that is the origin of the 73.7 per cent which Mr. Dreyer has in Respondent's Exhibit 61, that is precisely where it comes from.

1493

Trial Examiner Hier: All right, go ahead.

The Witness: If you will refer to Exhibit 43, Respondent's Exhibit 43—

Mr. Schrup: For identification.

Trial Examiner Hier: That is right, it is for identification.

Go on.

The Witness: The burden rates on that as compared with the percent of production shows from 50 to 100, so therefore they do not include anything like the 73.7 per cent, and therefore the burden rate for that percentage had to be calculated, and that is the reason for that.

Now the figures for the direct labor, $40,094, the potential loss of accounts less 73.7 per cent would make the total direct labor under those conditions $10,545.

By Mr. Sprowl:

Q. Now am I correct, Mr. Dreyer, in assuming that because the curve on Respondent's Exhibit 43 for identification goes only to a drop of 50 per cent in production, that from that curve you couldn't calculate the burden rate if you had a 73 per cent drop in production?

A. That is right.

1494 Q. And the exhibit you are testifying about is the same kind of a computation predicated upon a 73 per cent drop in production?

A. Correct.

Trial Examiner Hier: Which is further, as I understand it, predicated on another assumption, namely that if the discounts were eliminated, the business sold to those accounts now receiving those discounts would be lost amounting to a 73.7 per cent drop in volume?

Mr. Sprowl: That will come on a later exhibit to show where we would be on cost of production if we were cut back to that point, that is why we have gone to 73.7. We could have gone to 75 or any other figure.

Are you through with 61?

The Witness: No.

Referring back to Exhibit 38, or some of the succeeding ones, 39 and 40, for indirect labor, payroll tax and insurance, packing and supplies figures, we have for the bases for indirect labor, $13,633; a loss of 73.7 per cent of that would be $11,525.37.

Similarly, for payroll tax, $1,052 less 73.7—or, 73.7 of that figure would be $775.

For Workmen's Compensation and group insurance, 73.7 per cent of $941 would be $693.

1495 For packing and supplies and services, I took half of that as being conservative, 37 per cent of $1,806, or $668.

Adding all of these together it would amount to $13,662 and some cents.

Now we add the adjusted direct labor of $10,545, and we had total expenses of $40,102 less these itemized adjusted expenses of $13,663 which would leave the estimated expenses of $26,439, with the loss of 7.37 per cent.

The burden rate under those conditions would be $26,439 divided by $10,545 or 250 per cent.

That was the basis for arriving at a burden rate if the D and DA accounts were lost.

Trial Examiner Hier: How do you define burden rate? I get the idea, but I want to know how you define it.

The Witness: The burden rate is the result of dividing the expenses by the direct labor involved. In other words, for every dollar of direct labor you have so many dollars of expense. In other words, you can therfore determine how much it is per dollar of direct labor.

Trial Examiner Hier: It is the proportion between—

The Witness: The proportion between the total expenses and the direct labor.

By Mr. Sprowl:

Q. Now, Mr. Dreyer, looking at Respondent's Ex-
1496 hibit 38 for identification and having followed the explanation you have just given as to Respondent's Exhibit 61, it seems to me that you follow the same method in preparing both of those exhibits at different levels of production.

A. Exactly. The previous computation stopped at 50 per cent and this computation is at 73.7 per cent.

Do you want me to go on?

Q. Yes, take up 62.

Mr. Schrup: I will interpose the same objection.

* * * * *

1497 Objection overruled.

Mr. Schrup: They might just as well come in and say what would happen if they had a fire.

Trial Examiner Hier: Objection overruled.

Go ahead.

By Mr. Sprowl:

Q. Will you take up Respondent's Exhibit 62 and will you explain to the Trial Examiner first of all what an L-170 coil represents?

A. Well, that is a coil manufactured in its entirety by the Niehoff Company.

Q. In the coil department?

A. In the coil department.

Q. And have you had any previous exhibits identified relating to that coil?

A. I really don't remember. I believe I will have to refresh my memory on that.

Q. I think not, I think we did it only in the plastics department.

A. I don't believe we did either.

Q. All right, that is made in the coil department of the C. E. Niehoff Company?

A. Yes, sir.

Q. What is the fact, was it made in 1949?

A. Yes, sir, it was.

1498-A Q. Now I notice three columns, the first one headed "normal."

Does that indicate normal production at 1949 volume?

A. It means the production, yes, without any loss or reduction due to the loss of either D or DA accounts.

Q. All right.

A. The cost per hundred coils were obtained from the Niehoff records, the material cost.

Q. Now just a moment, the second column—

Mr. Schrup: Might I suggest Mr. Sprowl let the witness testify if we are going to have this type of proceeding.

Mr. Sprowl: You can ask all of the questions you want to on cross examination, but I want to examine the witness in my own way.

Mr. Schrup: I think you are leading him.

Mr. Sprowl: I am not leading him. Will you sit still and let me ask a question for a change?

Trial Examiner Hier: Go ahead.

By Mr. Sprowl:

Q. Mr. Dreyer, I want to direct your attention to the second column, the 52.2 per cent, is that the production remaining, assuming that the 47.5 per cent of DA business which the Niehoff Company enjoyed in 1949 were lost?

A. Yes, sir, it is.

Trial Examiner Hier: Now what does "RE"

1498-B stand for?

The Witness: Respondent's Exhibit 43.

Trial Examiner Hier: I see.

The Witness: That figure 149 was obtained from that on the basis of the loss of 52.5 per cent.

Trial Examiner Hier: I understand.

By Mr. Sprowl:

Q. And that burden rate is taken from that exhibit?

A. Yes, that is right.

Q. Now the last column is "Less D and DA," what does that indicate?

A. That 250 was the one which I just explained, how that was obtained.

Q. That burden figure is taken from 61?

A. From 61, that is right.

Q. And if the D and DA represented, as you explained, and as I understand it, 73.7 per cent of the business which the Niehoff Company enjoyed in 1949,—

A. That is right.

Q. —this would then represent the difference between that and 100 per cent, or about 26.3 per cent of production?

A. That is right.

Q. Now will you explain the other figures under that?

A. Well, the cost of the material if these accounts were lost would still be the same per hundred coils. The labor cost would be the same, approximately. In other words, we are leaning backwards in that case, it would probably be a little higher but we feel that the same figure should be used because the difference would be hard to determine.

1498-C

In each case the burden is the product of the burden rate times the labor.

In the first column, inasmuch as the burden rate is 100 per cent, the burden amount would be the same as the labor amount, $29.94. In the second column the burden rate being 149 per cent, the actual burden would be 149 per cent of $29.00, or $44.61.

The third column where the burden rate is 250 per cent, in the same manner the burden expense would be $74.85.

Q. This is per one hundred coils?

A. Per one hundred coils.

So under normal production, the cost per one hundred coils would be $129.81, and with the loss of the DA accounts it would be $144.48, and with the loss of both D and DA accounts the cost per hundred coils would be $174.72.

Q. Following down the exhibit, what is the factory cost each?

A. Well, dividing the cost per hundred by one hundred we would get the factory cost each. In round figures it would be $1.30 for the first column, $1.44 for the second, and $1.75 for the third.

Q. In other words, if your 1949 production had been cut back about 47 and a half per cent, your cost per coil would have risen from $1.30 to $1.44 on the factory floor?

1498-D

A. That is right.

Q. If it were cut back some 26 per cent, it would rise to $1.75 a coil?

A. That is right.

Q. All right. Now what is the per cent of normal?

A. Well, the first column being a hundred, for the loss of DA accounts we would divide $1.44 by $1.30 which would make 111 per cent.

In the third column, similarly, dividing $1.75 by $1.30 it would be 134 per cent.

Q. In other words, in each of the three columns you have shown there in percentage figures the relationship of the increased cost to normal cost?

A. That is right.

Q. So in the second column it would rise to 111 per cent of normal and in the third column 134 per cent of normal, is that correct?

A. That is correct.

Now in taking the Niehoff jobbers' cost sheet—

Q. Now just a moment, that is in evidence and we might as well give the numbers.

Trial Examiner Hier: While you are looking for that number I will ask Mr. Dreyer this question: In all 1499 of these exhibits, Mr. Dreyer, the column headed "Normal" represents actual figures of production during 1949, is that it?

The Witness: That is without the loss of any accounts, that is right.

Trial Examiner Hier: You took your 1949 production as normal for the purpose of these exhibits?

The Witness: That is right. The costs were determined on normal production, yes, sir, that is what it amounts to.

By Mr. Sprowl:

Q. I show you Commission's Exhibit 8-A, and ask you if that is the jobbers' price sheet you referred to in preparing your Exhibit 62 for identification?

A. Yes, it is.

Q. Now with that background will you explain that last column to us?

A. Well, the jobber's cost in that price list is $2.40 each.

Q. Now stop right there. The part number of that part is—

A. AL-170.

Q. Calling your attention to the second page of Commission's Exhibit 8-A, in the first column on the extreme left hand side, under the heading coils to fit Auto-Lite, the first column is AL-170 coil showing a jobber price at $2.40. Is that where you derived that price from?

A. Yes, sir.

The second column is the one on the basis of the 111
1500 per cent variance from the normal jobber's cost which would be $2.66 if the DA accounts were lost, and $3.22 if both the D and DA accounts were lost.

Q. In other words, $2.66 is the figure which you computed and represents 111 per cent of $2.40?

A. That is right.

Q. And the $3.22 is a figure which you computed and represents 134 per cent of $2.40, is that right?

A. That is correct.

Trial Examiner Hier: Now before you go on to another exhibit, Mr. Dreyer, I would like to ask you this question: In computing the exhibit of this type, 62, what other assumptions did you make in reference to burden rate? In other words, I am not an accountant, I know nothing about it, but it occurs to me that you must have made the assumption that even though a 52.5 per cent of sales, or in another instance 73.7 per cent decrease in sales took place, that is the first matter assumed, nevertheless, the supervision, management, G&A, and so on would remain constant. Did you use that assumption implicit in this exhibit?

The Witness: The material and labor, are you referring to?

Trial Examiner Hier: No, I am not referring to material and labor, that is actual cost.

The Witness: Yes, any of the items made in the
1501 coil department, the burden rate would be the same 250 per cent.

Trial Examiner Hier: I mean, all of these exhibits have that implicit assumption in them, is that a fact?

The Witness: Yes, for the coil department. This applies only to that one department.

Trial Examiner Hier: All right, go ahead.

The Witness: That concludes Exhibit 62.

By Mr. Sprowl:

Q. Now is 63 the same type of computation you have just described on Exhibit 62 except that it relates to Coil FF-170 instead of AL-170?

A. That is correct.

Q. There again did you derive the jobber's cost which appears at the bottom of the lefthand column of Respondent's Exhibit 63 as $2.60 from Commission's Exhibit 8-A?

A. I did. It is on the third page.

Q. Is it on the third page of Exhibit 8-A?

A. Yes.

Q. The last column to the right under the heading "Coils to fit Ford?"

A. That is right.

Q. It is the first entry under that heading, FF-170 coil, showing the jobber price as $2.60?

A. That is right.

Q. And all of the other figures on this Exhibit
1502 63 were either derived or computed in the same manner you have explained the figures on Exhibit 62?

A. Yes.

Q. Turning now to Respondent's Exhibit 64 which relates to a part called Coil FF-173. Excepting that it applies to that particular coil, were all of the figures appearing on 64 derived or computed by you in the same manner that you derived or computed the figures on 63 and 62?

A. Yes.

Q. Referring to the figure at the bottom of the left hand column of 64, "Jobber's cost, $2.88," was that taken from the jobber's price sheet which is Commission's Exhibit 8-A?

A. Yes.

Q. Does it appear in the third page, righthand column, under the heading coils, "Coils to fit Ford?"

A. Yes.

Q. As part FF-173 showing a jobber's price of $2.88?

A. That is right.

Q. That is where you obtained that figure?

A. Yes.

Q. Now take up the next.

Trial Examiner Hier: I believe we will adjourn now until 10:00 o'clock tomorrow.

(Whereupon, at 5:00 p.m., Tuesday, June 17, 1952, the hearing in the above entitled matter was adjourned until Wednesday, June 18, 1952, at 10:00 a.m.)

1503 Room 1310, 173 West Madison Street, Chicago, Illinois.
Wednesday, June 18, 1952.

Met, pursuant to adjournment, at 10:00 a.m.

Before: Frank Hier, Trial Examiner.

Appearances:

E. P. Schrup, Attorney for the Federal Trade Commission.

Charles R. Sprowl, 134 South LaSalle Street, Chicago, Illinois, Attorney for the Respondent.

1504 Proceedings.

Trial Examiner Hier: You may proceed.

LOUIS DREYER was thereupon called as a witness for the Respondent and, having been previously sworn, testified further as follows:

Direct Examination by Mr. Sprowl.

Q. Mr. Dreyer, will you please take up Respondent's Exhibit 65 for identification?

A. Yes.

Q. I wish to first ask you if that is a burden rate computation computed in much the same manner as Respondent's Exhibit 49 was computed?

A. Yes.

Q. And it relates to the plastics molding department of the Niehoff company?

A. It does.

Q. As I understand it whereas the previous exhibits you have identified computed the burden rate to a certain assumed reduction in the volume of that department, that this Respondent's Exhibit 65 carries it on to the point

where you have a 73.7 decrease in that production, is that right?

A. That is right.

Q. With that background will you explain Re-
1505 spondent's Exhibit 65?

A. Well, if we have the direct labor for these three months as shown with a loss in business of 73.7% assumed it would bring the direct labor for these three months to $636.08.

Q. And those are the same three-month figures in 1951 that you used in Respondent's Exhibit 49?

A. Yes, they are.

Q. Those direct labor figures as you have already testified came right off the records of the Niehoff Company?

A. That is right. Similarly for the total expenses; here again on the basis of 73.7 decrease in sales the indirect labor would decrease in the same proportions over the payroll taxes and the insurance charges, workmen's compensation included, whereas the factory supplies and services would be reduced by about half of that percentage and on a conservative basis.

Going through those various figures the total expenses would be $3341.16 for those three months and dividing that figure by $636.08, the direct labor for those three months after 73.7% decrease would give a burden rate of 525%.

Q. Now, turning back to Respondent's Exhibit 45 is that, as I recall it, your computation of your actual burden rate for the three months in question?

A. Yes.

Q. And Respondent's Exhibit 46 is the effect of a 10% decrease in sales in the plastics department on that burden rate?

1506 A. A 10% decrease.

Q. And Exhibit 47 is the effect of a 20% decrease in sales on the burden rate?

A. That is right.

Q. And Exhibit 48 shows the effect of a 30% decrease in the burden rate?

A. That is right.

Q. And 49 shows the effect of 40% decrease?

A. Right.

Q. And 50 shows the effect of a 50% decrease, is that right?

A. That is right.

Q. And your Exhibit 51 is a graph which graphically

portrays the burden rate at various levels of production which form the computations made on 45, 46, 47, 48, 49 and 50?

A. That is right.

Q. And that graph will curve in before it reaches the point comparable to the reduction of 73.7% in the burden rate?

A. That is right.

Q. So it was necessary in order to get that burden rate to make the computation which is Exhibit 55, is that correct?

A. That is correct.

Q. And the computation method used on Respondent's Exhibit 65 is the same method you adopted in Respondent's Exhibits 45 through 50, inclusive, is that correct?

A. Yes.

1507 Q. Will you turn to Respondent's Exhibit 66 and will you tell me what that exhibit portrays?

A. This is an analysis of the DR-13 Rotor. A normal burden rate is 170%; from the Respondent's Exhibit 51 the burden rate reflecting a loss of 52½% in business would be 285% and the burden rate reflecting as loss of 73.7%, a loss of D and DA business, is 525%, as calculated.

Q. That is, 525% comes from Respondent's Exhibit 65?

A. That is right.

Q. And the 285% is taken off of the graph which is Respondent's Exhibit 51, am I correct in that?

A. Yes.

Mr. Sprowl: Off the record?

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Sprowl:

Q. Now, if you had a percentage in the third column it would be 73.7?

A. That is right.

Q. That would be the reduction in the production level?

A. That is right.

Q. Now, taking the column headed Normal, the second portion of that column called: Cost Per 100 Rotors, is that actual?

A. Those are actual.

1508 Q. You show the material, labor and the burden rate as you have computed it, as you have heretofore explained, to show the cost of $5.68 for 100 rotors?

A. That is correct.

Q. And I assume the figure immediately below that is cost of 5.7 cents per each rotor?

A. That is right.

Q. As merely dividing the previous figure by 100?

A. That is right.

Q. Your percent is 100; that is the normal level of production, is that it?

A. That is right.

Q. Now, where is the figure jobber's cost 14 cents derived from?

A. That is from the jobber's cost of February 28, 1949.

Q. Is that the exhibit which is Commission's Exhibit 8-A?

A. Yes.

Q. Your answer to that was Yes, is that right?

A. Yes.

Q. Now, calling your attention to page 2 of Commission's Exhibit 8-A, in the middle column under the heading: Parts to fit Delco Remy; going down that column to an item: DR-13 Rotor, showing a jobber's cost of 14 cents. Is that where you obtained the figure which appears on Respondent's Exhibit 66?

A. Yes.

1509 Q. Now, will you explain the figures under the second column of Respondent's Exhibit 66?

A. Material and labor cost, assuming a drop in business of 52½%, the DR-13 Rotors would still be the same, assumedly.

Q. That is, it would be the same for each 100 rotors?

A. For each 100 rotors. The burden rate, however, would change as shown in the first line to 285% and therefore the burden cost would be $3.74 plus, total cost of $7.20 plus, or a factory cost each of 7.20 cents.

Q. Now, what percentage is that cost to the normal factory cost?

A. Well, dividing 72 by 57 would give a percentage of 126.

Q. And you have recorded that in the center column, the next to the last entry?

A. That is right.

Q. What is the last figure on the bottom of that little column, 18 cents?

A. The jobber's cost shown on the first column of 14 cents, multiplied by 126%, would give 18 cents.

Q. All right, now the third column.

A. That was figures in a similar manner using a burden rate of 525% and resulting in a cost per 100 rotors of $10.35 plus, as factory cost, or 10.4 cents each.

Again dividing 104 by 57 would give a percentage of normal of 182. Then multiplying the original job-
1510 ber's cost, the normal jobber's cost of 14 cents by 182% would give a jobber's cost of 25 cents each if the D and DA accounts were lost.

Q. Did you explain the 182% figure?

A. That is obtained by dividing 104 by 57.

Q. And the jobber's cost of 25 cents, that is 182% of 14 cents, which is the present jobber's cost?

A. That is right.

Q. Mr. Dreyer, directing your attention to the middle column of this Respondent's Exhibit 68 you have the figure RE-51. Does that refer to Respondent's Exhibit 51?

A. Yes.

Q. And that is put on there to show that you derived your burden figure of 285 from Respondent's Exhibit 51?

A. That is right.

Q. Now, in the next column you have the word "Calculated". Does that refer to the burden figure of 525?

A. Yes.

Q. And that is the burden figure which you have calculated on Respondent's Exhibit 65 for identification?

A. Yes.

Q. Now, Mr. Dreyer, is Respondent's Exhibit 67 subject to the same explanation as is Respondent's Exhibit 66, with the exception that it relates to DR-55 distributor cap rather than the DR-13 Rotor?

A. Yes.

1511 Q. And is the jobber's cost of 50 cents shown at the bottom of the first column of figures on the left hand side derived from Commission's Exhibit 8-A?

A. Yes.

Q. And is it derived from the figures on that exhibit appearing on the second page, the middle column, under: Parts to Fit Delco Remy?

A. Yes.

Q. DR-54 caps show a jobber's price of 50 cents?

A. Yes.

Q. And turning to Respondent's Exhibit 68, excepting for the fact that that relates to the FF-40 Rotor, is that

subject also to the same explanation that you have given for Respondent's Exhibit 66?

A. Yes.

Q. Directing your attention to the last figure in the column headed: Normal, which is jobber's cost 38 cents, was that figure derived from Commission's Exhibit 8-A?

A. Yes.

Q. And whereabouts on Exhibit 8-A?

A. Page 3, the first column, under the heading: Parts to fit Ford. It would be the fourth item from the bottom in the first column.

Q. Does that show a jobber's cost of 38 cents?

A. That is right.

1512 Q. Now, you previously put in some exhibits on a part called a DR-135-P plate. Have you made any further computations with respect to that plate?

A. No, I haven't.

Q. And is there any reason for that?

A. Yes, because it is a part which goes into an assembly and there are no jobber's costs shown. There would be no basis for comparison in the same manner as we have done in these cases covered this morning.

Q. Now, will you put before you Respondent's Exhibits 56 and 66?

A. Yes.

Q. Now, am I correct in assuming that the first column of figures on the left hand side of each of those exhibits has to do with the normal production run?

A. Yes; in the Exhibit 66 I use the burden rate of 170, whereas in Exhibit 56 it is 169.3.

Q. Now, in Exhibit 56 I notice you come out with a cost per 100 of $2.23, whereas in Exhibit 66 you come out with a cost of $5.68. What is the difference in these two exhibits which reduces that difference in cost?

A. In Exhibit 56 only the work done in the plastics molding department was considered. There is some other work done in other departments in which the burden rate is approximately the same, so in Exhibit 66 the total
1513 cost is reflected in work done in all departments, whereas in Exhibit 56 only such work as was done in the plastics molding department was shown.

Q. Am I correct in saying that Exhibit 56 is the cost per 100 at various levels of production as it leaves the molding machine?

A. That is right.

Q. Whereas Exhibit 66 is the finished factory cost?
A. That is right.
Q. Including all trim and assembly and box that goes into that?
A. That is right.
Q. Now, will you place before you Respondent's Exhibits 54 and 67?
A. Yes.
Q. I will ask you again if Exhibit 54 in that case represents respecting the DR-55 distributor cap, the machine cost after the item has left the molding machine, whereas 67 portrays the finished factory cost?
A. Yes; that is correct.
Q. Now, will you put before you Respondent's Exhibits 52 and 68 for identification?
A. Yes.
Q. Each of those exhibits relates to the FF-40 rotor, do they not?
A. Yes.
Q. And which one relates to the cost of the rotor 1514 as it leaves the plastics molding machine?
A. Exhibit 52.
Q. And does Exhibit 68 represent the finished factory cost of that FF-40 rotor?
A. That is right.
Q. Now, with respect to the AL-170 coil, which is Respondent's Exhibit 62 and the FF-170 coil, which is Respondent's Exhibit 63, and the FF-173 coil, which is Respondent's Exhibit 64, do each of those three exhibits show the finished factory cost at the various levels of production shown on those exhibits for that coil?
A. Yes.
Q. And am I correct in assuming that there are no other exhibits which show the cost of that coil at any intermediate stage of production?
A. There are no others.
Q. Is there a reason for that? I will put it this way: Is there any single machine in the coil department which does a major part of the work in making a coil such as there is in the plastics department?
A. No, there is quite a variety there and in order to show the feature of a cost which would be comparable or which would mean something with regard to the jobber's price, the cost of the total coil was taken from the records. The cost for material, labor and burden.

1515 Q. I want to ask you this, Mr. Dreyer: Will you turn, as an example, we will take the last exhibit, Respondent's Exhibit 68. I want to direct your attention to the last three lines running across the bottom of that exhibit; the first line shows the actual factory cost for that particular unit at three different levels of production, and you have explained to me that the line below that is merely a percentage calculation of increase in the cost to normal as production goes down.

Now, I see that you have in coming to the jobber's cost instead of increasing the jobber's cost from 38 cents by merely the increase in factory cost, you have, in fact, increased it by 133%. Why have you done that? Do you understand my question?

A. Not quite clearly.

Q. Let me go back: You will notice under Normal, you have a factory cost of 17.3 cents. Are you Respondent's Exhibit 68?

A. That is right.

Q. Do you see that?

A. Yes.

Q. Under your second column, which is the Cost, you have reduced your volume 52.5%; you get a cost of 23 cents, is that correct?

A. Yes.

Q. That is an increase of how much over 17.3?

A. An increase of 33%.

Q. No; I mean in pennies?

1516 A. That would be 6.3 cents.

Q. It would be 5.7 cents, wouldn't it?

A. I am mistaken. That is right,—5.7 cents.

Q. Now, why didn't you in arriving at the jobber's cost under the second column, merely add 5.7 cents to 38 cents, to make it 43.7 cents?

A. Well, it is a question of percentages there. It wouldn't reflect the true conditions if you did it in that manner. If the factory cost goes up 33%, you have to get that same percentage more from your jobber.

Q. In other words, you would have to apply a mark-on to that increased factory cost?

A. That is right.

Q. And that would cover what other items?

A. The factory cost itself is not the total cost to the company. In addition to that, there must be sales and

administrative expenses added, plus whatever profit is required, and on all these factory costs you still have to add those to get the basis for determining the jobber's cost.

Q. Now, is it your opinion that the proper way to arrive at what the jobber's cost should be in the event your production is cut back 52.5%, is to take the 133% figure which appears in the second column and multiply it times the jobber's cost in normal conditions?

A. Yes, I think that would be the right way to do that.

1517 Q. That produces a jobber's cost of 50 cents. Is that too high or too low or about right?

A. I would say it was about right because the expenses which have not been considered here would be changed in about the same proportions, not absolutely mathematically correct but close enough for comparative purposes.

Q. Let me ask you this: If someone else disagreed with your opinion they nevertheless could from this exhibit, get the exact increase in factory cost of 5.7 cents and apply such markup figure as they thought was correct, is that right?

A. That is right.

Q. So what this exhibit does show is the actual increase in factory cost and your opinion as to what the new projected jobber's costs should be at those reduced levels of production?

A. Yes.

Trial Examiner Hier: Which opinion, Mr. Dreyer, assumes that the increase in factory cost would be carried out as to all other factors. In other words, if there was a 133% increase in factory cost you would assume as the basis of your opinion that there would be a 133% increase in other factors, such as overhead, sales and administrative expense, and profit?

The Witness: Yes, I am not so sure about a profit but probably that too. But the others would be about in line; I think so.

By Mr. Sprowl:

1518 Q. Now, you have made these calculations as to 5 or 6 items that are manufactured in the Niehoff plant and were actually manufactured by them in 1949.

Do you have an opinion as to whether or not if you went and took the time to make similar calculations as to all

other items which the Niehoff company actually manufactured in 1949, would show the same general type of result?

Mr. Schrup: I object. It calls for an additional assumption and speculation on the part of the witness.

Mr. Sprowl: It calls for his opinion.

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Trial Examiner Hier: On the record. I think
1519 opinion evidence on this matter is incompetent and I am going to sustain the objection.

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1520 Mr. Sprowl: We offer in evidence Respondent's Exhibits 37 through 68.

Trial Examiner Hier: You are offering in evidence, Respondent's Exhibits 37 through 68, with the exception of 60-A through 60-L?

Mr. Sprowl: Yes.

Trial Examiner Hier: That is your offer?

Mr. Sprowl: Yes.

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1530 Respondent's Exhibits 37 through 59 are admitted in evidence as indicated and Exhibits 61 through 68 of Respondent are admitted in evidence as above indicated, and the reporter is charged with the custody of Respondent's Exhibits 37 through 68, inclusive by the hearing examiner.

(The papers referred to, heretofore marked for identification RESPONDENT'S EXHIBITS 37 through 59, and 61 through 68, were received in evidence.)

Trial Examiner Hier: We will take a few minutes' recess.

(Short recess.)

Trial Examiner Hier: On the record.

Mr. Schrup: In order that the record may be clear, I make a motion to strike the testimony of the witness, Dreyer, in connection with the exhibits offered and ruled upon by the Examiner.

Trial Examiner Hier: Obviously the motion is denied because if the exhibits go in, the testimony should be in for the same purpose and limited in the same manner.

Mr. Schrup: I wanted to be clear on that. I don't believe I have to show an exception as long as they are automatic.

Trial Examiner Hier: Exceptions are automatic.

Mr. Sprowl: I should like to have marked for identification, Respondent's Exhibit 69.

1531 Trial Examiner Hier: What is it?

Mr. Sprowl: The Sales Cost Per Customer of the Niehoff company in 1949.

Trial Examiner Hier: It may be marked.

(The paper referred to was marked Respondent's Exhibit 69 for identification.)

By Mr. Sprowl:

Q. Mr. Dreyer, at my request, did you take the information portrayed on Respondent's Exhibit 8 and make a computation which showed the selling cost per customer in 1949 arrived at by dividing the number of customers served by the Niehoff salesmen in that year by the total direct selling cost?

A. Yes.

Q. And has that computation been identified as Respondent's Exhibit 69?

A. Yes.

Q. And the figure 781 which appears on that exhibit is the same number of accounts which appears on Respondent's Exhibit 8?

A. Yes.

Q. And are the expenses of servicing accounts the same figures which appear under direct selling cost on Respondent's Exhibit 8?

A. Yes.

Q. And that does not include any selling expense incurred by Bigelow, or Paul G. Niehoff or the house of Peaslee, is that right?

1532 A. That is correct.

Q. Nor does it include any accounts which the Niehoff company sold in 1949 which were handled through its three branch offices?

A. That is right.

Q. And your final calculation on Respondent's Exhibit 69 is merely a division of 781 into the total selling expense?

A. That is right.

Q. Now, I would like to ask you this: As long as each salesman of the Niehoff company calls on the customers in his territory the same number of times in a year, irrespective of whether that is once or ten times, would that

make any difference in a calculation of the cost per customer?

Mr. Schrup: I object. I think that is going into conjecture on the part of this witness.

Trial Examiner Hier: He is asking for an accounting conclusion, isn't he?

Mr. Schrup: No.

Trial Examiner Hier: I don't see anything objectionable about it. Go ahead. The objection is overruled.

A. I fail to see where it would make any difference.

Trial Examiner Hier: What are you driving at about any difference? Difference in what respect?

The Witness: A certain number of accounts; the cost per account would be—

Trial Examiner Hier: You mean the difference in
1533 cost per account?

The Witness: That is right.

Trial Examiner Hier: Is this $204 on this Exhibit 69 the average cost per account?

The Witness: That is right.

Trial Examiner Hier: Let me ask you this: Is it a fact, if you know, that all Niehoff customers are called on the same number of times in each of the sales territories?

The Witness: I have no definite knowledge of that except I have seen some of the records. I know in the Chicago district they make more calls than they do in many of the others, per account.

* * * * *

1534 Tria. Examiner Hier: I know, but the weight to be placed upon an average figure does depend—well, I will ask the witness this question: The weight to be placed on an average figure, Mr. Dreyer, is in direct ratio to the similarity and the closeness of the figures which
1535 are averaged, isn't that right?

Coming down specifically to this: If all accounts were called on four times a year, then there is more weight to be placed on this $204 average than if some accounts were called on once and some accounts were called on 17 times, isn't that right?

The Witness: It wouldn't be a case of a weighted average all the way through.

Trial Examiner Hier: I am not talking about the weight but about reliability in a legal sense.

The Witness: I think that is right.

By Mr. Sprowl:

Q. You made no effort to weight this $204 figure to reflect the fact, as the witnesses have testified, that in their opinion they spent more time with the small than with the big account?

A. No.

Q. You treated them all as though they were the same?

Trial Examiner Hier: That is obvious from the exhibit.

* * * * *

1537 *Cross-Examination by Mr. Schrup.*

Q. Mr. Dreyer, it is your opinion that $204 would reflect, correctly, the cost of a call, each call upon each account, by a Niehoff salesman?

A. No; this is not the cost per call.

Trial Examiner Hier: It is not his cost per call. It is not intended as that. It is the cost per account.

By Mr. Schrup:

Q. I will add that to it: Is it your opinion, Mr. Dreyer, that the figure $204 appearing on Respondent's Exhibit 69 reflects the actual cost per account of servicing each of the 781 accounts of the C. E. Niehoff Company, taking into consideration the number of different calls made on the different accounts and the location of the different accounts in the different parts of the country?

A. This is a cost per account per year for the year 1949.

Q. That is without reference to actually computing the number of calls and the time spent or the distance travelled?

1538 A. The number of calls isn't considered.

Trial Examiner Hier: There isn't any doubt about that. It is an average. It isn't cost per call; it is an average.

Mr. Schrup: He doesn't say anything about average; he shows cost per account.

Trial Examiner Hier: When you take his total and divide it, you come out with an average.

Mr. Schrup: That is true, but what is the probative value?

Trial Examiner Hier: I am going to overrule the objection, if you have no further questions, and admit it into evidence.

(The paper referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 69, was received in evidence.)

Mr. Sprowl: That is all, Mr. Dreyer.

Trial Examiner Hier: That is all; thank you.

(Witness excused.)

Mr. Sprowl: I should like to have identified as Respondent's Exhibits 70, 71 and 72 this press release of the FTC: as Exhibit 70, the Complaint against Mid-South; as 71—

Trial Examiner Hier: What is 70, re what?

Mr. Sprowl: This is a press release issued by the Office of Information of the FTC to morning newspapers on Friday, May 12, 1950, respecting FTC Complaints 5766 through 5771. As Respondent's Exhibit 71 is the
1539 Complaint in Docket 5766, against Mid-South; and Respondent's Exhibit 72 is the Complaint in Docket 5767, against Cotton States.

Trial Examiner Hier: First of all, Mr. Schrup, will you look at those things and see if there is any question as to their authenticity?

Mr. Schrup: I don't question their authenticity. I think I know the purpose for which they are offered. I have the same objection as I have heretofore made.

Trial Examiner Hier: How can there be the same objection if these haven't been offered?

Mr. Schrup: I think I can see what they are offered for.

Trial Examiner Hier: Tell me what those are offered for, Mr. Sprowl.

Mr. Sprowl: This, again, goes to my questioning of the good faith of the Commission in this proceeding. It shows that in 1950 the Commission started out with a great deal of flag-waving and press-releasing, to go after what they call group-buying units and they issued complaints against two group-buying organizations on that date and at the same time they issued four subsidiary complaints against four suppliers who sold variously to those two groups.

The Niehoff company, as we know, sold only to Cotton States. I propose also to show from a letter of the Commission that to this date no proceedings have been
1540 held on the two complaints issued against either Mid-South or Cotton States.

Trial Examiner Hier: Tell me this, Mr. Sprowl: There is nothing in those press releases which were not

contained in the complaints themselves, isn't that the fact?

Mr. Sprowl: I think the press release is quite eloquent in explaining the intention of the Commission in bringing these complaints. It doesn't appear in the complaints at all.

Trial Examiner Hier: Let me see them.

Mr. Sprowl: Here is the press release on top.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record. 71 and 72 are the complaints themselves?

Mr. Sprowl: That is right.

Trial Examiner Hier: Official notice will be taken of those.

Mr. Sprowl: All right. On that basis, I will withdraw 71 and 72 and, as a matter of fact, let us assume that we strike the numbers.

Trial Examiner Hier: No; we will leave the numbers because they already appear in the record. The record may show that in lieu of the receipt of 71 and 72 for identification in evidence that the Examiner will, at the request of counsel for the Respondent, take official notice of the complaints in Dockets 5766 and 5767. By the way, mark them for identification.

1541 (The papers referred to were marked Respondent's Exhibits 70, 71 and 72 for identification.)

Mr. Sprowl: Will you also take judicial notice as to the additional complaint named in the press release?

Trial Examiner Hier: Well, that is what I was coming to next. That is the reason I asked you the question. Was there anything in this press release which are not in the complaints, because I can take official notice of the contents of those complaints and, of course, this is on a matter that I am not going to pass on anyway.

Mr. Sprowl: I appreciate that.

Trial Examiner Hier: But in order that the Commission may be bound by what I do in the matter of official notice, I will take official notice of the complaints in Dockets 5766 through 5771, unless there is some objection that I don't anticipate from counsel in support of the Complaint.

Mr. Schrup: It is rather difficult in this manner of procedure. The only thing I can state is that the original ruling in this matter was wrong; I urge that one violation of the law does not justify another. There are others

to be considered, buyers who might be discriminated against.

Trial Examiner Hier: I am not taking official notice of these matters as defense. I have made that clear. This is part and parcel of the receipt in evidence of these projects and assumed states of affairs, the reasons
1542 for which are in 1061 and 1064 of the transcript, and therefore 70, 71 and 72, the record may show, are withdrawn.

Mr. Sprowl: Not 70.

Trial Examiner Hier: Well, I said I would take official notice of the complaints.

Mr. Sprowl: Exhibit 70 is the press release.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record. Exhibits 71 and 72 are withdrawn and Exhibit 70 is received in the record for the limited purpose indicated.

Mr. Schrup: Over my objection?

Trial Examiner Hier: Your objection is shown and your exceptions are automatic.

(The paper referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 70, was received in evidence.)

(The papers referred to, heretofore marked for identification Respondent's Exhibits 71 and 72, were withdrawn.)

Mr. Sprowl: Now, to an inquiry which I addressed to the secretary of the FTC with respect to complaints issued in Dockets 5766 and 5767, which are the Cotton States and Mid-South complaints, I was advised that the complaints were served on May 10, 1950, that answer was filed July 31, 1950 in Docket 5766 and on August 25, 1950 in Docket 5767, and I was further advised that no hearings have been held to date in either matter.

1543 Trial Examiner Hier: Since counsel in charge of both of those complaints are in the room, that should be able to be verified.

Mr. Sprowl: As Mr. Schrup may be able to confirm that matter, I will show you the letter.

Mr. Schrup: I have my continuing objections to the continued relevancy of this matter. But there have been no hearings in the Mid-South or Cotton States cases. Those are 5 group cases.

However, there has been and is now in process the

working out of stipulations to avoid trial in those cases, with some degree, as I understand it, of possible success.

Trial Examiner Hier: The facts stated in Mr. Daniels' letter which Mr. Sprowl quoted from are correct?

Mr. Sprowl: It is not Mr. Daniels' letter; it is Mr. Kolinsky's.

Mr. Schrup: That is right. As I stated before, these cases are directed against buyers. Mr. Sprowl's client is a seller. The cases are not alike, to start with.

Trial Examiner Hier: I don't think these are relevant but on the matter of defense I am going to admit them, thereby overruling the objection of counsel for the Complaint.

Mr. Sprowl: I didn't think we would finish so soon. I do have Mr. Geyer and Mr. Niehoff for some questions this afternoon.

1544 Trial Examiner Hier: What time do you want to adjourn to, 2 or 2:30?

Mr. Sprowl: What about 2 o'clock? But before we adjourn, our original Answer in this matter did not, I think I mentioned this before, spell out, I plead, a defense under 2(b) and I have prepared an amended answer which is substantially identical to our original answer except that it goes on and sets up the 2 (b) defense, and I have the copies here; I wonder if it would be in order to file them here, or would you prefer by a stipulation, that I mail them to the secretary of the Commission in Washington?

Trial Examiner Hier: We will take care of that in a minute. First of all, you might as well put your objections on the record, Mr. Schrup.

Mr. Schrup: I haven't seen them. I would like to look at them.

Trial Examiner Hier: What time is it?

Mr. Schrup: We can do that in the noon hour.

Trial Examiner Hier: Let the record show we either accept it and order it filed or don't order it filed. If we do I will take it back to Washington with me and I will have to get up an order directing that they be filed. That won't take it off the docket.

Mr. Sprowl: Curiously enough, I see nothing in the Rules; it is absolutely silent on amended proceedings.

1545 Trial Examiner Hier: We will adjourn until 2 o'clock.

(Whereupon, at 11:45 o'clock a. m., a recess was taken until 2:00 p. m., this day.)

1546 Afternoon Session.

2:00 p.m.

Trial Examiner Hier: Come to order. You may proceed.

Mr. Sprowl: I want the record to show that I am turning over to the reporter Respondent's Exhibits 37 through 59, both inclusive, for identification.

Trial Examiner Hier: Mr. Schrup, have you had an opportunity during lunch hour to prepare answers?

Mr. Schrup: Yes, we have preserved our answers and we reserve our objection that the substituted amended answer does not conform to the requirements of Rule 8.

Trial Examiner Hier: In what respect?

Mr. Schrup: It makes a defense which is not a defense. He asserts that the Respondent states that all such price differentials as were granted by it as aforesaid, were granted in good faith to meet an equally low price of various of his competitors.

That does not conform to the requirements of either the Staley or the Standard Oil cases in construing the requirements of Section 2 (b) of the Act.

Trial Examiner Hier: In other words, your position is that there is not sufficient to allege a defense there in the terms of the Statute. I do not agree with that.

Mr. Schrup: I reserve my objection.

1547 Trial Examiner Hier: The objection is overruled and the Amended Answer is going to be ordered in the record and received and filed by the Examiner when he gets back to Washington; it has to be done by separate orders and I will do it then.

Mr. Sprowl: Mr. Fred Geyer, do you want to take the stand?

FRED H. GEYER resumed the stand and testified further as follows:

Redirect Examination (Continued) by Mr. Sprowl.

Q. Mr. Geyer, at page 660 of the record you testified as to the number of potential jobber customers available to the Niehoff company in the years 1949, 1950 and 1951.

A. Yes, sir.

Q. And you also testified that in 1949 the Niehoff company had 866 jobber accounts and that in 1951 it had 805 jobber accounts, and you couldn't recall how many jobber accounts the Niehoff company had in the year 1950.

Have you since checked your records as to the number of jobber accounts which the Niehoff company had in the year 1950?

A. Yes, sir.

Q. How many accounts did you have?

A. 821.

Q. You have testified from time to time in this 1548 matter, Mr. Geyer, concerning the various jobber price sheets that were issued by the Niehoff company in 1948, 1949 and 1950 and of the discount brackets that were published in 1948 and I believe in prior years.

What is the fact, Mr. Geyer, as to whether or not at the time those jobber price sheets were formulated and those discount brackets were established, you had before you at each of those times the then prevailing jobber prices and discount rates of your various competitors?

A. Well, always before making a set of prices we make every effort to obtain all of our competitors' prices and that has always been the procedure at any time when we issue a new price sheet.

Q. Where do you get your competitors' prices from?

A. Well, in most cases, I will say in practically all cases, we get them through our salesmen from the different territories; occasionally we might get a set of price sheets from one of our accounts.

Q. Where do the salesmen get them from?

A. I think they get them from the jobber.

Q. That they call on?

A. That is right.

Q. I would like to direct your attention to what was in 1949 the pink price sheet, the jobber's price sheet. How many different base jobber's price sheets were in 1549 force during the calendar year 1949?

A. We issued a price sheet October 1, 1948 which went through to February 28, 1949.

Q. So that was in effect for the first two months of 1949?

A. That is right.

Q. All right.

A. And that sheet we used until August 1, 1949.

Q. What you mean is you issued a new one on February 28th.

A. We issued a new one on February 28, 1949, and those prices were used until August 1, 1949. Then a new price sheet was issued at that time.

Q. And that August 1 price sheet stayed in effect for the balance of the year?

A. That was for the period of the year and,—that is, for the balance of the year and into 1950.

Q. Directing your attention to Respondent's Exhibit 10, which I show you and which is the comparison of the Niehoff jobber prices with the jobber prices of various of its competitors in the year 1949, which of those 1949 Niehoff price sheets were used for the purpose of that comparison?

A. I am sure we use the last sheet that we issued in 1949.

Q. August 1, 1949 price sheet?

A. August 1, which went through until some time in 1950, in the early part of 1950.

Q. Mr. Geyer, at page 770 and 771 of the tran-
1550 script, you testified as to the gross margin of a jobber as the jobber's volume increase and you gave certain percentages and said that the gross margin of profit of that type of jobber would tend to decrease as his volume got greater.

What type of jobber were you speaking of at that time?

Mr. Schrup: We have a continuing objection. I believe at the time we made an objection, and it is continuous.

Trial Examiner Hier: Does the record show he had an objection to that question?

Mr. Sprowl: Well, he objected at the time we interrogated Mr. Geyer as to his giving any opinion testimony as to margins of profits of jobbers.

Trial Examiner Hier: All right. Same objection, same ruling. Go ahead.

By Mr. Sprowl:

Q. What type of jobber were you speaking of when you said his gross margin would decrease as his volume got greater?

A. Well, the large jobber, the jobber who does a sub-jobbing business.

Q. By sub-jobbing what do you mean?

A. Well, I mean a jobber who is servicing small jobbers

in a given area where his salesmen and he, that is, his company, can't service this particular territory, so they sell this account at a, let us say, sub-jobbing price.

Q. What is the sub-jobbing price in relation to
1551 the dealer price he would otherwise sell at; is it higher or lower?

A. Well, the price is considerably lower because this man is a jobber and the other man is a dealer.

Q. So you were speaking of the large jobber who did a sub-jobbing business and thereby sold at a lower re-sale price?

A. Right.

Q. What would be the situation as to the relationship of gross margin to size, if you were treating with a jobber who did no or substantially no sub-jobbing business?

A. Did you ask me what?

Q. What would happen to his gross margin?

A. The man who does no sub-jobbing business, his gross margin or profit would remain the same.

Q. That is, he would always re-sell at the dealer price?

A. Right.

Q. And if he could buy at a more advantageous price, his gross margin would go up, I assume.

A. Yes, sir.

Q. And your testimony in the earlier pages dealt with the type of jobber who did a sub-jobbing business?

A. Yes, sir.

Q. Now, you testified that the net profit of that jobber who did a sub-jobbing business as he got larger, would go down. Would that also apply to the situation of the jobber who did no sub-jobbing business?

1552 A. It would to a certain extent, possibly, if he operated some branch stores. To the regular jobber, it wouldn't. A large jobber who was selling the sub-jobbing, obviously his net profit would be reduced.

Q. What reduces the net profit of these jobbers, percentagewise?

A. You mean of a jobber who supplies the sub-jobbing—

Q. Let us take a jobber who sells only to dealers and he has gotten up into the $400,000 or $500,000 class; he is able to buy at the most extreme discount. Under those circumstances, why would his net profit go down?

A. His net profit would go down due to his selling expenses, his operation increases, his putting on branch

stores, the additional territory that he covers, it is a greater expense to haul; when he increases his volume he is working a larger territory and obviously his selling expenses increase and then that decreases his margin of profit.

Q. His net profit?

A. His net profit, yes.

Mr. Sprowl: That is all.

Recross Examination by Mr. Schrup.

Q. Mr. Geyer, I understand from your testimony that you are talking about a jobber now who can't cover certain territory and as a result he gets sub-jobbers for that
1553 territory, is that correct?

A. Yes.

Q. Well, then, it would follow, would it not, that as a result of those sub-jobbers, his over-all volume of sales would increase?

A. Yes, sir.

Q. And he would make more profit selling from them than from C. E. Niehoff?

A. Yes; that is possible.

Q. Referring to your change of list prices for your products, I believe there was a list price in effect during the year 1948 which was changed on February 28, 1949?

A. Yes, sir.

Q. And then that list price was in effect until August 1, 1949 and for the balance of the year and into 1950?

A. Yes, sir.

Q. Now, were the discounts from those list prices changed by the C. E. Niehoff Company during that period?

A. You mean, was the price to the jobber or to the dealer lower?

Q. No; was the rate of discount changed?

A. No, sir.

Mr. Schrup: That is all.

Mr. Sprowl: I think that is in the record some place.

Trial Examiner Hier: That seems to be all for you.

(Witness excused.)

1554 Mr. Sprowl: Do you want me to turn these over to you (indicating documents)?

Trial Examiner Hier: Yes; I will take them back with me.

Mr. Sprowl: How many are we required to file?

Trial Examiner Hier: I think ten copies.

Mr. Sprowl: Here are ten copies of the Amended Answer of the Respondent, C. E. Niehoff & Company.

Trial Examiner Hier: All right.

Mr. Sprowl: Mr. Niehoff, do you want to take the witness stand?

C. E. Niehoff resumed the stand and testified further as follows:

Redirect Examination by Mr. Sprowl.

Q. Mr. Niehoff, the Complaint in this matter is dated May 1, 1950, and it was served within a week or so thereafter, on the Niehoff company.

I want to ask you if prior to the time this particular Complaint was served upon the C. E. Niehoff Company, if any one in the Federal Trade Commission ever came to your company or to you, to discuss with you the propriety or lack of propriety of your volume discount program?

Mr. Schrup: I object as immaterial and irrelevant to this case. The statute has been in effect since 1936.

1555 Mr. Sprowl: I would like to point out that under the Act one of the prerogatives or duties, or whatever you want to call it, of the FTC, under Section 2, is to work out if they feel that any discount program is improper; they have the power to work out with anybody whom they feel has an improper discount program, a program which they consider to be proper, and there is nothing in the Act which per se makes a discount program illegal.

Trial Examiner Hier: No, but that power is purely a power and it is not mandatory.

Mr. Sprowl: Of course it is not.

Trial Examiner Hier: The Act also empowers them to go ahead without giving any notice.

Mr. Sprowl: That is right.

Trial Examiner Hier: So it seems to me it is immaterial whether they, in fact, discussed it with him or didn't, as a defense.

Mr. Sprowl: I think it goes to the good faith of the Commission. It is one thing to go out and single out one man and swing the ax at him and leave his competitors entirely free and string him up all alone, and I think indicative of that good faith that they never came to him and suggested the program they could work out with him.

Mr. Schrup: I could take the opposite line there and have asked the witness if he, before he put his dis-
1556 criminatory plan into effect whether or not he had undertaken and submitted a cost justification to the Commission for approval.

Mr. Sprowl: He made the cost study of it.

Trial Examiner Hier: I think it is immaterial. You may make an offer of proof.

Mr. Sprowl: I offer to prove by this witness that at no time prior to the issuance of the Complaint in this matter did any representative of the FTC ever call upon either this witness, the president of the Niehoff company, or any other person in the Niehoff organization to suggest that there was anything improper about their volume discount program as it was then in effect, or to suggest that they thought it was perhaps a little too broad in its aspects, and to work out a discount program which would satisfy the FTC. That is all.

1561 Room 1500, 173 West Madison Street, Chicago, Illinois,
Wednesday, November 12, 1952.

Met, pursuant to adjournment, at 2:00 p.m.

Before: Frank Hier, Trial Examiner.

Appearances:

E. P. Schrup, Attorney for the Federal Trade Commission.

Charles R. Sprowl, Attorney for the Respondent, C. E. Niehoff & Company, 134 South LaSalle Street, Chicago, Illinois.

1562 Proceedings.

Trial Examiner Hier: This is a reconvened hearing in Docket No. 5768, In the Matter of C. E. Niehoff & Company, pursuant to the request of counsel for the respondent.

Mr. Sprowl: I want to put Mr. Oleson on the stand, but I would like to make one inquiry first. We filed our amended answer on June 18th and you indicated at that time that some order would be entered, or should be en-

tered to have that amended answer received, and I have never received copy of the order.

Trial Examiner Hier: It probably escaped my mind entirely. I don't know what the state of the pleadings is on that thing.

Mr. Sprowl: We turned over the necessary ten copies.

Trial Examiner Hier: To me?

Mr. Sprowl: Yes, sir, and you said that you would take it back, and you indicated, you thought maybe an order would be necessary, and, if necessary, you would have one entered.

Trial Examiner Hier: Yes, this indicates that the order was entered.

Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

Mr. Sprowl: Mr. Oleson, will you take the stand and be sworn, please?

1563 ELMER OLESON was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Sprowl.

Q. State your name, please.

A. Elmer Oleson.

Q. Mr. Oleson, where do you live?

A. 1127 North Dearborn Street, Chicago, Illinois.

Q. And, by whom are you employed?

A. National Standard Parts Association.

Q. Where is that located?

A. Our Chicago office is at 8 South Michigan Avenue, Chicago, Illinois.

Q. And, what is your position with that organization?

A. Director of Management and Market Research.

Q. And, how long have you held that particular position?

A. A little over four years.

Q. When did you start with the National Standard Parts Association?

A. September, 1948.

Q. And, have you held this particular position ever since you entered that Association's employ?

A. Yes, sir.

Q. I assume that is some sort of a trade association?

1564 A. That is right.

Q. Can you tell me the type of companies or persons that makes up its membership?

A. Automotive manufacturers and wholesalers in the automotive industry.

Q. As of today's date, approximately how many automotive manufacturers are members?

A. Approximately 250.

Q. And, how many wholesalers?

A. Approximately 1,200.

Q. What type of automotive wholesalers are your members, if there is a type?

A. They are wholesalers, or they are distributors of replacement parts, tools and equipment, and so forth, in the automotive service industry.

Q. Now, what is your principal function? What is the principal function of the Management and Market Research Division of which you just spoke?

A. Our principal function, the one that occupies most of the time, is the collecting of data and compiling information for our annual survey covering comparative performance records and leading lines of automotive wholesalers.

Q. You do that annually?

A. It is done annually, yes.

Q. And, for how many years have you done that annually?

1565 A. In its present form, it has been done,—it started in 1936, I believe, and prior to that time, data was collected as far back, I know, as 1932.

Q. And, from this annual survey, does the NSPA make some kind of a record or report?

A. It is an annual report that is prepared; a comparative performance record and leading lines survey.

Q. And, that analysis is your principal function and one of your principal reports?

A. That is true.

Q. And, I assume your NSPA record would be the analysis you prepare from this survey?

A. That is right.

Q. That is done as a regular part of your business, annually, is it?

A. Yes.

Q. Now, prior to 1936 or 1937, you say there was also a similar report made?

A. Well, it was a compilation of similar data, although not in the same form as the present report.

Q. The present report has enjoyed its present form for the past fifteen or sixteen years?

A. Yes.

Q. Is that correct?

A. That is correct.

1566 Q. Do you ever have more than one of those each year?

A. No.

Q. Now, generally speaking, without giving any particular figures, what does this annual survey which is compiled by the NSPA consist of?

Mr. Schrup: I think at this point, I will make an objection to any testimony with regard to what the annual report, based on service of wholesalers, consists of. I think it would be hearsay, and there has been no proper foundation laid.

Trial Examiner Hier: The annual report, that wouldn't be hearsay. He prepared it.

Mr. Schrup: Yes, but the foundation upon which he prepared it would be hearsay.

Trial Examiner Hier: This gentleman has appeared in Docket No. 5770—

Mr. Schrup: That is correct.

Trial Examiner Hier: (Continuing)—and I assume that he will testify the same way here today as he did there. It is perfectly obvious that what he does is to get these questionnaires back from the members—

Mr. Schrup: That is right.

Trial Examiner Hier: And that some of the members don't reply.

Mr. Schrup: That is right.

Trial Examiner Hier. And that some of them do.

1567 Mr. Schrup: That is correct.

Trial Examiner Hier: You correlate and collate that information and come out with what you might call a chart to show the members in the industry.

The Witness: That is right.

Trial Examiner Hier: In percentages and absolute figures.

The Witness: In percentages. It is based on percentages.

Trial Examiner Hier: I don't think there is any reason for an objection to it.

Mr. Schrup: I would have no opportunity in establishing what would be the testimony of any one of those particular jobbers.

Trial Examiner Hier: I understand that. If Mr. Sprowl is going to offer some reports in evidence, I will not admit them or rule on them either way until you have had an opportunity to examine the witness as to how they were prepared, and show the basis of it. I don't see any reason for an objection, and the objection is overruled.

Mr. Sprowl: It is only preliminary, because I propose to offer the specific reports, because, you understand, without the reports, the expedition would be pretty valueless.

By Mr. Sprowl:

Q. Just in a general way, what Mr. Hier stated 1568 in the form of his questions as to what this report consists of, is that generally correct?

A. It is generally correct, yes, sir.

Q. All right.

A. It is generally correct.

Q. Now, did you prepare or did the NSPA prepare such a survey as you have just described, respecting the year 1949?

A. Yes, sir.

Q. And, generally speaking, will you tell me how you collected the information upon which that survey was based, for the year 1949?

A. The questionnaire was sent to all wholesaler members of the Association.

Q. That is, some eleven or twelve hundred members?

A. That is right.

Q. All right.

A. Pertinent questions concerning the operation of their business, based on their records.

Q. All right.

Mr. Sprowl: I should like to have this identified as Respondent's Exhibit No. 73.

Trial Examiner Hier: That is right.

Mr. Sprowl: I think we might as well identify the one

with the letter on. The letter is not a part of the questionnaire.

1569 The Witness: That is right.

Mr. Sprowl: It is just an instruction sheet.

The Witness: That is right.

Trial Examiner Hier: It will be marked Respondent's Exhibit No. 73 for identification.

(The paper referred to was marked Respondent's Exhibit No. 73 for identification.)

By Mr. Sprowl:

Q. I show you what has been marked as Respondent's Exhibit No. 73 for identification, and I ask you if that is the questionnaire which was sent out to each of the wholesaler members of the NSPA in the year 1950 with respect to their 1949 performance records?

A. That is right.

Q. What particular time of the year did you mail out this particular questionnaire?

A. It was mailed out in March.

Q. Of 1950?

A. Yes, sir.

Q. You were then with the NSPA?

A. Yes, sir.

Q. At that time?

A. Yes, sir.

Q. So, this questionnaire went out under your supervision?

A. It did.

1570 Q. All right. Did you send out a similar questionnaire in 1951 to each of your wholesaler members?

A. We did, yes, sir.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

It is stipulated by and between counsel that the questionnaire sent out in 1950 and 1951 by the witness and the Association by whom he is employed, are basically the same as Respondent's Exhibit No. 73, and, for that reason, respondent's counsel, who has these questionnaires in his possession at the council table is not having them marked, in order to prevent a further encumbrance of the record.

Is that agreeable, Mr. Schrup?

Mr. Schrup: I think you meant Respondent's Exhibit No. 73 for identification.

Trial Examiner Hier: Yes, "for identification" should be in there. Are you offering this exhibit?

Mr. Sprowl: I will offer everything at once because they are all tied in together.

Trial Examiner Hier: All right.

Mr. Sprowl: Frankly, I think the questionnaire is good evidence but it doesn't mean anything without the report which was later compiled from it.

Trial Examiner Hier: All right. Go ahead.

1571 By Mr. Sprowl:

Q. Now, I believe you testified that Respondent's Exhibit No. 73 for identification went out some time in March of 1950; that is, about the date it bears?

A. About the date it bears, yes, sir.

Q. Now, in 1951, a similar questionnaire was sent out?

A. That is right.

Q. About March 15, 1951?

A. Approximately the same date.

Q. And that related to the 1950 performance records?

A. That is right.

Q. And, similarly, in 1952, some time around March 15th, a similar questionnaire went out to your wholesaler members?

A. That is right.

Q. And that related to the 1951 performance records?

A. That is right.

Q. All right. Now, how many of these questionnaires, out of the eleven or twelve hundred that are sent out, are returned to you?

A. It varies from year to year, from, I would say, 125 to 175, on the average. It is more than ten per cent of our membership responding to the questionnaire.

Q. And, what do you do with these questionnaires when they are returned to you?

A. The questionnaires are machine-checked for
1572 accuracy. The figures are checked for any—

Q. By "machine-checked", you mean merely figuring up additions and subtractions?

A. Yes, additions and subtractions to make sure that they are arithmetically correct and that the figures, as indicated by the wholesalers, are in balance.

Q. Does somebody on your staff do this under your supervision, or do you do that yourself?

A. I do that personally.

Q. All right. Now, do you ever find any of these questionnaires that have been returned to you to be incomplete or inaccurate on their face?

A. Yes.

Q. And, how can you tell they are incomplete or inaccurate, Mr. Oleson?

A. Well, if the total figures shown do not balance out, it would indicate either some item has been left out or there is an error in the computation as submitted by the wholesaler.

Q. Now, if it is an arithmetical arror, you can some times correct that yourself?

A. That is right.

Q. But if the error is one that is fundamental, you must have the source of the material correct it, and I assume that is something that you can not correct yourself?

A. Well, if the return is identified, we can make
1573 the correction by requesting the firm submitting the return to give us additional information.

Q. In other words, if they would lump certain figures instead of breaking them down in the manner requested, you would return it to them for a further breakdown?

A. Either return the questionnaire or write a letter to the firm requesting clarification or further breakdown of the figures that are shown.

Q. And, what you have testified about as to the manner of auditing these returned questionnaires applies equally as much to the year 1950, which was the questionnaire relating to the official year 1949 as it would to the questionnaires sent out in the following two years?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. Now, from this information that you elicited through Respondent's Exhibit No. 73, what did you do?

A. Prepared an annual report.

Mr. Sprowl: And, I should like to have marked for identification, as Respondent's Exhibit No. 74, a booklet called "1950 Comparative Performance Records."

Trial Examiner Hier: The reporter will so mark it.

(The paper referred to was marked Respondent's Exhibit No. 74 for identification.)

1574 Mr. Sprowl: I think we might as well mark the other two booklets; the 1951 Comparative Performance Records as Respondent's Exhibit No. 75.

Trial Examiner Hier: The reporter will so mark it.

(The booklet referred to was marked Respondent's Exhibit No. 75 for Identification.)

Mr. Sprowl: And the 1952 booklet as Respondent's Exhibit No. 76.

Trial Examiner Hier: It will be so marked.

(The booklet referred to was marked Respondent's Exhibit No. 76 for Identification.)

By Mr. Sprowl:

Q. Mr. Oleson, I should like you to look at Respondent's Exhibit No. 74, and I observe that beginning on about the third inside page and on every other page about throughout the book are some statistical figures in percentages.

A. That is right.

Q. I say "every other page". When we get over towards the back, they seem to appear on every consecutive page. Is that an identical reprint of the report which you personally prepared in the year 1950 from the questionnaire, which is Respondent's Exhibit No. 73, which you received in the year 1950 from the various wholesaler members respecting their 1949 performance records?

A. Yes. This is a composite report based on these 1575 returns, and these are figures in composite form.

Q. I see some art work in this booklet on certain lefthand pages. They are sort of illustrative freehand pictures. They, of course, would not constitute any part of your statistical report?

A. No.

Mr. Sprowl: May we be off the record a minute, Mr. Examiner?

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Sprowl:

Q. In other words, all of the numerical figures and descriptive prose material, relating to the prose material appearing in this booklet, are merely an identical reprint of the statistical report you personally prepared?

A. That is right.

Q. And, if we had the original report here today, it would coincide with these printed figures?

A. Yes.

Mr. Sprowl: I know that there will be other objections, Mr. Schrup, as to the admissibility of this, but will you make any objection as to the fact this is not a photostat but an identical reprint of statistical material?

Mr. Schrup: No, I am not objecting on that ground, Mr. Sprowl.

1576 By Mr. Sprowl:

Q. That is what you distribute to your members?

A. Yes.

Trial Examiner Hier: I want to ask this question now, or I may forget it: Do you, in your professional capacity, regard the return of something more than ten per cent of the membership as an adequate reflection or cross-section, taking into consideration the variabilities of the automotive trade, the fact that you have manufacturers and jobbers both involved, the geographical factors which may or may not influence some of these performance records, the variability in bookkeeping and accounting set-ups of the different questionnaires, and so on, do you regard all that as an adequate cross-section?

A. Yes. We have it broken down by volume classifications to give us our representative cross-section. Now, these figures were arbitrarily set up into volume classifications, splitting the membership into three divisions, which should be rather typical of the industry as a whole. We have large, medium and small wholesaler members. The returns come from all sections of the country, and we have people that will show a profit in their operation and we will have people who show a loss.

Trial Examiner Hier: Tell me what happens in the make-up of these books. If you send out the questionnaire, for instance, to members on the West Coast and you get only one reply we will say, do you send out letters to

1577 those in the area, to whom you had previously sent questionnaires, urging them to reply?

A. That never happens that we have just one return from a state.

Trial Examiner Hier: I was just wondering where you have a falling down on the part of the members in a particular area.

The Witness: We order a sufficient quantity of the questionnaire to send out follow-ups if we don't have a representative return from the members.

Trial Examiner Hier: Go ahead.

By Mr. Sprowl:

Q. Now, I show you Respondent's Exhibit No. 75 for identification, which is labeled "1951 Comparative Performance." That, I presume from your previous testimony, actually relates to the 1950 figures of the wholesalers you solicit?

A. That is right.

Q. And, looking through this Respondent's Exhibit No. 75 for identification, excepting for the art work in this printed book, are the figures and prose, or do the figures and prose therein represent an exact reprint of the statistical report you completed in 1951?

A. It is.

Q. From the information you received as a result of the questionnaire you sent out in that year?

1578 A. That is right.

Q. Relating to the 1950 performance records of this wholesaler membership?

A. That is right.

Q. Now, I show you Respondent's Exhibit No. 76, which is, on its face, called the "1952 Comparative Performance Records", is that, again, the result of your compilation based on the information you received in 1952 respecting the 1951 performance records of your wholesalers?

A. That is true.

Q. And, referring to the inside of this booklet, is the numerical and prose material appearing in there, except for the art work, an exact reprint of your statistical report filed in that year?

A. That is right.

Q. And it was prepared in the same manner that Respondent's Exhibits 75 and 74 were prepared?

A. That is right.

Q. Now, you start mailing out these questionnaires some time around the middle of March?

A. Yes, sir.

Q. How long does it take, from the time you start sending out these questionnaires, until you have a completed performance record or report?

A. From the middle of March until about the first
1579 of June before we have the finished report.

Q. And that is some two and a half or three months a year?

A. Yes, sir.

Q. Is that right?

A. Two and a half to three months, yes, sir.

Q. And, do you have some of the staff assist you in compiling this information?

A. Well, due to the tremendous amount of work involved in getting the report out, I would say at some time or another, about half of our personnel are involved in doing some work in connection with this.

Q. Now, I would like to show you what is called in this proceeding the "Steel Exhibit", which is—

Mr. Sprowl: May we be off the record a minute, Mr. Examiner?

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Sprowl:

Q. Mr. Oleson, I show you what has been called the "Steel Exhibit" in this case, or Commission's Exhibit 47-A through E. Did you, at my request, check the list of wholesalers tabulated in the lefthand column of that exhibit against your wholesaler membership in the year 1949?

A. I did.

1580 Q. Did you make that check personally?

A. Personally, yes.

Q. You did?

A. Yes, sir.

Q. And, of the wholesalers listed in that exhibit, how many did you find that were members of your wholesaler group in the year 1949?

A. Thirty-one.

Q. Thirty-one?

A. Yes, sir.

Q. Thirty-one out of those listed on the five pages of that exhibit?

A. That is right.

Q. And were those thirty-one recipients of the NSPA questionnaire in the year 1950, which is Respondent's Exhibit No. 73 for identification?

A. Yes, the questionnaire was mailed to all wholesale members.

Trial Examiner Hier: Let us follow that up: Without repeating any of the names or locations, will you tell me how many of the thirty-one responded to that questionnaire?

The Witness: I could not do that without making a complete check. Some of our returns, of course, came in blind. We invited them to submit returns without the firm name in order that certain individuals that may have a feeling that they were disclosing confidential information did not need to.

1581 Trial Examiner Hier: Do I understand from that statement that you could not tell, even if you were back in your office, how many of those thirty-one members did submit replies to the questionnaire?

The Witness: We could not tell exactly who submitted them. In some cases, we would probably have the name of the town from the postmark indicated on the return.

Trial Examiner Hier: Can you give me a decent approximation without guessing. I will take your estimate, but I don't want you to guess.

The Witness: I wouldn't know without checking over the list of names.

Trial Examiner Hier: O'K.

The Witness: We have prepared two reports since then.

Trial Examiner Hier: Go ahead, Mr. Sprowl.

Mr. Sprowl: I would like to make a statement on the record, Mr. Examiner.

Trial Examiner Hier: Yes.

Mr. Sprowl: I assume Mr. Hier has in mind that the steel exhibit doesn't include all of the wholesalers.

Trial Examiner Hier: I understand.

Mr. Sprowl: It merely includes those in the southeast.

Trial Examiner Hier: It includes those in the southeast quadrant of the United States, as I recall it.

Mr. Sprowl: That is right.

1582 Trial Examiner Hier: Go ahead.

By Mr. Sprowl:

Q. Could you tell me what use is made of this resultant survey? Take, for example, Respondent's Exhibit No, 74, which was the one published in 1950?

Mr. Schrup: Used by whom?

By Mr. Sprowl:

Q. How do you circulate that? To whom do you circulate it, Mr. Oleson?

A. Initial distribution is made to all members of NSPA, as wholesalers and manufacturers.

Q. Now, after that original distribution, do you receive requests from any other organizations for copies of your report?

A. Yes, we do. We distribute approximately thirty-five hundred copies annually.

Q. All right. From what type of organizations do you receive those requests annually?

A. We receive them from non-member manufacturers and wholesalers; from universities and colleges; business administration services, such as Dun & Bradstreet, Biddle Purchasing Company, and from certified public accountants; schools.

Q. What universities? You mentioned universities.

A. Some copies have been requested by the University of Illinois; that is one. Copies have gone to the University of Michigan, the University of Minnesota; Boston University.

1583 Q. Who is the Biddle Purchasing Company?

A. It is a firm in New York that deals with news and statistical information that they furnish to business firms.

Q. Do you furnish them to any financial papers?

A. We have requests from them.

Q. What papers?

A. Well, let me see. Our books are sent out, and stories have been carried by the—The Wall Street Journal has carried stories on the book and the figures contained therein.

Q. Has your book ever been cited in any other types of publications?

A. Practically all of the trade journals in the automotive field refer to it or sections of it during the course of a year's time after the issue is put out.

Q. And that has been your experience every year that you have been with the NSPA?

A. That is right.

Mr. Sprowl: That is all of my direct.

Trial Examiner Hier: I take it that you offer these documents in evidence?

Mr. Sprowl: I will offer Respondent's Exhibits Nos. 73, 74, 75 and 76 in evidence.

Trial Examiner Hier: I am not going to rule on those until after cross-examination.

Mr. Schrup: That is what I intended to do, if your 1584 Honor please.

Cross-Examination by Mr. Schrup.

Q. Mr. Oleson,—?.

A. Yes, sir.

Q. (Continuing.) —in addition to the National Standard Parts Association, are there any other automotive trade associations of manufacturers and jobbers, or of manufacturers alone or of jobbers alone who perform a similar service to that of the National Standard Parts Association?

A. There is one other wholesaler association that makes a survey along the same lines.

Q. Is that the only one, to your knowledge, that makes any survey along the same lines?

A. I don't know of any other.

Q. Do they issue similar— Do they issue annual reports similar to what the National Standard Parts Association issues?

A. I have seen the ones they have issued in the past—

Q. Yes.

A. (Continuing.) —three or four years.

Q. Are the reports identical with the reports that are issued by you?

A. No; our questionnaire is different.

Q. Yes.

A. And we get a different type of breakdown for 1585 information. Basically, it would be the same type of information.

Q. But you couldn't tell whether the same jobbers furnished the returns on the questionnaire or not?

A. Well, we have a certain number of dual memberships that would belong to both associations, but, of course, I would say, for the most part, that, largely, the members of our Association would not be members of the other Association and vice versa.

Q. And you have two hundred and fifty manufacturers that are members of your Association?

A. That is right.

Q. And, you have some twelve hundred wholesalers?

A. Approximately that.

Q. Now, do each of these twelve hundred wholesalers purchase the 250 different lines?

A. I don't know.

Q. Do you know what lines each of the wholesalers purchase from the various 250 manufacturers?

A. The records would be available in our files as to the lines that they purchase, the major lines, with applications for membership.

Q. Now, you divide, for the purposes of classification, the returns of the questionnaire from jobbers, into large, medium and small jobbers?

A. Yes.

Q. Now, in the classification of large jobbers, do
1586 you average the questionnaires received?

A. No, we average the percentage?

Q. You average the percentage?

A. Yes, rather than dollar figures.

Q. Yes.

A. In that way one particular firm maybe that would be doing a two million dollar business wouldn't outweigh the others.

Q. On the medium and small jobbers you do likewise?

A. That is correct.

Q. And, of these 125 to 175 returns that are received back by the National Standard Parts Association, about how many would be in the classification of large jobbers?

A. About one-third.

Q. About one third?

A. Yes, sir.

Q. What about medium jobbers?

A. About one-third.

Q. And, small jobbers?

A. About one-third.

Q. Now, these questionnaires that are returned to you, do they disclose the exact buying price of each jobber that returns the questionnaire?

A. Not the buying prices. It is an over-all picture of sales volume.

Q. In other words, the buying price of any par-
1587 ticular jobber as between the various manufacturers from which he purchases, may differ?

A. We have no information on that point.

Q. Now, it would be true, might it not, that that questionnaire from a small jobber, so-called, might show that while he handles various lines, on one of the lines that he handles, he might be a very large purchaser of that line as compared to a medium jobber who does not favor that line?

A. Not necessarily. One of the requirements for membership in the National Standard Parts Association is that they carry a representative number of lines, which would seem to indicate that it—

Q. It would seem to indicate what?

A. (Continuing.) —wouldn't be an unbalanced process, where one person might be selling maybe a fifty or seventy-five per cent business on one line, the way we do for the wholesale supply divisions, but they are not included in our classification.

Q. But do any of these questionnaires disclose on their face the buying prices for all of the lines handled by that particular buyer?

A. No, there would be a variation, of course, between the different lines. On the equipment lines there would probably be a variation between those and the parts throughout the entire field there.

1588 Q. Those questionnaires then would not disclose—strike that. Taking the questionnaires as returned by what you term large, medium and small buyers or jobbers,—

A. Yes.

Q. (Continuing.) —those questionnaires then would not disclose on their face what the buying price of any one of the classifications would be for the particular line of manufacture?

A. The only information we have is that he is a wholesaler distributor of automotive parts.

Q. But they do not disclose the buying prices?

A. No, they do not disclose the buying prices.

Trial Examiner Hier: It is also true, is it not, that one of your wholesaler member's reports to you may be in top quantity breakdown on one line and bottom quantity on another line?

A. That is entirely possible, depending on the geographical location.

Trial Examiner Hier: And the volume of business he does on that particular line?

The Witness: That is right.

Trial Examiner Hier: Go ahead, Mr. Schrup.

Q. (By Mr. Schrup.) Well, I gather from the question that the Examiner directed to you, that the volume of purchases in any given line might vary as between the large, medium and the small. There may be an occasion
1589 where the small jobber, so-called or so classed, may purchase more of a given line than the large or medium sized jobber?

A. That would be possible.

• • • • •

By Mr. Schrup:

Q. Mr. Oleson, as regards the jobbers that are classified under the NSPA as large, medium and small, and who returned these questionnaires, do the questionnaires disclose whether any particular jobber may buy the same line from different manufacturers of those lines or line?

A. No.

1593 Q. Does the questionnaire disclose whether the large jobber buys several different ignition lines, or the medium jobber buys several different ignition lines, or the small jobber?

A. It is not broken down by trade names.

Trial Examiner Hier: There has been something overlooked here, I think, due to the fact this witness appeared before in a different cause. My recollection is, Mr. Oleson, that you previously testified in Docket 5770 that these reports were confidential?

The Witness: Yes, sir.

Trial Examiner Hier: I mean, that still is the fact, is it?

The Witness: That is the fact, yes, sir.

Trial Examiner Hier: Go on.

The Witness: That is the basis on which we get a fair return.

Mr. Schrup: I am coming back to this other question which I think should be answered.

By Mr. Schrup:

Q. It is quite true, is it not, that regardless of the classification or the size of a jobber, that jobbers will vary as to pushing certain lines?

A. That is possible. It will vary with individuals within an organization, too.

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1603 to 1604 Room 1310, 173 West Madison Street, Chicago, Illinois, October 21, 1953.

Met, pursuant to adjournment, at 2:00 p.m.

Before: Frank Hier, Trial Examiner.

Appearances:

Edwin P. Schrup, Attorney for the Federal Trade Commission.

Charles R. Sprowl, Attorney for the Respondent, C. E. Niehoff and Company.

1605 Proceedings.

Trial Examiner Hier: The hearing will come to order.

C. E. NIEHOFF, heretofore called as a witness for the Respondent and having been previously sworn, testified as follows:

Direct Examination by Mr. Sprowl.

Q. You are the same Mr. Conrad Niehoff that heretofore testified in this matter on three or four occasions?

A. I am, yes, sir.

Q. Mr. Niehoff, have you read the portions of the Robinson-Pattman Act of which the complaint in this matter is directed?

A. Yes, sir, I have.

Q. And do you understand that one example of an unlawful price is the one which is below cost to drive a competitor out of business?

A. I do, yes.

Q. And do you also understand that it is unlawful to enter into a conspiracy with your competitors to fix prices?

A. I do.

Q. And do you appreciate that a special lower price to an individual customer, to individual customers which are established not in good faith and with the intention to injure competition is an unlawful price?

A. I couldn't hear that entirely.

1606 Q. Do you understand that a special lower price to individual customers established not in good faith

with the intention of injuring competition is an unlawful price?

A. Yes, I do.

Q. And do you understand that the practice is expressly prohibited by the Robinson-Pattman Act and are examples of unlawful prices and the practices which have been declared by the courts to be unlawful likewise are examples of unlawful prices?

A. Yes, sir.

Q. Mr. Niehoff, what is your understanding of a lawful price?

A. A lawful price is based upon the entire cost factors which includes material cost, labor cost, overhead, selling, administrative, advertising, delivery cost, that in itself makes up the cost base plus a margin of profit for the selling, established selling price.

Q. And do you appreciate that a lawful price, establishing a lawful price you consider prices charged by your competitors for comparable items?

A. Yes, we do.

Q. Now, have you or has anyone of the Niehoff Company, to your knowledge, ever had any reason to believe that any of your competitors' prices were unlawful?

A. None whatsoever.

Trial Examiner Hier: Let's find out what he bases that on. It is taken from his knowledge?

1607 Mr. Sprowl: I will get to that. I think we will cover it all, if not we can go back.

By Mr. Sprowl:

Q. How long have you been head of the Niehoff Company?

A. Well, for the period of some 31 years, from its inception.

Q. All right, in that period has the Niehoff Company ever conspired with any of its competitors to fix prices?

A. No, never.

Q. And in that period of time to your knowledge have any of your competitors ever conspired with each other to fix prices?

Mr. Schrup: I have an objection to that, I don't consider that as material.

Mr. Sprowl: It is going to Mr. Hier's suggestion.

Mr. Schrup: Well, I think Mr. Hier's suggestion was directed to another point which I had intended to cover on

cross-examination, if you are talking about a conspiracy here—

Trial Examiner Hier: It is only to his knowledge.

Do you know of any of your competitors conspiring to fix prices during the last 31 years?

The Witness: No, sir.

Mr. Schrup: There is no charge of conspiracy here.

Mr. Sprowl: I appreciate that.

Trial Examiner Hier: I understand, it doesn't matter one way or the other.

By Mr. Sprowl:

1608 Q. Has the Niehoff Company ever priced its merchandise below cost in order to drive a competitor out of business?

A. No, sir.

Q. Has it ever granted special lower prices to customers in bad faith with the intent to injure competition?

A. No, sir.

Q. Was there ever a time in which the Niehoff Company engaged in any common pricing method with its competitors by agreement?

A. None whatsoever, the only time that there was any group meeting was in the days of the NRA and I attended one meeting but there was no agreement of pricing ever reached and I never attended any of the other meetings.

Q. Nothing ever came of a common pricing plan out of those meetings?

A. No, sir.

Q. Now, when you refer to your competitors' prices in the course of your testimony to what prices are you making reference?

A. Well, we study the competitors' prices their entire schedules, their entire list, either wholesale and jobber and distributor prices.

Q. And that applied to your situation in the year 1949 as well?

A. Yes, it did, surely.

Q. Now, when you speak of prices are you including not only this jobber's base price I have heard you 1609 refer to but also the quantity discount?

A. Yes, we are acquainted with the discounts that are generally quoted by the different competitors in the field.

Q. And where do you get this pricing information from your competitors?

A. We try to get it through our salesmen and through the customers that we serve, they frequently send us price schedules.

Q. I believe you have testified and there has been received in evidence as exhibits on behalf of the Commission the certain price schedules that the Niehoff Company published in 1949 which had peculiar types of perforations on the edge that you said fit some kind of a standard binder, do your competitors issue similar price lists?

A. Yes, that is the standard Kalamazoo binder.

Q. And do your competitors distribute those among their customers the same way you do?

A. Yes, they do.

Q. And they are put in that binder you describe that the customer carries in his counter some place?

A. Well, the retail prices and the dealer and trade prices are carried in those binders, yes.

Q. Where?

A. The actual cost price is not generally put in those binders, their cost price.

Q. They are made available to the customer?

1610 A. Oh, yes, they are made available to the customer.

Q. And, that is the source of your salesmen's knowledge of your competitor's prices or your knowledge?

A. That is right.

Q. Was that true in 1949?

A. Yes, it has been true in 1949 and it has been true prior to that time and since that time.

Q. Now, when you were testifying about the Niehoff Company never having priced any of its merchandise below cost to drive competition out of business or priced any of its products on accounted pricing methods agreed upon by its competitors, were you referring to all items in the Niehoff line or a portion in the line?

A. To all items in the line.

Q. That includes what?

A. Automotive ignition parts and brake parts and—

Q. That is what you call the hydraulic line?

A. Yes, hydraulic brake parts and the equipment.

Q. That is the testing equipment you testified about?

A. That is right, that is correct.

Q. Now, when you speak of competitors of the Niehoff Company, whom do you include by that term?

A. Well, we include the original equipment manufacturers who make the original parts for the car manufacturer, who are, as a matter of fact, principal com-
1611 petitor in the field and also the replacement manufacturers of which there are quite a number of them.

Q. And Respondent's Exhibits Nos. 3 and 4 already in evidence list the ignition and brake parts competitors of the Niehoff Company?

A. I think they do, yes.

Q. Do you include all competitors back to the time you started in business some 30 years ago?

A. Yes, I would.

Q. And also competitors that the Niehoff Company had in the year 1949?

A. That is correct, yes, sir.

Q. Now, do you recall Respondent's Exhibit 10-A and Respondent's Exhibit 10-B which is the graphic comparisons between the Niehoff jobber base price in effect in 1949 respecting the fast-moving items in the Niehoff ignition line and the 1949 jobber base price of your ten principal competitors for the same items?

A. Yes, I believe I do because I testified with regard to them previously.

Q. What does that show with respect as to where the Niehoff price falls in relation to your competitors' price?

Mr. Schrup: Well, I think, Mr. Sprowl, it is not necessary to lead the witness in this matter, it speaks for itself.

1612 The exhibit speaks for itself. If I am right there is a key on it for the difference in prices, whether higher and lower between the Niehoff Company and its competitors.

Mr. Sprowl: With this exception I will go along with Mr. Schrup on that, it does not show the Delco-Remy or Auto-lite prices.

Mr. Schrup: They are conspicuous by their absence.

By Mr. Sprowl:

Q. I will ask the witness now as to the 1949 prices, where did the Niehoff ignition prices, parts prices, fall in relation to the Delco-Remy, Auto-lite and Ford prices for comparable items?

A. Well, generally, the prices that we issued to our

trade are slightly lower than the original equipment manufacturers.

Q. Who do you consider? Do you consider Auto-lite?

A. Auto-lite, which is Chrysler, Delco-Remy, which is General Motors, as they have the added prestige and extensive advertising.

Q. Your pricings would be slightly under those base jobbers' prices?

A. Our prices are slightly under those jobber unit prices or wholesale prices.

Trial Examiner Hier: How many per cent lower, roughly?

The Witness: Well, I would say roughly, and this is just roughly, about ten per cent.

Trial Examiner Hier: Now, you used the expres-
1613 sion "generally," in answering that question, am I supposed to conclude from that all of your prices on all parts were not lower, but most of them were?

The Witness: No, there may be exceptions to the rule.

By Mr. Sprowl:

Q. Exceptions to the ten per cent?

A. Yes, that is right. The ten per cent, as a matter of fact, is an average.

Trial Examiner Hier: Is an average of the underages?

The Witness: That is right.

By Mr. Sprowl:

Q. And you have already testified at previous hearings respecting Respondent's Exhibits 10-A and 10-B that in relation to the prices of all other competitors in the ignition field your base jobber prices are slightly higher on the average, is that right?

A. I believe they are, sir.

Q. As I recall, you put it, you never can achieve the lowest, you try not to achieve the highest and at a variance through the pricing schedules as shown by that exhibit.

A. That is right.

Trial Examiner Hier: How long has this situation continued, Mr. Niehoff, where your prices are slightly higher than this particular class of competitors?

1614 The Witness: How long has it continued?

Trial Examiner Hier: Yes.

How long has it been in existence?

The Witness: Well, I think it has been true for a great many years, I mean there are some competitors whose prices are quite a bit lower than ours, others that may be only fractionally lower than ours and there would be some competitors that have some of their prices higher which I don't know.

Trial Examiner Hier: The point I am interested in is for how long a period of time have you been thus able to sell in spite of lower competitive prices?

The Witness: Well, let us say over the last 15 or 20 years—.

Trial Examiner Hier: You overcome your price disadvantage, I presume, in your own opinion, with other factors?

The Witness: We try to, yes, sir.

Mr. Sprowl: I think the witness already testified, Mr. Hier, that the quality and service are their offsetting factors.

Trial Examiner Hier: Well, to tell the truth, it has been so long since I have seen or heard his testimony—.

By Mr. Sprowl:

Q. Am I correct in that, that you have testified that you offset it by quality and service?

A. Quality, service and other factors.

1615 Q. Now, do you recall the testimony that has been given in the record about the volume discount plan offered by the Niehoff Company competitors?

A. Will you repeat that please?

Q. Do you recall the testimony that has been given here about the volume discount plans offered by your competitors to your respective customers?

A. Oh, yes, I do, yes.

Q. Do you recall that four or five of those competitors' contracts were applicable to the year 1949 and were put in evidence as respondent's exhibits?

A. I believe that is true, yes.

Q. Eleven-A, B, 12, 13, 14 and 15, do you recall the testimony as to other competitors whose actual contracts were not available?

A. Yes, I do.

Q. Now, was the Niehoff Company the originator of the annual discount purchase plan that is used commonly in this field?

A. No, it was not.

Q. When and why did you adopt that plan?

A. Well, we had to adopt it so as to be competitive, the plan has been existence for a good many years, probably since the early '30's as I recall it now.

Q. Now, you have already testified as to the frequency with which the Niehoff Company reviews its prices,
1616 but in order to make this part of the record stand on its own feet, would you review that for us again?

A. Our prices are reviewed over the complete line at least once a year, sometimes twice a year, special items may be reviewed more frequently depending upon the urgency of it.

Q. Would that be a new item or some change in the item?

A. It could be both the new item and the old item.

Q. What would cause you to review an old item?

A. Well, the competitive situation that may exist. If the original parts people make a change in their price pattern we have to be responsive to that.

Q. And what factors did you and do you consider or did you consider in the year 1949 in establishing the prices applicable to that year? I am speaking now of the base jobber price.

A. Would you repeat that?

Q. What factors did you consider in determining your price?

A. We considered the same factors that we always do, the entire cost factors.

Q. You gave that earlier today, the cost factors.

A. Material cost, labor cost, overhead, administrative, sales, delivery, all the costs that make up the selling price plus the margin, the fair margin of profit.

Q. And do you consider your competitor's prices?

A. Yes, you always have to study the competitor price situation.

1617 Q. Now, when you say you consider your competitors' prices you are speaking now of the base jobber price as distinguished from their discount plans?

A. Well, both, as a matter of fact.

Q. In other words, I assume you consider one first and then the effect of the discount plan on the price after you—

A. That is about right.

Q. —after you have established your base price?

A. That is right.

Trial Examiner Hier: I assume from what you said, Mr. Niehoff, the margin of profit you get on different items varies considerably?

The Witness: That is right.

Trial Examiner Hier: You don't have a standard mark-up?

The Witness: No, sir.

By Mr. Sprowl:

Q. Let me ask you this, do you ever,—if after you have worked through this pricing method you find that you have to sell the item and at an actual loss, what is your practice? Do you carry the item or what do you do?

A. Well, I don't think we have had any case where we have had to actually sell an article for a loss, but I might state that the original parts people for the car manufacturer usually sets what we term the selling price, and
1618 that is our, more or less our guide, now, when we come to an item where the normal margin of discount don't apply, we might have to vary from the original and in that instance there would be an exception to the general rule and have a higher list price than the car manufacturer would have. And that is the one factor we have to be watchful of. The other things are the gross margin items in an effort to get your cost down to a minimum.

Q. In other words, you don't try to carry any loss leaders so to speak?

A. Definitely not.

Q. If you found an item could only be handled at a loss would you carry it in your line or discontinue it or what?

A. Why, in having considered over a period of time certain items, we have usually come to the conclusion if it is not profitable to have them, we wouldn't put them into the line.

Q. You don't carry them?

A. No, sir.

Trial Examiner Hier: Now, let me see if I can draw the threads of this together in my own mind.

As I understand it in setting prices you have really three levels, between which the prices must fall. The lowest level is the cost, the actual cost of production of the item; the highest level is the price at which the original equipment manufacturer, which you named three here sells, now,

I assume that is based on the assumption you can't
1619 command a premium over what they sell?

The Witness: That is right.

Trial Examiner Hier: And the third level is what the rest of the competition sells at and generally speaking, your prices fall between the upper level and the middle level?

The Witness: I think that is generally stating it correctly.

Trial Examiner Hier: In other words, you found by experience you can get more than the rest of your competition except the original equipment manufacturers but that you can't get as much as they get, is that the gist of your testimony?

The Witness: That is about it, yes.

Trial Examiner Hier: Do you care to add anymore to it? I mean, if you left out something that is important, I don't know.

The Witness: No, there may be, however, the exceptions to the rule, see, that is the point, but they would be strictly exceptions and not the general rule.

Trial Examiner Hier: Now, in my question I was talking about base prices and list prices, is that still true? I just happened to think of that, or would that only be true in connection with actual selling price, taking into account all discounts?

The Witness: It may be true as to list prices and it may be true as to selling prices too.

1620 Trial Examiner Hier: Yes, all right.

By Mr. Sprowl:

Q. Now, pursuing that a little further, Mr. Niehoff, after you have established your base price considering the factors you testified about, the items going into cost and the profit factor and your competitors' prices, then do you also consider your competitors' volume discount plan in establishing your own discount plans?

A. We have to, yes.

Q. And that is the similar plan, you work out a similar plan and that is the type you have testified about, that was in effect in 1949, is that right?

A. Yes, we had a discount plan in effect.

Q. If you didn't have that discount plan could you remain competitive in the field?

Mr. Schrup: Just a minute, I have an objection to that, that is speculative and conjectural.

Mr. Sprowl: If this man doesn't know the answer to what he does—

Trial Examiner Hier: I think that is a matter that goes to the weight, it is based on his business judgment in years past.

It is mere speculation, but go ahead and answer it.

By Mr. Sprowl:

Q. If you didn't have such a volume discount plan
1621 could you remain competitive with your competitors?

A. No, we could not.

Trial Examiner Hier: By that you mean you couldn't sell, is that right?

The Witness: Practically so, yes.

By Mr. Sprowl:

Q. I believe you have already testified about how your annual volume discount plan is available to all of your customers, is that right?

A. Yes, I have previously.

Q. And it is up to them to attain the volume, once they have established their ability to reach that volume the plan is available to them, is that correct?

A. To all the customers, yes, sir.

Q. Now, I believe you have already testified that you organized the Niehoff Company in 1923, is that correct?

A. That is correct, sir.

Q. And you have continuously headed that company?

A. I have, yes.

Q. From that time to the present day?

A. Yes, sir.

Q. Where was the original location of the Niehoff Company in 1923?

A. At Ohio and LaSalle Street here in Chicago.

Q. And did it own those quarters or leased them?
1622 A. We leased the quarters.

Q. How large were they?

A. We had approximately three—

Mr. Schrup: I don't want to break up the examination here, Mr. Sprowl, but I don't believe all this is material.

Trial Examiner Hier: He is trying to show the witness is a reasonably prudent businessman.

Mr. Sprowl: And I will lead up to the questions I think I should qualify in the record, I don't think there is any

doubt he is but I would like to put it in the record, if I could.

Trial Examiner Hier: What record?

Mr. Sprowl: Put this testimony in the record.

Trial Examiner Hier: The objection is overruled. Go ahead.

By Mr. Sprowl:

Q. Did you answer whether that was leased or owned space?

Trial Examiner Hier: He said it was leased.

By Mr. Sprowl:

Q. Leased?

A. Yes, sir.

Q. Did you do any manufacturing at that time?

A. None originally, no, sir.

Q. And what items did you handle at the outset?

A. Well, primarily the parts that we supplied for 1623 the Model T Ford. They were vibrator points for the replacement of the ignition on the early Model T cars.

Q. So, I gather if you didn't manufacture that your business was limited to the sale and distribution of those parts at that time?

A. Yes, that is right.

Q. And the Niehoff Company is presently located at 4925 West Lawrence Avenue in Chicago?

A. That is correct, sir.

Q. Does it own or lease that property?

A. The corporation owns the property at that address.

Q. And how large a plant do you have at that location?

A. Approximately 75,000 square feet of space.

Q. And when was it built?

A. We built that plant in 1939.

Q. And have you added to it since then?

A. Yes, we have added to it on several occasions.

Q. How large was the plant in 1939?

A. The original plant in 1939 was around 20,000 to 25,000 square feet.

Q. And how many times have you enlarged it since 1939?

A. Well, we have built three or four additions to the plant since that time to bring it up to the present space that we are now occupying.

Q. I assume that because of the conditions that pre-

vailed that none of that building was done during the war?

1624 A. No, we built in 1941, an addition, as I recall it.

Q. How big was the 1941 addition?

A. Well, approximately, as I recall it now, about 20,000 square feet.

Q. And when was your next addition?

A. The final addition was in 1949 or 1949.

Q. And that accounted for the balance of the floor space?

A. Yes, we did do some building in between but limited ways.

Q. Now, I take it when the company started in 1923 it had no volume, it started from scratch, is that correct?

A. That is right.

Q. And what is the present annual volume of the company including the domestic and foreign sales?

A. As of now or as of 1949?

Q. As of now.

A. Approximately three million dollars.

Trial Examiner Hier: Let's get on.

Mr. Schrup: May I get that figure, please?

Trial Examiner Hier: Let's get an idea of what your volume was in 1925 or 1926 when you had a chance to get your sea legs so to speak.

The Witness: In 1925?

Trial Examiner Hier: Yes, somewhere around there.

The Witness: About $350,000.

By Mr. Sprowl:

1625 Q. How many people do you presently employ at the Niehoff Company?

A. Oh, 200 employees, approximately, maybe a few more.

Q. And how many did you have back in 1923, 4 and 5, the period which Mr. Hier was referring to?

A. Probably four or five.

Q. Do you still buy all the items you sell or do you manufacture some or a good part of them?

A. We are generally basic manufacturers of the various lines that we sell.

Q. At the present time?

A. That is right, there are some exceptions to that rule of course.

Q. When did you first enter into the actual manufacture of any of your own items?

A. Well, I would say roughly in the early thirties.
Q. You have added to the standard of your manufacture annually?
A. Continuously, yes.
Q. Now, in the thirty year existence of the Niehoff Company what is the fact as to the longevity or tenure of your principal executive officers?
Mr. Schrup: I have a continuing objection on materiality.
Trial Examiner Hier: I don't see that it makes any
1626 difference one way or the other, go ahead.
The Witness: Well, we have had most of our executives—they have been associated in the company for a period of 20 years or longer.

By Mr. Sprowl:

Q. I take it you are one of them that has been there longer.
A. I have been there 31 years.
Q. And has the secretary and treasurer also been there the same period of time?
A. That is right, 31 years.
Q. And how about Mr. Fred Geyer?
A. Geyer was with us since 1933, that is a little over 20 years.
Q. And prior to that time he was in the automotive distributing business up in Milwaukee, wasn't he?
A. Associated with the Andrew Autqmotive Supply Company in Milwaukee, yes, sir.
Q. For some ten or 20 years prior to the time he came with the Niehoff Company?
A. I imagine it is quite a long time, maybe 20 years.
Q. Is he the gentleman that has been sales manager of the Niehoff Company since 1941?
A. That is correct, sir.
Q. And he is presently a director, is he not?
A. He is a director of the business, yes, sir.
Q. How long has Mr. Sanders, your advertising
1627 manager been with the company?
A. Well, I would say about 16 years, oh, I think longer.
Q. That is Mr. Carl Sanders you are speaking of?
A. Yes, he has been with us over 20 years, considerably over 20 years.
Q. And your chief production engineer, Mr. Grant?

A. He has been with us since 1929 or 1930, about 1930.

Q. Now, in the 30 years existence of the Niehoff Company, has it experienced steady growth or has it been a spotty growth?

A. It has been a gradual growth over these 30 years, steady but gradual.

Q. Along with the general growth of the auto industry would you say?

A. I would say so, yes, probably.

Q. What has been the credit rating of the company in that period of time?

A. We tried to maintain it on a very high-grade credit, we discount our bills.

Q. By that you mean you take your discounts that are available?

A. Cash discounts available on our purchases.

Q. Now, by that I gather you mean you pay your obligations promptly?

A. Very promptly.

Q. Now, what has been the practice in the com-
1628 pany in consulting with the outside counsel on technical fields?

A. Well, we have always had counsel, legal counsel on matters of legal questions, we have had outside counsel service, accounting service to maintain an accurate accounting system and such other matters as patent issues and so forth, we had to consult with patent attorneys.

Q. During this entire business history of the Niehoff Company have you, has it always tried to sell its merchandise at a price that would produce a fair and reasonable profit to the company?

A. Well, my theory has always been that the business has no sound reasons for existence unless it can operate on a profitable basis.

Q. Well, now in the years—the 30 years—excuse me—

A. Profit really means progress in the business and during the 31 years we have operated on a profitable basis each year, a conservative profitable basis.

Q. By that you mean in every one of the years you started in business, I mean accounting years, the company has been in the black, so to speak, and shown a profit?

A. Every year has been a profitable year.

Q. That is true even in those depression years?

A. That is correct, sir.

Q. That prevailed in the early thirties?

A. That is correct.

Q. Now, did you gain customers during that
1629 period or lose customers or what is the fact?

A. That is right, lost customers and gained customers.

Q. I assumed you gained more customers over the years as your growth increased?

A. We definitely have, yes.

Q. How do you lose your customers?

A. To competitors.

Q. Is there any other way you might lose them?

A. Oh, yes, customers go out of existence, out of business.

Q. Now, what is the fact as to whether or not the officers of the Niehoff Company have kept themselves informed as to the engineering changes which have occurred in the automotive field?

A. That is important as a factor in our business because we have to keep our lines up to date.

Q. By that you mean they must of necessity keep themselves informed of the changes in engineering?

A. Very definitely so.

Q. Now, I believe you have already testified that that comes about when some automobile changes the size or shape of the part you are making, you have to bring out a new part that will fit the new automobile, is that right?

A. That is right, sir.

Q. Now, what is the fact as to whether or not your officers have tried to keep themselves informed as to the prices charged by your competitors for these items
1630 and for the discount allowances they extended to their customers?

A. Well, we must at all times study the market situation and the competitive situation and keep definitely informed, that is a very important factor to guide us in our own pricing of our product.

Q. As a matter of fact, it is very vital in your line with so many, many competitors, is it not?

A. There are plenty of competitors.

Q. And it is vital to know what they charge, isn't it?

A. That is right.

Q. It is vital to know what their discount plans are, is it not?

A. It is, yes, sir.

Q. Now, considering the pricing factors which you have

mentioned this afternoon in your testimony, would you as a reasonable and prudent businessman have any reason to believe that the prices of any of the competitors of the Niehoff Company ever were or now are unlawful?

Mr. Schrup: Just a minute, I have an objection to that until he qualifies the witness a little further as to whether he has any knowledge as to the pricing factors that go into his competitors' prices.

Trial Examiner Hier: Overruled, the Commission itself has laid down the rule, it opened the door.

By Mr. Sprowl:

1631 Q. Do you want the question re-read?

Trial Examiner Hier: Read the question, please.

(Record read.)

The Witness: None whatsoever.

By Mr. Sprowl:

Q. And does that apply not only to the present time but the year 1949?

A. Yes, that would apply to 1949.

Q. That would apply all the way back to 1923 when you went into business, would it not?

A. That is correct, sir.

Q. And as a reasonable and prudent businessman, have you ever had any reason to believe there was anything unlawful about any of the annual volume discount plans offered by your competitors to their customers in this period of time?

A. No, I didn't, I don't believe so.

Q. Nothing to lead you to believe that any of those volume discount plans were unlawful?

A. None, sir.

Mr. Sprowl: That is all of this witness.

Trial Examiner Hier: Just a minute before you go ahead.

Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

1632 In 1923, Mr. Niehoff, when you entered this business were Delco-Remy and Auto-lite major factors in the business?

The Witness: Yes, Auto-lite was the supplier of the parts to the Chrysler ignition system and Delco-Remy was the supplier to all makes of General Motors cars, but, as

I stated, at that time we were only supplying the Ford parts, we were only in competition with the Ford line, our line expanded in the course of years.

Trial Examiner Hier: Tell me this, were those three automotive parts suppliers powerful enough economically to fix non-conspiratorially—to fix up the level in which you competitors could sell, were they that powerful then?

The Witness: I think they were.

Trial Examiner Hier: Were they then selling on an annual volume discount basis, do you know?

The Witness: I wouldn't know, sir.

Trial Examiner Hier: Then, if that is the case when did the annual volume discount plan of selling in this industry first start to your knowledge?

The Witness: Well, as I testified, it came about to my knowledge in the earlier—in the early thirties.

Trial Examiner Hier: The early thirties?

The Witness: Yes.

Trial Examiner Hier: Now, prior to that time how were you and your competitors selling, on a single 1633 price basis or some other basis?

The Witness: In our earlier pricing method prior to the early thirties we had a quantity price per se or per item.

Trial Examiner Hier: I understand what you mean, a quantity discount per order, is that what you mean?

Mr. Sprowl: Per item.

The Witness: Per item.

Trial Examiner Hier: Yes.

The Witness: In other words, for example, if I may state this, if we had a 100 lot business or a 500 lot business—a 500 lot price or a thousand lot price on a given item—

Trial Examiner Hier: You started in business with this?

The Witness: That is correct.

Trial Examiner Hier: Were others doing the same thing at that time in 1923?

The Witness: Well, yes, I think others were doing that to a high degree, I don't know that all of them were because I don't recall it.

Trial Examiner Hier: What I am trying to get at, did you originate that idea or did you adapt it from other people?

The Witness: No, that is a simple rule of cheaper by the dozen.

Trial Examiner Hier: Well, now, who started selling on an annual volume quantity discount basis in the
1634 early thirties? Do you know which firm first did that? Was it yourself or somebody else?

The Witness: Well, I think the quantity discount based upon the given volume may have started in other fields than the ignition field.

Trial Examiner Hier: I understand, who was the first in your field?

The Witness: Well, I know that the Eklund Company had a—

Trial Examiner Hier: Who?

The Witness: Eklund Company.

Trial Examiner Hier: Yes.

The Witness: They had a warehouse deal, as we called it, to the NEPA accounts.

Trial Examiner Hier: That is yearly, 1930 and prior to the time you did?

The Witness: That was prior to the NRA days, I can't tell you the time it was adopted.

Trial Examiner Hier: How about Delco-Remy and Ford?

The Witness: I couldn't state as to their discount at the time.

Trial Examiner Hier: Well, all right, I just wanted to get some sort of a bird's eye view of this.

Go ahead with the cross-examination.

1635 *Cross-Examination by Mr. Schrup.*

Q. Well, Mr. Niehoff, in listening to the pattern of the questions propounded to you and your answers, you are familiar, are you not, with the fact that in the matter of the Edelmann Company, another Chicago concern that the Commission had directed to take some testimony with reference to what was considered a lawful pricing competitor?

A. Well, I am familiar with the Edelmann Company, yes, I am not familiar with the testimony.

Q. You had no occasion to read that testimony?

A. No, I did not.

Q. And your counsel didn't advise you of that testimony?

A. Yes, we discussed the issue in which the Edelmann case was taken to the Commission, I think that is about it.

Q. Well, now, I wasn't clear from your testimony with relation to the volume of discount plan which you adopted back in the early thirties, now, which of your competitors actually had such a discount prior to your adoption of it?

Trial Examiner Hier: He named one.

Mr. Schrup: I believe he named the Eklund Company.

Trial Examiner Hier: Yes.

By Mr. Schrup:

Q. Now, did you adopt it prior to or following the adoption of such a system by Standard Motor Products of New York?

A. I couldn't answer that because I don't know
1636 when they adopted their plan.

Q. You don't know if they had one in existence when you adopted yours?

A. No, I don't.

Q. Now, with reference to the P and D Manufacturing Company, which I understand, is another one of your competitors, can you tell us whether you adopted your volume discount system prior to the volume discount system by that concern?

A. Yes, I think they had a volume discount base in the early thirties.

Q. And was that in existence prior to your adoption of a volume discount plan?

A. I believe it was, yes.

Q. You have no idea about the specific date when you adopted your plan?

A. No, I can't tell you specifically.

Q. Now, another one of your competitors, I believe is B. Sorenson Company, would you have any knowledge as to whether you adopted your volume discount system prior to an adoption of a like system by such company?

A. I don't know when they adopted their system.

Q. You do not know whether they had one in existence when you adopted your volume discount plan?

A. Actually I do not.

Q. Now, I further didn't get it quite clear from
1637 your testimony, I believe you named some of your principal competitors with the, what you call the manufacturers of original equipment, by that you mean a vehicle manufacturer?

A. Well, I mean the Auto-lite people, if you call them vehicle manufacturers, they are manufacturers of the original equipment used on vehicles.

Q. And also the Delco-Remy people would come into that category?

A. That is right.

Q. And also the Ford would have that set up?

A. Ford, assuming he builds his own equipment.

Q. Do any of those three concerns have a volume discount plan similar to yours?

A. Well, they have a discount plan, I don't know whether it is a volume—.

Q. You don't know whether it is or not?

A. I don't know whether it is a volume discount plan or not.

Q. Well, could you briefly tell us what your idea is of what discount system they have?

A. Well, they vary somewhat, Auto-lite has the basis of discounts to what they call the central distributor, and they get a preferential discount over the jobber to whom this central distributor sells the Auto-lite equipment.

Q. And who does that jobber resell the merchandise to?

A. To the dealer.

1638 Q. And what type of dealer would that be?

A. Well, it may be the cart dealer or any independent repair station or garage or service station.

Q. And would he sell at the same price to the car dealer as he would to the independent garage?

A. Generally I think the car dealer would get a preferential discount.

Q. Now, I believe your testimony is that in the past the Niehoff Company made no sales to car dealers, that is the franchise car dealers of the various vehicle manufacturers?

A. We do not make any sales direct to such car dealers.

Q. Do your jobbers?

A. Jobbers may, yes.

Q. Now, I may be mistaken, Mr. Niehoff, I believe you have testified previously that it was impossible to sell to car dealers because of the franchise arrangements with the car manufacturers, do you recall whether you so testified or not?

A. I made the statement that the jobber may sell to the dealer, I don't say he does sell to the dealer or how much he may sell the—

Mr. Sprowl: I don't think you understood the question, he talked about you being able to sell to the car dealer.

The Witness: We don't sell to the car dealer.

Mr. Schrup: I didn't state that.

It was my understanding that Niehoff products
1639 couldn't be sold to the car dealer because of some franchise arrangement with the car manufacturer whom they represented.

The Witness: That is generally true, yes.

By Mr. Schrup:

Q. Now, Mr. Niehoff, as I recall, we have in evidence four Niehoff price sheets for August 1, 1949, 6-A being the pink jobbers' price sheet, and 6-B being the green wholesale confidential price sheet, 6-C being the yellow dealer price sheet and Commission's Exhibit No. 6-D being the white list price sheet, that bears the highest merchandise price of all, does it not?

A. That is the retailer's suggested price.

Q. That is for the vehicle owner, for repairs of the vehicle owner?

A. That is right.

Q. And then the yellow dealer price is listed as a little lower price than that?

A. Yes, that is generally described as the suggested price to the dealer, service station.

Q. And then you have the green wholesale confidential prices which is a still lower merchandise price?

A. That is right, sir.

Q. And for whose use is that price sheet suggested?

A. That is for the—that is to be competitive with the car dealer price and to the stocking dealer of service-
1640 men that stock the merchandise and carries the stock.

Mr. Sprowl: Off the record?

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Schrup:

Q. Now, with reference to the three price sheets we have described by color, the green, yellow and white sheets, Mr. Niehoff, the Niehoff Company extends no discount in connection with purchases of that merchandise, do they?

A. Well, those price sheets that you have described are used by our distributor or jobber as you classified it and that is his suggested resale schedule.

Q. Those are used by him in connection with the resale of the merchandise he purchases from you?

A. That is right, sir.

Q. Now, in connection with his purchases of merchandise from you, those prices are based upon the pink price sheet which is Commission's Exhibit 6-A, that is the pink jobbers' price sheet?

Mr. Sprowl: Do you have the exhibits here, I don't know whether they are pink, white, blue or yellow.

Mr. Schrup: That is right.

May we go off the record for a minute?

Trial Examiner Hier: Off the record.

(Discussion off the record.)

1641 Trial Examiner Hier: On the record.

Mr. Schrup: As regards our off the record conversation with Mr. Niehoff, I understand that Commission's Exhibit 6-A which was the pink jobbers' price sheet in use during 1949 subsequently had its color changed and is now known as the blue price sheet, speaking about the base jobber's price sheet.

The Witness: Now, it has been changed to blue and is called the distributor's price sheet.

By Mr. Schrup:

Q. But it is still the price sheet upon which the prices appear, the bases of which both the jobber or the distributor purchased from the Niehoff Company?

A. Yes, it is, but I don't know as to the exact timing of the change there according to the exhibits.

Mr. Sprowl: Well, I only want to suggest, Mr. Hier, that pages 43, 4 and 5 of the records, these exhibits 6-A, B, C and D were identified as to what they were.

Now, without the exhibits before us, I am just a little concerned that we will muddy this thing all up and lug in some new colors.

Mr. Schrup: That is not my intention to do that.

Trial Examiner Hier: I don't know what he is leading up to with you, obviously, he is leading up to something.

Mr. Schrup: I do want to get it all in one place in the record.

1642 By Mr. Schrup:

Q. All those price sheets, Mr. Niehoff, were used in conjunction with what is known as your catalog No. 27, is that correct, sir?

Trial Examiner Hier: Well, doesn't the record so show?

Mr. Schrup: Yes, sir, the price sheets so state.

Trial Examiner Hier: What is the use of asking him? Go ahead.

By Mr. Schrup:

Q. Now, Mr. Niehoff, you also had in use during the year 1949 a series of three price sheets known as the pink jobbers' price sheet, the green wholesale confidential price sheet and the yellow dealers' price sheet used in connection with Ford, Mercury and Lincoln parts?

A. Yes, that is right.

Q. Now, to what class of purchaser would the latter three price sheets extend to?

A. Those are prices, those prices are the same as the general price list or lists that were in effect at that time and they were designed to provide information for those accounts that did not buy the complete line and we issued in conjunction with that a pamphlet or abbreviated catalog and that was issued to those stations that would generally handle the official United Motors line and the Auto-lite lines, but did not generally handle the Ford line be-
1643 cause they were interested in the independent source of supply on those items.

I might add that that has been discontinued some long time ago.

Q. Which is that, sir?

A. The issuance of a special price sheet and a catalog for Ford items only.

Q. What year was that?

A. I am unable to give you that offhand but around 1949.

Q. If I recall the price sheets which we are talking about, the special Ford, Mercury and Lincoln price sheets were dated August, 1949, isn't that used as the date when a price sheet comes into effect?

A. That is right, and that is probably the last price list that was issued on that basis.

Mr Sprowl: Are there any exhibit numbers, Mr. Schrup, relating to those?

Mr. Schrup: Commission's Exhibits 7-A, B, C and the special catalog to which they are applicable is catalog number two which is also Commission's Exhibit No. 2.

By Mr. Schrup:

Q. Now, Mr. Niehoff, as I understand the testimony of yourself and also Mr. Geyer in the past you had four types of customers' classifications in 1949, the terminology has been changed subsequently to 1949, but speaking
1644 about the year 1949, first was the jobber without an agreement, now, as I understand it, that was the type of jobber who signed no written agreement with you.

Trial Examiner Hier: This is all in the record, isn't it?

Mr. Schrup: I want to get this clarified here.

Mr. Sprowl: I am going to object to rehashing something that isn't brought out on this direct and in the record not once but four times.

Trial Examiner Hier: What is the point of it all?

Mr. Schrup: I am coming to the point right now, sir.

Trial Examiner Hier: How about telling me what the point is?

Mr. Schrup: I want to find out why there was some changes in discount schedules.

Trial Examiner Hier: Why there was?

Mr. Schrup: Why there were some.

Trial Examiner Hier: He is familiar with the price lists, put your question.

By Mr. Schrup:

Q. All right, Mr. Niehoff, in 1948 according to the Commission's Exhibit No. 17, which is the Niehoff jobber's agreement, your discount brackets were $1,800, which was entitled to a five percent discount, $2,700, which was entitled to a seven per cent discount, and $3,600, which was entitled to a ten per cent discount, now, in the previous year, 1947, the brackets were $1,500 which was entitled to
1645 a five per cent, $2,400, which was entitled to seven per cent and $3,000, which was entitled to ten per cent, now, what was the reason, if any, for the increase in 1948 over 1947 of the amounts needed to be purchased in each bracket under the Niehoff jobber agreement?

Mr. Sprowl: I would like to impose this objection: Obviously, Mr. Schrup has neither the transcript nor the exhibits before him. I have no way of checking whether that is an accurate recapitulation of what the record shows and I submit the witness is as confused as counsel.

Trial Examiner Hier: I am going to turn it over to the witness.

Do you have those figures in mind?

The Witness: Yes, I do.

Trial Examiner Hier: Are you able to answer the question without looking at the exhibits, the price sheets and so forth?

The Witness: Yes, I think I can give you a reasonable explanation.

Trial Examiner Hier: If you can do it, we will go ahead; if he can't do it, we will quit until you get the exhibits.

The Witness: We considered the slight change in the discount range, we also considered the fact that additional items were added to the line including also hydraulic parts
items in which we extended our lines, so it would be
1646 relatively easy for the buyer, for the distributor to
make that additional volume and earn that additional discount and I think that was the deciding factor in making a change in the discount range there.

Mr. Sprowl: In other words, the premises—may I ask a question?

Mr. Schrup: Just a minute—

Mr. Sprowl: Let me get it straight, your Honor.

Mr. Schrup: I can't cross-examine—

Trial Examiner Hier: Just a minute, off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

Go ahead with the next question.

The Witness: I didn't quite finish.

Trial Examiner Hier: Go ahead and finish if you haven't done so.

The Witness: There may have been other factors because I recall it now, there had been some price depression in the entire price structure that had a bearing on our decision too.

By Mr. Schrup:

Q. When you talk about price depression, did you also proportionately increase your list price?

A. I assume we did.

Q. Prior to the discount price?

A. I assume we did, I would like to verify that.

Q. Now, Mr. Niehoff, subsequent to that you had
1647 another volume change in 1949 in which you lowered
the brackets according to Commission's Exhibit No. 16 which you dropped down to $1,200 for a five per cent

discount, $2,400 for a seven per cent discount and $3,600 for a ten per cent discount, what was the reason for that?

Mr. Sprowl: Before we get into that, let's check the records on it, what exhibit?

Mr. Schrup: Commission's Exhibit 16, sir, I am talking about Commission's Exhibits 16, 17 and 18.

Mr. Sprowl: Well, you are presently talking about 17—16, that is the 1949 jobber's agreement?

Mr. Schrup: That is right, the exhibit was in effect January, 1949 to December 31, 1949.

Mr. Sprowl: Well, I think he should ask the witness—gosh, I don't have any way of knowing whether that is what the exhibit shows.

Trial Examiner Hier: Obviously, Mr. Sprowl, if he is misquoting the exhibit, the answer is worthless.

Mr. Sprowl: Go ahead.

The Witness: There is no mystery about that because I think the competitive picture is one that we had to study and we had to meet some of the discounts or more nearly meet some of the discounts that were issued by competitors and everybody is not—everybody knows the trend of competition in 1949 was again in reverse to what is was a year or two earlier and that had a bearing upon our 1648 —which always has a bearing on the price situation.

By Mr. Schrup:

Q. To two of the competitors whose pricings you are trying to meet?

A. Competitors in the ignition field.

Q. You weren't setting your prices trying to meet the prices of any specific competitor?

A. We generally don't try to meet any specific competitors' requests.

Q. When you state that I am asking you with relation to fixing your list price or any of the prices appearing on the four price sheets we have discussed as well as the discount schedule.

A. We always have to follow the pattern made by the original car manufacturers on prices.

Q. Now, you are talking, sir, are you not, about the list price?

A. The list price governs also the net selling price because they have a pattern of discounts that applies to the list which results in the net price.

Q. Now, let me ask you this, sir, you are talking now, as I gather about Auto-lite, Delco-Remy and Ford?

A. Yes.

Q. Now, in making your different volume brackets change in 1947, 1948 and 1949 that we have talked about, were you fully acquainted with the discount schedules, if any, of those three concerns, Auto-lite, Delco-Renny and Ford?

1649

A. Yes, I think we were.

Q. Did they govern your change?

A. They governed the change specifically as to the selling or the list.

Q. That is right, but what about the discount schedule which is the actual buying price?

A. Well, they have made changes in their discount program which has to be taken into consideration when we make our prices.

Q. You will appreciate, of course, Mr. Niehoff, that you have—that we have none of those discount schedules of these competitors which we are talking about in evidence, if there are any, and I have no way of cross-examining—

Mr. Sprowl: There are five in evidence.

By Mr. Schrup:

Q. Not Delco-Remy, Auto-lite and Ford, let's go to the other competitors, which of those competitors specifically do you have in mind when you fix your list price and your discount?

A. The only answer I can give you that we consider all of the competitors and not any individual competitors.

Q. And not specific competitors whose prices you are trying to meet.

Trial Examiner Hier: I understand that the gentleman answered in 1947 or any other time you did not exactly meet each competitive price of any particular competitor?

1650

A. Well, even if you want to, it is impossible because the prices vary.

Trial Examiner Hier: That is what I am trying to get at.

I don't know how many competitors are listed in this exhibit.

Mr. Schrup: I have the exhibits here, sir.

Trial Examiner Hier: And their prices vary all over the lot, is that it?

The Witness: Yes, they do as a matter of fact.

Trial Examiner Hier: And you attempted to draw a line, I assume, among that seven or eight or ten or fifteen competitors or eleven at which you can hold most of the time that you then had and have a chance of gaining new business, is that right?

The Witness: It is a matter of judgment.

Trial Examiner Hier: I know it is a matter of judgment.

The Witness: And we may be wrong in our judgment or right, but we try to get a fair level of prices which not necessarily are the highest nor the lowest.

Trial Examiner Hier: Well, that is the main question in these two cases right there.

By Mr. Schrup:

1651 Q. Well, Mr. Niehoff, on Respondent's Exhibit No. 3, which we have here, Mr. Sprowl, we have listed one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen—sixteen competitors of the Niehoff Company, now, while your list prices and discounts from list prices in a sense differ from all of those, I suppose all of those in turn differ from each other, is that correct, sir?

A. More or less so.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Schrup:

Q. Before I forget it, I am not clear on one answer you gave in response to Mr. Sprowl's question, what do you actually manufacture out of your $3,000,000 sales volume, what amount of that do you manufacture?

A. Well, I would say about 65 per cent, if you want it percentage wise.

Q. About 65 per cent?

A. Yes.

Q. Now, at the beginning of your examination, Mr. Niehoff, you were asked whether you had read the Robinson-Patman Act and you said, "Yes," do you recall when you first read it?

A. I read it several times, yes, I don't know whether I recall the wording of the Act.

Trial Examiner Hier: What he means, it was
1652 passed in June of 1936, when did you first read it with reference to that date, that is what he has got in mind, I am sure, a year later or a couple of months later or what?

The Witness: Well, I don't think I read it until a couple of years later to be honest with you, are you talking of 1939 when it was passed?

Mr. Schrup: 1936.

Mr. Sprowl: 1936.

The Witness: 1936.

By Mr. Schrup:

Q. You had read it prior to the issuance of the complaint against the Niehoff Company?

A. Yes, I am sure I read it before.

Q. And prior to the Niehoff Company complaint I believe you testified that you had been advised by competent counsel as you went along as to your pricing practices?

A. Well, we had been advised on pricing procedure from time to time, yes.

Q. Have you been advised relative to your volume discount plan?

A. Not necessarily.

Q. Now, in response to counsel you also gave some answers with relation to what you considered lawful prices of the competitor, were there any other examples that might come to your mind you considered unlawful?

1653 A. Well, not that I can think of at this moment.

Q. And I believe you also stated in considering the prices of your competitors, if I might quote, "I had no reason whatsoever to consider any of their prices unlawful."

A. That is right, that is what I said, yes.

Q. And in making that statement what did you take into account with relation to their prices?

A. There has never been an issue about prices.

Q. And is that the sole basis for your answer?

A. That and there has never been any issue brought up on this question of the Robinson-Patman bill, at least not until 1950 we had any knowledge of it.

Trial Examiner Hier: Did you ever have any question in your mind, Mr. Niehoff, when you got the complaint or subsequent to that that volume discount might come within the purview of the Robinson-Patman condemnation?

The Witness: Yes, in a sense, sometime before we received notice, yes.

Trial Examiner Hier: Well, was that before any investigators appeared in your office or anything of that sort?

The Witness: We never had any investigators outside of the one investigator that came in and wanted information on the group.

Trial Examiner Hier: Well, what I am trying to get at, were you peacefully going along doing business without any hint or suspicion in your mind that a volume
1654 discount, an annual volume discount such as you have employed was questionable legally up until the time either this complaint was issued or until the time somebody started to poke it around prior to its issuance?

The Witness: Well, yes, because I didn't discuss—I did discuss the question with counsel, our corporation counsel at the time and I don't remember just the substance of the discussion but this is probably late in 1949—pardon, late in the '40's is what I mean, so far as I can recall from counsel's statement there was nothing specifically stated that our method was not regular, I explained to him that everybody in the field was following this procedure and there was nothing that we could do about it unless the pattern changed as far as the competition was concerned.

Trial Examiner Hier: Go ahead.

By Mr. Schrup:

Q. Now, I think you further stated, if I am correct, Mr. Niehoff, in response to Mr. Sprowl's question, that you considered as an example of the unlawful price a price that was prohibited by the Robinson-Patman Act or a price prohibited by a court decision, am I correct there, sir?

A. I don't understand your question.

Q. Well, Mr. Sprowl asked you with reference to considerations of lawful price whether you would consider a price to be unlawful that was prohibited by the Robinson-Patman Act and also prohibited by a court decision
1655 and I believe your answer was yes, is that correct, sir?

A. Well, I believe my answer was yes.

Q. Would you consider a price unlawful on the Robinson-Patman Act that was prohibited by a Federal Trade Commission decision?

A. I don't know what decision you refer to.

Q. If there was such a decision that prohibited a price as being unlawful under the Robinson-Pattman Act, would you consider that to be unlawful?

A. There may have been some decisions, but I don't think they would apply to our field of operations.

Q. I am speaking about a volume discount plan, are you aware that as early as 1938 and 1939 that the Commission, that is the FTC, issued two cease and desist orders concerning volume discount plans?

A. No, I am not aware of that.

Q. You were not so advised by counsel?

A. No, I am sure.

1657 By Mr. Schrup:

Q. Mr. Niehoff, a price, a buying price that is paid by one of your customers competing with another one of your customers, that is lower as a result of a volume discount plan such as you have, do you consider
1658 that price to be a lawful price?

A. Well, I don't know why not.

1659 Trial Examiner Hier: He wants to know if you sell to two competing customers at different prices because one buys more than another and you have no cost justification for the price, do you as a reasonable businessman consider those prices to be lawful?

The Witness: Well, I believe we have cost justification for the difference in price.

Trial Examiner Hier: He asks you to assume that you do not have it and then on that assumption wants to know, do you consider those two prices to be lawful—to be unlawful, one being lower than the other?

Mr. Sprowl: He says to be lawful.

The Witness: I wouldn't know what to answer to that question.

Trial Examiner Hier: You don't know?

The Witness: No.

1660 Trial Examiner Hier: All right, he has no opinion on that. Go ahead.

By Mr. Schrup:

Q. In other words, in the absence of the cost justification in this case you have no opinion as to whether or not your price to your different customers are lawful or unlawful prices?

A. I believe they are lawful.

Q. Even in the absence of a cost justification?

A. As I have stated, I think we have cost justification.

Q. That is the trouble, you think you have, let's assume it is found you have not, what would your answer be, sir?

Mr. Sprowl: He just said they were lawful.

Mr. Schrup: Mr. Sprowl, let the witness answer.

Mr. Sprowl: Read the record back.

Trial Examiner Hier: Answer the question, Mr. Niehoff, if you didn't have a cost justification in this case would you say your present selling prices were lawful or unlawful as a matter of business judgment, that is what the gentleman wants to know?

The Witness: I believe them to be lawful.

Trial Examiner Hier: In the absence of cost justification?

The Witness: Even in the absence of any cost justification.

Trial Examiner Hier: You believe them to be lawful?

1661 The Witness: There is cost justification.

Trial Examiner Hier: It is a hypothetical question, a matter of opinion.

By Mr. Schrup:

Q. Now, let's go one step further, in the absence of a cost justification you believe your prices would be lawful and what is the reason for that statement, sir?

A. Well, sound economics as far as the pricing policy is concerned because my conception of a rule of cheaper by the dozen has been established for hundreds of years and I think that is the crux of this whole issue which has been practiced in pricing in all fields that I know of.

* * * * * * *

Mr. Sprowl: Now, I do not agree with you, Mr. Hier, and I think that is an unfair question, it does not assume cost justification.

Trial Examiner Hier: In cant language or vulgar language it does more or less.

Mr. Sprowl: Well, you get—

Trial Examiner Hier: I will withdraw it.

1664 (Record read.)

Trial Examiner Hier: That is his answer.

By Mr. Schrup:

Q. Now, what do you mean by the statement, "cheaper by the dozen" as applied to your pricing structure?

A. Well, I mean there is an economic factor that enters into the volume as far as the costs are concerned and it has been generally accepted as such in all industries, it has been accepted in the automotive industries.

1666 Q. Why do you state that you believe that your competitors' prices are lawful?

A. Well, I don't know why I should question the fact they were otherwise, if they are not lawful I don't know what they are.

Q. If they have a volume discount plan in effect and you stated you knew what the prices—what the pricing practices were and resulted in different prices to competing purchasers, do you consider that a lawful or unlawful price on their part?

A. I don't follow that.

Trial Examiner Hier: Well, let me see if I can do it. This Eklund Company you mentioned, if they sell on a volume discount basis somewhat similar to yours, Mr. Schrup's question is, "Do you consider that a lawful pricing system?

The Witness: I have already stated that.

1667 Trial Examiner Hier: You do?

The Witness: Yes.

Trial Examiner Hier: The answer is yes.

By Mr. Schrup:

Q. And you state that in the absence of a cost justification on their part, sir?

A. I don't know whether they have cost justification or not, I have no knowledge of that.

Q. But assuming in the question they have no cost justification, sir, would you consider their price a lawful price?

A. I don't know how they can fix prices without knowing costs.

Trial Examiner Hier: Well, can't we summarize it this way, Mr. Niehoff—

The Witness: I don't know how you can separate them.

Trial Examiner Hier: —unless something appears in the newspaper or trade journals about one of your competitors being sued by the Government or private industry charging them with unlawful prices, you assume their prices are lawful, is that correct, or isn't it? I don't want to put words in your mouth, I am trying to shorten this thing somehow.

The Witness: I wouldn't know.

Trial Examiner Hier: Unless something of that sort appears you assume they are lawful, is that right?

The Witness: I would say yes.

Trial Examiner Hier: That is what most people do.

1668 The Witness: I don't know.

Mr. Sprowl: I think he went further than that, he also said that he had no knowledge of conspiracy.

By Mr. Schrup:

Q. Mr. Niehoff, have you recently changed your volume discount plan?

A. Pardon me.

Q. Have you recently changed your volume discount plan?

A. What do you mean "recently?"

Q. When was the last change you made in your volume discount structure?

A. You mean one at the beginning of 1953?

Q. And before that?

A. I don't think there has been any other than those that are in the record here.

Q. Now, you are aware that the Commission has directed complaints against three of the competitors, Standard Motor Products, P and D and B. Sorenson Company.

A. Yes, I know that.

Q. Did that cause you to believe or disbelieve—did that in any way lead you to believe those prices of those competitors might not be lawful prices?

A. No, not necessarily so because I have no proof other than that they have been charged with having illegal prices.

Q. And as a result of competing with those three
1669 competitors and following the actions of the Commission's complaint against those three competitors you made no change in the structure?

A. That complaint had no bearing on it.

Q. You still continued with the volume discount plan?
A. Yes.
Q. Now, in acting as counsel wishes to describe you, as a reasonable prudent businessman in setting your prices as shown on the various price sheets which are Commission's Exhibits 6-A, B, C and D, in effect in 1949 and in making your applicable discount brackets you took only into consideration what you knew as to the pricing structures of your competitors as shown by the exhibits in evidence which are 11-A and B, 12, 13, 14 and 15, and I believe the prices shown on Commission's Exhibits 10-A and B and what your testimony has been to the prices and the discount structures of the competitors shown, all the competitors shown on Respondent's Exhibit 3 and also the testimony relative to Auto-lite, Delco-Remy and Ford.
A. I am lost.
Trial Examiner Hier: Read the question back.
(Record read.)
The Witness: Well, in the first place, I don't know really what is in the exhibit.
Trial Examiner Hier: In other words you are telling me you can't answer it as put.
The Witness: I just can't follow it because I
1670 don't know specifically what are in the exhibits.
Trial Examiner Hier: The witness can't answer the question.

By Mr. Schrup:

Q. Let's confine ourselves to the one exhibit, we have a copy here.
There has been introduced in evidence here, Mr. Niehoff, a document known as Respondent's Exhibit 11-A and B termed "Master Distributor's Rebate Contract of Standard Motor Products—strike that.
Trial Examiner Hier: What is the question?

By Mr. Schrup:

Q. Now, is it on the basis of that contract that you determined that in meeting the prices of Standard Motor Products you were meeting lawful prices on their part?
A. No.
Q. What was your determination based on, sir?
A. I don't think this had any specific bearing upon our pricing policy except that this procedure has been a standard procedure in the industry and consequently we had

to meet the pattern or the practice that has been in the industry for many, many years.

Q. Well, now, would you know whether or not that Standard Motor Products, Inc., during the time period in question which is 1948 and 1949 as shown by the 1671 indorsement made use of any other contracts in the sale of their merchandise?

A. I think our sales manager is in a better position to answer that than I am.

Q. Well, assuming there were other contracts including this particular contract, do you base your statement that the prices of Standard Motor Products, Inc., were lawful solely on what appears in those contracts?

A. I assumed they were lawful, yes.

Q. In other words, other than taking a look at the contracts you took no other affirmative steps to determine whether the prices were lawful?

A. Well, as far as Standard was concerned, it wasn't within my province to determine whether they were lawful but I assume they were lawful, I took no other steps at all.

Q. Would the same answer apply to all the other companies shown on Respondent's Exhibit 3?

A. Well, I believe their prices to be lawful.

Q. For the same reasons you stated with regard to Standard Motor Products?

A. Well, for the same reasons I have given previously, yes.

Trial Examiner Hier: Off the record.

(Discussion off the record.)

Trial Examiner Hier: On the record.

By Mr. Schrup:

Q. Mr. Niehoff, with reference to your pricing 1672 system which results, as I understand it, in all jobbers without agreement paying the prices that appear on the jobber's price sheet subject to no discount other than two per cent for cash, is that correct?

A. Yes, that is right.

Q. That is one buying price?

A. Yes.

Q. Then your jobber with an agreement, using the terminology of 1949, applied for five, seven and ten per cent for the jobber pricing sheet?

A. That is right.

Q. And your distributor discount plus ten per cent

which, of course, is the same as one of the prices to the jobber with an agreement?

A. Yes.

Q. And the distributor with agreement provided for ten and five and six and seven per cent?

A. With exceptions, yes.

Q. Yes. Roughly then, we had one, two, three, four, five, six and seven different buying prices for the same merchandise.

A. We had a graduated discount which was based on the volume that was readily obtainable to most of the accounts in the field.

Q. But such did result in a purchaser possibly paying one of seven different buying prices for that merchandise, is that not correct, sir?

1673 A. You say seven, yes.

Q. Now, in what they would pay of those seven different buying prices would somewhat more or less relate to the different classification that the Niehoff Company placed with them whether a jobber without an agreement or jobber with an agreement or distributor with or without an agreement, is that right, sir?

A. Their discount would be placed according to those.

Q. Now, with reference to placing any one purchaser in any one of those four classifications which we have described, which competitors' prices did you take into account as to any particular customer?

A. No competitors' prices, that had no bearing upon the situation.

Q. What do you mean by that, sir?

A. The volume of business that the account did would have a bearing on the price.

Mr. Schrup: I think that is all.

Trial Examiner Hier: Any redirect-examination, Mr. Sprowl?

Mr. Sprowl: I don't think so, read me the last question.

Trial Examiner Hier: Read the last question or two back.

(Record read.)

1674 Trial Examiner Hier: Satisfied?

Mr. Sprowl: I don't know what it means but I am satisfied.

Trial Examiner Hier: All right, I guess we are through here.

Mr. Sprowl: Let me look over my notes.

Redirect Examination by Mr. Sprowl.

Q. There were other competitors besides Eklund back in the early 1930's that were using a volume discount plan before the Niehoff Company adopted one, were there not?

A. Yes, there were.

Q. Do you recall how many?

A. Offhand, I don't know, no.

Q. Was it one more than Eklund or three more than Eklund?

Mr. Schrup: The witness doesn't know.

Mr. Sprowl: Let me ask him.

Trial Examiner Hier: If he doesn't know he can say so, he doesn't have to say unless he knows.

Mr. Sprowl: He said there were more and couldn't name any.

The Witness: I don't know how many.

Mr. Sprowl: All right.

By Mr. Sprowl:

Q. Now, you testified on cross-examination that in 1675 setting your discount schedules you didn't try to meet any particular competitors' discount schedules in 1949, but that you considered all of your competitors' discount schedules in a group, is that the nature of your testimony?

A. That is right, sir.

Q. In other words, I gather by that your discount schedule isn't precisely the same as any one competitor's discount schedule but similar to all of them?

A. That is right, sir.

Mr. Sprowl: That is all.

* * * * *

1680 Room 332, Federal Trade Commission Bldg.,
Sixth and Pennsylvania Avenue, N. W.
Washington, D. C.
Monday, November 2, 1953.

Met, pursuant to adjournment, at 10:00 a. m.

Before: Frank Hier, Hearing Examiner.

Appearances:

E. P. Schrup and F. C. Mayer, Attorneys for the Federal Trade Commission.

Charles R. Sprowl, 134 South LaSalle Street, Chicago, Illinois, Attorney for the Respondent.

1681 Proceedings.

Hearing Examiner Hier: The hearing will come to order.

There will be marked for identification as Commission's Exhibit No. 94 a tabulation headed, "Summary Of Net Billing To Customers Located At New Orleans, La., and Memphis, Tenn. and Of Customers Selected by Respondent For Order Processing Analysis."

As Commission's No. 95 for identification a tabulation headed, "Summary Of 17 Invoices Used In Order Processing Analysis," and as Commission's Exhibit No. 96 for identification a tabulation entitled, "Sales Analysis For 1949, Recap"

(The documents referred to were marked Commission's Exhibits Nos. 94, 95 and 96, for identification.)

M. C. STEELE was thereupon called as a witness for the Commission and, having been previously duly sworn, testified as follows:

Direct Examination by Mr. Mayer.

Q. Your name is M. C. Steele?

A. Yes, sir.

Q. Mr. Steele, with relation to the tabulations which have been marked this morning as Commission's Exhibits 94, 95 and 96 for identification, what books and rec-
1682 ords were examined in the preparation of these tabulations?

A. The Niehoff ledger accounts were suitable, the invoices, credit memoranda, debit memoranda, I think that is all.

Q. And was that examination made at the Niehoff plant?

A. Yes, sir.

Q. Were these tabulations, Commission's Exhibits 94, 95 and 96, for identification, prepared by you personally or under your direct supervision?

A. Yes, sir, they were.

Q. Now directing your attention, Mr. Steele, to Commission's Exhibit No. 94 for identification, and in particular to the first column on that exhibit headed, "Sales Order No.", will you tell us the source or sources from which you gathered the information appearing in that column?

A. That came from respondent's Exhibit No. 19 which shows the purchase orders, the sales orders.

Q. Now directing your attention to the second and third columns of Commission's Exhibit No. 94 for identification, headed "Name" and "Location", would you tell us the source or sources from which you gathered the information appearing in those columns?

A. The names of the accounts at New Orleans and Memphis, Tennessee, were taken from Commission's Exhibits 47-A to 47-E, inclusive, and the other names were taken from the respondent's Exhibit No. 19.

1683 Q. And did you prepare Commission's Exhibit 47-A to 47-E?

A. Yes, I did.

Q. Now directing your attention to columns four and five appearing on Commission's Exhibit No. 94 for identification, headed, "Classification 1949, 1950-51", would you tell us the source or sources from which you gathered the information in that column, or in those columns?

A. The classification 1950-51 was taken from ledger cards and the classification 1949 was the equivalent classification under the old system formerly used by Niehoff, with the exception of one account, Weaver's Motor Parts Co. at Houston, Texas, which, in 1950 and 1951 was a D account and formerly had been a JA account.

Q. Directing your attention to Commission's No. 94 for identification, the columns headed "Discount Deducted on Invoice", would you tell us the source of the information appearing in that column?

A. That information was obtained from the invoices.

Q. Now, sir, directing your attention to the columns headed "Rebate 1949" and "No. of Shipments" appearing on Commission's Exhibit No. 94 for identification, would you tell us the source of the information appearing in those columns?

A. The Rebate 1949 with respect to Greiner Auto was taken from the invoices, and with respect to the other accounts was taken from the credit memoranda, giv-
1684 ing them their annual rebate. The number of shipments represented in the account were made up of the number of orders or shipments to these accounts during the years included in this tabulation.

Q. Directing your attention to the next column appearing under the general heading of 1949 on Commission's Exhibit for identification No. 94 headed, "Net Billing", would you tell us the source of the information appearing in that column?

A. With respect to the accounts in New Orleans and Memphis, Tennessee, the amounts under net billing came from Commission's Exhibits No. 47-A to 47-E, inclusive, and with respect to the remaining accounts the information was tabulated from the invoices rather than from the ledger accounts appearing on the books of C. E. Niehoff & Company, the respondent.

Hearing Examiner Hier: Wait a minute. That is after discounts and before rebate?

The Witness: Yes, sir, after the discounts were taken off the invoices.

Hearing Examiner Hier: And before rebate?

The Witness: Yes, sir, with the exception of the Greiner Auto Parts, that is after rebate also.

Hearing Examiner Hier: That is after rebate?

The Witness: Yes. That was taken off the invoices.

By Mr. Mayer:

Q. Now, Mr. Steele, directing your attention to
1685 the two columns "Range" and "Average Shipment", under the general heading of 1949 appearing on Commission's Exhibit No. 94 for identification, will you tell us the source or sources of the information appearing in those columns?

A. That was taken from the ledger account sheets recording the invoices to these various accounts in 1949.

Q. And how in particular was the average shipment information obtained?

A. That represents the net billing divided by the number of shipments.

Hearing Examiner Hier: What is this range, that is the 23 orders of Union Auto Electric Service here, net billing $1,313 and the individual orders ranging from $1 up to the top of $143?

The Witness: That means in the $1,313 there were invoices ranging from $1 up to $143.

Hearing Examiner Hier: That is what I mean. Out of the 23 orders?

The Witness: Out of the 23 orders, yes.

Hearing Examiner Hier: How do you explain the second item from the bottom, Beatrice Iron & Metal Company, from zero to $211? There could not be an order for zero, could there? There seem to be 24 shipments there.

The Witness: May I check my work sheets?

Hearing Examiner Hier: Yes.

1686 The Witness: The reason we put zero in there, there was an order for less than a dollar, it was less than 50 cents and we put zero in there. Twenty-two cents actually was the minimum order.

By Mr. Mayer:

Q. In other words, Mr. Steele, the figures appearing in the range column are rounded off figures?

A. That is correct.

Hearing Examiner Hier: All right.

By Mr. Mayer:

Q. Now, sir, directing your attention to the columns appearing under the years 1950 and eight months of 1951 on Commission's Exhibit for identification No. 94, would the source or sources of information for the figures appearing in those columns be the same for the identical columns under the year 1949?

A. Yes, they would.

Q. Now, Mr. Steele, directing your attention to Commission's Exhibit No. 95 for identification, and in particular to the first three columns on that exhibit headed, "Sales Order No.", "Invoice No." and "Customer Order Date", would you describe the source or sources of the information appearing in those columns?

A. The sales order number and customer order date were taken from respondent's Exhibit No. 19, and the

1687 invoice number was taken from the invoices applicable to those particular sales orders.

Q. Now directing your attention to the column headed, "Customer and Location" on Commission's Exhibit No. 95 for identification, would you describe the source of the information appearing in that column?

A. That was taken from respondent's Exhibit No. 19, supplemented in one or two cases by further information contained on the invoices.

Q. Now, sir, directing your attention to the column headed "Salesman" on Commission's Exhibit No. 95 for identification, would you tell us the source of the information appearing in that column?

A. That was taken from the invoices.

Q. Would you tell us, sir, what is the meaning of the initials "P.G.N." appearing in that column opposite the Green Motor Parts, Tulare, California?

A. That stands for Paul G. Niehoff.

Q. Now directing your attention to the two columns headed "Classification 1951 and 1949" on Commission's Exhibit No. 95 for identification, would you describe the source or sources of the information included in those two columns?

A. The classification in 1951 was taken from the ledger accounts for these particular customers and under 1949 it was the equivalent classification under the old sys-
1688 tem used by the respondent.

Q. Now, sir, directing your attention to the column headed "Net Billing" on Commission's Exhibit No. 95 for identification, would you describe the source of the information appearing in that column?

A. That was taken from the invoices.

Q. Now, sir, the two columns headed "Discount Amount and Percent" on Commission's Exhibit No. 95 for identification, would you explain the source of the information appearing in those two columns?

A. From the invoices.

Q. Now, sir, the column headed "Total Sale" on Commission's Exhibit No. 95 for identification, would you describe the source of the information appearing in that column?

A. That was taken from the invoices also.

Q. And in explanation, was that taken from the invoices before any discount was allowed from the figures appearing on the invoices?

A. Yes, sir.

Q. Now, Mr. Steele, in the columns headed "Net Bill-

ing" and "Total Sale" on Commission's Exhibit No. 95 for identification I notice three entries opposite the account name Dixie Wheel Co., Inc., Richmond, Virginia, in the column headed "Customer and Location". Would you explain those entries, please, sir?

1689 A. The item of $879.62 was subject to a 10 per cent discount, but the item of $55 was not subject to any discount, it was what the respondent termed a net item, so to show the amount applicable or subject to discount we listed the two items separately, and then the sum of the two is shown there as $934.62.

Q. Now, sir, directing your attention to the last column headed "How Shipped" on Commission's Exhibit No. 95 for identification, would you tell us the source of the information appearing in that column?

A. That was taken from the invoices.

Q. Now, Mr. Steele, directing your attention to Commission's Exhibit No. 96 for identification, would you tell us, sir, how the information appearing on Commission's Exhibit No. 96 for identification was acquired?

A. This was obtained from Mr. C. E. Niehoff and represented a record which he had prepared for the company to use.

Q. And in the acquisition of this information, Mr. Steele, was it represented that this entailed all of the domestic sales of the C. E. Niehoff & Company for the period indicated?

A. Yes, sir

Mr. Mayer: Mr. Examiner, at this time we should like to offer into evidence Commission's Exhibits Nos. 94, 95 and 96 for identification.

Mr. Sprowl: May I examine him first on those

1690 exhibits, Mr. Hier?

Hearing Examiner Hier: All right.

Cross-Examination by Mr. Sprowl.

Q. I think we had better taken them in the same order, Mr. Steele. On Commission's Exhibit No. 94 for identification, referring to this column of classification of accounts, the 1949 classification and 1950-51 classifications, would you clarify for me whether the 1950 and 1951 classifications are merely to show the corresponding classification in later years to the 1949 classification, or is that the

actual classification that those accounts carried in 1950 and 1951?

A. In 1950 and 1951 it was the actual account as shown by the ledger account.

Q. And 1949 would be merely—

A. An equivalent, with the one exception that I mentioned, the Weaver Motor Parts.

Hearing Examiner Hier: Let us go off the record a moment.

(Discussion off the record.)

Hearing Examiner Hier: Back on the record.

By Mr. Sprowl:

Q. Now as I understand your testimony today, the figure net billing shown in the ninth column is before rebate but after discount, with the exception of Greiner 1691 Auto which is after both rebate and discount, is that correct?

A. Yes, sir.

Q. Now referring to your earlier Exhibit No. 47, you recall that exhibit, do you not, Mr. Steele?

A. Yes, sir.

Q. I wish you would look at 47-B and at Greiner Auto listed there, two-thirds of the way down the page. As I understand your testimony, the figure appearing on Commission's Exhibit No. 94 should correspond to the net proceeds that appear in column ten on Exhibit 49-B opposite Greiner, is that correct?

A. That is right.

Q. I notice on 47-B that figure is $10,306 and on Exhibit 94 it is $11,230. How do you account for the difference?

A. I am in error there. It should be before the rebate and only after the deduction of the 10 per cent discount, which puts it on the same basis as the rest of them in Exhibit 94.

Q. It should correspond with column 5 on Exhibit 47-B which is after discount but before rebate?

A. That is correct.

Hearing Examiner Hier: What is the correction now?

Mr. Mayer: There isn't any.

Mr. Sprowl: Merely in his description of the source of the net billing figure on Greiner it is actually after discount but before rebate.

1692 Hearing Examiner Hier: All right. They are all alike?

The Witness: They are all alike.

By Mr. Sprowl:

Q. Now I would like to digress for a moment. On Exhibit 94 you see an account John M. Walton, New Orleans, Louisiana. Is it not a fact, Mr. Steele, that this account is a magneto account only and does not handle the regular Niehoff ignition line?

A. I believe there was testimony in the record to that effect, yes, sir.

Q. If that is the situation it is really not typical of the matters charged here in this complaint, is it?

Mr. Schrup: Just a minute. I have an objection to that. Those are the actual figures, as the chart of course will show.

Mr. Sprowl: I am going to object to the materiality of the Walton account, that is all. It is only a magneto account, it does not have any relationship to the other types of billings here complained about.

Hearing Examiner Hier: The Walton account?

Mr. Sprowl: Yes.

Hearing Examiner Hier: Well, the question is isn't that simply a magneto account. He can answer that, if he knows.

Mr. Sprowl: He did answer that it was.

1693 Hearing Examiner Hier: All right. What is the objection then?

Mr. Schrup: He was making the objection. I was just answering him.

Hearing Examiner Hier: I understood you to make an objection to the question. What is it?

Mr. Schrup: I gather that his statement was directed to the fact that the John M. Walton account should be eliminated which we objected to.

Hearing Examiner Hier: That is not a matter of questioning. Go ahead.

By Mr. Sprowl:

Q. Referring to Monger Brothers, on your Commission's Exhibit No. 94 for identification at Pawhuska, Oklahoma, that appears also in Exhibit No. 47-C. Now you show their net billing on 94 as $1,098.63, and in column 5

of Exhibit 47-C you show it as $1,083. How do you account for that difference?

A. Well, we could not account for it, Mr. Sprowl because the data from which 47-C was taken was furnished by the respondent and represented a compilation which I understood had been rounded off and sometimes there would be a few dollars difference in the rounding off during the year, rounding off of the invoices.

Q. You mean you did not obtain from the books of the Niehoff Company the underlying information relating 1694 to 47-A to 47-E?

A. They were, as you remember, the testimony furnished to us by the Niehoff Company.

Q. I was not in those hearings. I might have read it. But that is the fact, is it?

A. That is the fact, and that original exhibit is in evidence in this record.

Q. Now you observe in examining the ledger sheets relating to Monger Brothers that there was also a second location of that company at Ponca City, Oklahoma.

A. Yes, sir.

Q. And the volume of both of those locations was considered by the Niehoff Company in establishing the classification for that account, was it not?

A. I don't know.

Q. In any event, on 47-C you show in addition to the Pawhuska location detail for 1949 the similar detail for Ponca City, do you not?

A. Yes, sir.

Q. Now do you recall from the invoices that, as a matter of fact, the Ponca City 1950 volume for that account after discount was $903 and for 1951 it was $845?

A. I do not find that. Are you referring to Pawhuska? You said Ponca City.

Q. I said Ponca City. Do you recall that from the 1695 ledger account?

A. I have nothing on that.

Q. Now your 47-C shows the 1949 volume for the Ponca City location, does it not?

A. Yes, sir.

Q. Now referring to the Aetna Auto Parts account on 94 shown as Chicago, Illinois, did not the ledger card reflect that was a new account obtained in December, 1949?

A. May I check my work sheets?

Q. Yes, please.

A. No, sir.

Q. You have no information on that?

A. I do have information.

Q. What is your information?

A. That the first invoice was dated January 1, 1949.

Q. How many invoices during the year? Is that the nine invoices that you show?

A. Yes, sir.

Q. Now why did you take only the first eight months of the net billing on the accounts for the year 1951?

A. That was the latest information available when we were in there in the fall of 1951.

Q. In other words, that was all that was available to you when you made your review of the record?

A. That is correct.

1696 Q. Did I understand your testimony as to the Weaver account that it was a JA and not a J account in 1949?

A. Yes, sir.

Q. That is your recollection at this time?

A. That is as shown by the ledger account, yes, sir. It had been formerly a JA account and had been changed to a D account.

Q. I notice again on the Stout-Condra account, Springdale, Arkansas, you show net billing $511.07, whereas 47-A shows $513. Would an explanation as to that discrepancy again be rounding off of the figures appearing in 47-A?

A. Yes, sir, I believe it is.

Q. Do you recall looking at the 1948 ledger sheet of Garage Supply Company?

A. No, sir.

Q. You do not recall whether or not that sheet shows that in 1948 the volume of that account, after discount but before rebate, was $3,897?

A. No, sir.

Q. Now not all of the accounts listed on 94 also appear on 47?

A. No, sir.

Q. Only those in the selected area covered by 47 would appear in both exhibits?

A. That is correct.

1697 Q. Now referring to Hunt Auto Supply in Norfolk, Virginia, the figure of $2,708 for the 1949 net billing was after discount but before rebate, is that correct?

A. That is correct.

Q. Now I want to direct your attention to the National Auto Supply. For the year 1949 under whose name was the ledger card for the National Supply account maintained?

A. May I check my work sheets?

Q. Yes, please.

A. I have it under the same name.

Q. As a matter of fact, there was no National Auto Supply account as such in 1949, it was under the name of Nixon, was it not?

A. Well, my information that I have here shows that the shipment in 1950 was made to Nixon at Overland, Missouri, which is a different location.

Q. When do you show the first shipment under that account?

A. National Auto Supply?

Q. Yes.

A. Well, it is shown in October, 1949.

Q. How much do you show was shipped in 1949?

A. $12.37.

Q. Isn't it a fact that there was $265 shipped in December under the Nixon account?

A. I don't have any record of that, no, sir.

1698 Q. Is it a fact there was no National Auto account until March 15, 1951, when that company took Nixon over?

A. I do not have any record of that.

Q. Is it not a fact that the Nixon account was acquired in December of 1950 from Sorensen by the Niehoff Company?

A. I don't know.

Q. Isn't it a fact that the 1950 volume of the Nixon, or National account, as you wish to call it, was $15,977 instead of the $87.30 that you show?

A. I don't know.

Q. And you did look at the ledger card, did you not?

A. Yes, sir.

Q. And if the facts I have mentioned are correct then your figures are inaccurate, would not that be right?

A. Yes, sir, with this explanation, that we asked for the ledger card with National Auto Supply Company and if there are others we did not get them. We have no way of determining. Access to the files was not given to us.

Q. Well, if the 1951 cards show the Nixon billing after March 15, 1951, to be under the name of National Auto Supply you would say from that that Nixon was the predecessor, wouldn't you?

A. If it showed on the card, yes, sir.

Hearing Examiner Hier: What is the significance of this sales order number, Mr. Steele? That is not the 1699 invoice number, is it?

The Witness: That is the way they are listed in respondent's Exhibit No. 19. We used the same number so as to make cross references. That is the consecutive number given by the respondent to the sales orders as they come in. That is the way the sales orders were put in by the respondent in respondent's Exhibit No. 19.

Hearing Examiner Hier: If that is the case then look at Monger. There are six shipments there, and I don't know how many orders. What does that sales order refer to?

The Witness: It is actually referring to the sales orders shown on Commission's Exhibit No. 95, but to identify the company with the ones that were included we put this sales order number on.

Hearing Examiner Hier: That is the particular order for merchandise?

The Witness: Yes, sir.

Mr. Sprowl: Included in the several orders that may be lumped together in Exhibit No. 94.

By Mr. Sprowl:

Q. In other words, Mr. Steele, I do not mean to confuse you but the Monger Brothers, which is the account Mr. Hier was talking about, for the year 1949 I assume there were more sales orders received for that company than the ones shown in the first column.

1700 A. That is correct, and among them was that sales order No. 45945.

Q. And you merely show that to tie in with the cost study that Mr. Dreyer made in our Exhibit No. 19?

A. That was a cost study, to tie in with the orders that you put in as Exhibit No. 19. The same order number is also shown on Mr. Dreyer's Exhibit No. 18.

Hearing Examiner Hier: Let us go off the record a moment.

(Discussion off the record.)

Hearing Examiner Hier: On the record.

By Mr. Sprowl:

Q. Now referring to Commission's Exhibit No. 94 the J. B. Cook account at Little Rock, Arkansas, you show there a net billing for 1949 of $24,268, and in 47-A, column 5, which I understand to be the corresponding figures, you show $23,813. How do you account for that $550 variation?

A. I can't account for it, Mr. Sprowl.

Q. You don't know which figure is correct?

A. We have a tabulation of all of the invoices for that year and when we checked back we came to this total shown in Commission's Exhibit No. 94.

Q. You had all those invoices at the time you prepared 47-A to 47-E, as I recall the record.

A. No, sir.

1701 Q. You are sure of that?

A. Yes.

Q. Don't you recall a colloquy was held and it was agreed that they be put in and they were returned to the Niehoff Company?

A. We never were examined as to that.

Q. If there is anything in the record about that, that has to be dismissed as not the fact?

A. You have me at a disadvantage, Mr. Sprowl. I would certainly like to see the reference in the record as to that.

Q. Now referring to the Regnier account, which is the last one listed in Commission's Exhibit No. 94 for identification, I infer that that account was a JA in 1949 rather than a D, as you show it there.

A. May I check my work sheets?

Q. Yes.

A. The information I have indicates it was a D account in 1949 and became a DA account on January 3, 1950.

Q. Now I would like to ask you about the column "Number of Shipments". Did you examine each shipment to see of what it consisted?

A. No, sir.

Q. In other words, did you consider the shipment of catalogs that might have been sent out through the mailing department on an invoice memo as a shipment?

1702 A. That might have happened, because we counted the invoices shown on the ledger account.

Q. Any invoice that ran through the ledger account you considered a shipment?

A. Yes.

Q. Irrespective of whether it was for actually manufactured parts that traveled the whole route of the Niehoff shipping department or just an order for a catalog that might have been handled?

A. We just counted the number of shipments, the number of invoices on the ledger account.

Q. Some might have been for other advertising materials, as long as it was on an invoice and shown on the account?

A. That would be the exception, but it might have been.

Q. But you would have counted those as shipments in arriving at the range shown in the two range columns?

A. Yes.

Q. And as I understand the range, you took the total number of shipments as you understood them to be and divided them into the net billing—I do not mean range but to get the average shipment.

A. To get the average, yes, sir.

Q. And again both in the range and the average shipment would be catalog orders or anything else appearing on the ledger sheet?

1703 A. I don't know of any, but there might have been.

Hearing Examiner Hier: Certainly if it was a shipment of catalogs only that would show up in the range that would be of no value.

Mr. Schrup: There has been no proof that it has been one way or the other yet.

Hearing Examiner Hier: I said "if". If there was one of these shipments of catalogs only the range would show from zero up to something or other, wouldn't it?

Mr. Schrup: That is assuming there were catalogs.

Mr. Sprowl: There was no charge made for the catalogs.

Hearing Examiner Hier: Naturally I am assuming that. Would not it show there?

The Witness: On the ledger account you generally show "N. C.", no charge. It would not appear on our range.

Hearing Examiner Hier: If the catalog shipment was mixed in with parts then of course you took the monetary value of the shipment.

The Witness: The total invoice, yes, sir.

By Mr. Sprowl:

Q. Now did you consider the replacement of a broken part as a shipment?

A. Anything for which an invoice was rendered.

Q. In other words, if it was a part returned for
1704 repair and sent back by the repair department and no charge made on the ledger account you treated that as a shipment?

A. If such was the case, yes.

Q. The point I am getting at is that you did not analyze the shipments to see of what they consisted?

A. That is right.

Q. It could have been new parts, it could have been replacement parts, it could have been repair charges, or it could have been catalogs, as far as the shipment was concerned?

A. It could have been anything for which an invoice was rendered, yes, sir, and value charged.

Q. Now I would like to ask you why, as to the seven accounts appearing in the first seven lines in Commission's Exhibit No. 94, you did not have the 1950 and 1951 information that you had for the other accounts shown there?

A. Actually, Mr. Sprowl, that was done to save time and expense for the Commission.

Q. Is it not a fact that in 1950 the average shipment to Greiner Auto at New Orleans was $715 as against the average shipment of $163 for Automotive Wholesalers?

A. I don't know.

Q. Is it not a fact that in that same year the average shipment to Stratton Warren in Memphis was $1,122 as against the average shipment of $127 to Union Auto Electric?

A. I have no information on that.

1705 Q. Is it not a fact that perhaps the reason you left them off in your Exhibit No. 94 was that the average shipment was spreading too widely against the small account in favor of the high account?

A. Definitely not.

Q. In other words, you just thought it was a waste of time to put this in?

A. Yes, a waste of the Commission's money and expense. The principal comparison, as far as I was concerned, was in 1949, that the cost study was supposed to have been applicable to.

Q. Notwithstanding the fact that the cost study was based on 1951 figures?

A. It was based on 1951 sales figures but based on 1949 costs and expenses.

Q. That is correct. Now turning to Exhibit No. 95, I would like to direct your attention to the Garage Supply Company, Glencoe, Minnesota, to which your footnote 2 is applicable. Now is it not a fact, Mr. Steele, that the $59.35 charge appearing in the addendum to the order in order to make up weight was no part of order 46161 when Mr. Dreyer made his cost study?

A. Yes, sir.

Q. So that fact that there was $59.35 picked up there in order to make weight in no way affected the calculation which Mr. Dreyer had already testified about respecting order 46161?

1706 A. In my opinion, it did, because that amount was included in the invoice.

Q. In other words, what I am trying to get at is just this: Are you acquainted with the fact that because of the pickup of $59.35 there is some error in Mr. Dreyer's statistical computation made from order 46161?

A. I picked up the amount in order to show the total amount shown on the invoice, which included a supplemental order.

Q. Let me put it this way: I am only concerned about that footnote to the extent that if this exhibit is admitted it is admitted for all purposes. I want to know from you as the man who compiled this exhibit if you are claiming that this addendum to order 46161 in any way upsets the calculations heretofore made by Mr. Dreyer as to order 46161 in his cost studies.

A. I don't want to go on record as approving anything that Mr. Dreyer did.

Q. I appreciate that. I will concede for the purpose of argument here that you may disagree entirely with his method of computation, but I am asking you if this particular thing is a basis in your mind for criticising his computation?

A. No, sir.

Mr. Sprowl: I would like to also ask counsel supporting the complaint whether they plan to attack Mr. Dreyer's calculation in any way because of this addendum of $59.35?

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1708 Mr. Mayer: We will let the accountant's position, as he stated it on the record, to remain as ours. We will not attack the particular item for that purpose.

Hearing Examiner Hier: All right.

By Mr. Sprowl:

Q. Again referring to Commission's Exhibit No. 95, what does your footnote 1 indicate opposite Green Motor Parts?

A. That indicates that sales order 45969 was invoiced with sales order No. 45646.

Q. Now I ask you as to that piece of information the same question which I asked you about footnote 2. Is it your contention that the fact that this was invoiced with another sales order in any way upsets the calculations heretofore made by Mr. Dreyer and offered here in evidence?

A. No, sir.

1710 Q. Now as to the Dixie Wheel Company account shown on Exhibit No. 95, in which you testified that the reason you split the amount of the net billing into two figures was because part of that billing was net and not subject to discount, is it your contention at this time that that fact in any way upsets the calculation heretofore testified to by Mr. Dreyer?

A. The fact that part of it was net and part of it was subject to discount?

Q. Yes.

A. No, sir.

Mr. Sprowl: I ask the counsel supporting the complaint—

Mr. Mayer: The answer is "no".

Mr. Sprowl: I take it then you do not propose to argue that that fact in any way upsets Mr. Dreyer's calculations.

1711 Mr. Mayer: No.

By Mr. Sprowl:

Q. Now referring to Commission's Exhibit No. 96, could your reference to District No. 13 under "Salesman" possibly be an error and should not that maybe be 16?

A. I don't have any reference here to 13. Are you looking at the same exhibit?

Q. I am looking at Exhibit 96. Let me ask you this:

What area does District 13 as referred to in Commission's Exhibit No. 96 actually include?

A. There is no district shown on Exhibit No. 96.

Q. I show you respondent's Exhibit No. 25 and ask you if the district 13 shown there, which is outlined in red, is the District 13 you are referring to on Commission's Exhibit No. 96?

A. I beg your pardon, sir. I did not see it. Would you mind repeating the question?

Q. I see you did not follow me in my first question. I ask you now if the description of District 13 might not be an error and should it not be District 16?

A. My work sheet also shows it as District No. 13, so I have no information otherwise.

Q. Well, if Mr. Dierkes was actually the salesman in District 13 would not your second description of District 13 be in error?

1712 A. I am sorry, Mr. Sprowl, I don't follow you.

Q. Will you explain to me then what you mean by District 13?

A. I don't know what that District means. That was the classification the company used and we just copied it off as they showed it on their recap.

Q. It could not have been District 16 and you made an error in transcription?

A. We might have, yes.

Q. Do you recall now whether that actually included the eastern portion of Pennsylvania and the southern portion of New Jersey lying south of Trenton?

A. I don't know.

Q. Would your description of District No. 13 indicate that perhaps in the year 1949, to which your Exhibit No. 96 relates, there was no salesman actually assigned?

A. That might be the assumption, yes, sir.

Q. And if Mr. Dierkes in 1949 actually covered District 13 as his territory would not District 13 as you show it here perhaps be in error?

A. Well, assuming those facts, it would lead to some question. At that time we had no reason to question it so we did not check it.

Q. I show you respondent's Exhibit No. 25 which shows District 13 outlined in red with Mr. Dierkes the salesman. Would that give you any reason to change your answer?

1713 A. I have no information other than what you see here, that Mr. Dierkes was assigned to District 13.

Q. Now did you average out the size of the J, JA, D and DA accounts in 1949 from the material appearing on your Commission's Exhibit No. 96?

A. Have I done that?

Q. Yes.

A. It does not appear on this exhibit.

Q. That could be done by simple division. For instance, as to jobbers you see 299. If you divide that figure into the total amount of sales, $156,855, you would arrive at an average per account, would you not?

A. That is right.

Q. Now if the Paul G. Niehoff, Peaslee and Bigelow accounts were completely removed from Commission's Exhibit No. 96 for identification you would get a smaller number of accounts in each classification and a smaller total in each classification, would you not?

A. Yes, sir.

Q. And the average of each kind of account, in the event of the elimination of those three accounts from your exhibit, could again be arrived at mathematically from this exhibit?

A. Yes, sir.

Q. I might ask you again as to Commission's Exhibit No. 96 for identification, are these amounts which
1714 you show on there the gross billing or the net billing after discount or the billing after both discount and rebate?

A. As I understand it from Mr. Niehoff, they are the net billings after discounts.

Q. In other words, after all discounts, whether they are the account classification discounts or two per cent discount for prompt payment?

A. No, sir, not the two per cent cash discount, no, sir.

Q. In other words, that is not deducted?

A. All would be deducted there, the discounts taken off of the face of the invoices.

Q. Would that include rebates?

A. No, sir.

Q. Referring to Exhibit No. 96 under your DA classification, you sold 10 and 5, 6, 7, do you see that?

A. Yes, sir.

Q. The 5, 6 and 7 are in most every case rebates, are not they?

A. In every case, yes.

Q. But the amounts shown below that have not taken that rebate off, is that correct?

A. As I remember, Mr. Sprowl, this was a statistical tabulation made from the invoices and it was only after deducting the discounts shown on the invoices.

Q. On the face of the invoices?

1715 A. Yes, sir.

Hearing Examiner Hier: We will take a few minutes recess.

(Short recess.)

Hearing Examiner Hier: The hearing will come to order.

By Mr. Sprowl:

Q. Mr. Steele, I show you respondent's Exhibit No. 36. I also would like you to look at Commission's Exhibit No. 47. On 47-B opposite the name Greiner Auto in column 11 is the figure for per cent of net proceeds of sales—strike that out. Under column 10 opposite Greiner on Exhibit 47-B, the net proceeds of sales to that account in 1949 is the figure $10,306.02, is that correct?

A. Yes, sir.

Q. And that corresponds with the first figure appearing in respondent's Exhibit No. 36 opposite the name Greiner?

A. That is correct.

Q. And the difference between this particular figure and the one which you have appearing in Commission's Exhibit No. 94 for identification under net billing for 1949 is that in Commission's Exhibit No. 47-B that is the net after all discounts and rebates, including the 2 per cent prompt payment discount, whereas in Commission's Exhibit No. 94 for identification the figure opposite

1716 Greiner for net billing is after discount and before rebate?

A. After discount taken off the invoice.

Q. But before rebate?

A. Yes, sir.

Q. And with that explanation, or should I say the correlation of the figure opposite Automotive Wholesalers of the $1,117.20 in respondent's Exhibit 36 would also apply. In other words, that figure in respondent's Exhibit 36 is taken from column 10 of Commission's Exhibit No. 47-B, is it not?

A. Yes, sir.

Q. And the reason it is different than the figure shown

in Commission's Exhibit No. 94 for identification is that it is after all rebates and discounts given as distinguished from those given on the face of the invoice?

A. Well, specifically it is after the two per cent cash discount, and no rebate was given to Automotive Wholesalers.

Q. In other words, the only difference between the column 10 figure in 47-B for Auto Wholesalers and the figure for net billing in 1949 shown on Commission's Exhibit 94 for identification is the two per cent cash discount?

A. That is correct.

Q. And in respondent's Exhibit No. 35 opposite the account Stratton Warren appear net proceeds of $21,-895.86, and that corresponds identically with the figure after Stratton Warren in column—I should say the figure in column 10 after Stratton Warren on Commission's
1717 Exhibit 47-B, does it not?

A. Yes, sir.

Q. And the reason that figure differs from the amount shown on Commission's Exhibit No. 94 for identification as the net billing for 1949 for Stratton Warren is that it includes all discounts and rebates, whereas the figure on Commission's Exhibit No. 94 for identification is merely after discount on the face of the invoice?

A. That is correct.

Q. And referring to Union Auto Electric, in respondent's Exhibit No. 35 there is shown as net proceeds for that account in 1949 the amount of $1,221.90. That again corresponds with the figure appearing in column 10 opposite that account, which is Commission's Exhibit No. 47-B, does it not?

A. Yes, sir.

Q. And Commission's Exhibit No. 94 for identification shows net billing for that account in 1949 of $1,313. What is the difference between that $1,313 and the net proceeds of $1,221.09 shown for that account on Commission's Exhibit 47-D?

A. That was a rebate of 5 per cent and 2 per cent cash discount.

Mr. Sprowl: That is all I care to ask of this witness at this time.

Hearing Examiner Hier: Do you have any objections to these exhibits?

1718 Mr. Sprowl: I will state them. As to Exhibit No. 94 for identification, I object because of the omission of the 1950 and 1951 information as to those accounts

listed at the top, and I object because of the error in the National Auto Supply account at East St. Louis.

• • • • •

1720 Hearing Examiner Hier: Back on the record. The understanding is then that Exhibit No. 94 will stand admitted limited as indicated. Counsel for the respondent, however, is going to get what he says represents the true picture on the account noted as the National Auto Supply Company, which is the eighth from the bottom, and when and if those figures are received and checked and agreed upon, the correction in Commission's Exhibit No. 94 accordingly will be made.

1721 (The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT NO. 94, was received in evidence.)

Mr. Sprowl: I have no objection in any particular respect to Exhibit No. 95. I object generally. I don't think it proves or establishes anything, or is material. Otherwise I have no objection, with this exception that if at any point issue is made over these three things shown on here, two by footnote and one opposite Dixie Wheel, at any point in this hearing, before the Commission or the court, or wherever it is, that that in any way upsets Mr. Dreyer's calculations, we will then be given an opportunity to rebut it. I don't want to fuss around with it now.

Hearing Examiner Hier: They have already stated it does not.

All right, gentlemen, Exhibit No. 95 is admitted in the record. Objection overruled.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT NO. 95, was received in evidence.)

Hearing Examiner Hier: What about Exhibit No. 96?

Mr. Sprowl: On Exhibit 96 I have only this objection: I object generally to the materiality. I don't think it adds or detracts anything from the case. We, as the respondents, have offered certain information concerning the

1722 Paul G. Niehoff, Peaslee and Bigelow accounts. It is my recollection, Mr. Hier, that you excluded that evidence because, in your opinion at that time, as I understand it, in your opinion all the way through there has been nothing made out under the complaint against those three accounts and it was useless to clutter the record with our rebuttal as to those accounts.

• • • • •

1723 Hearing Examiner Hier: Mr. Sprowl, if the exhibit is only offered to show whether the tail wags the dog or not, to use an old expression, if that is the only purpose of it then I don't see how you are harmed by the Bigelow, Peaslee and Niehoff accounts being in here, because it would be a lopsided picture. As a matter of fact, it seems to me this exhibit portrays exactly one of the things you have been claiming, that is that the small fry here do not keep Niehoff alive, he would be bankrupt if they were all working on that basis.

I am going to overrule the objection and admit the exhibit in evidence, it being tendered for the purpose
1724 stated. I don't know of any other purpose, I haven't heard any other.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT NO. 96, was received in evidence.)

* * * * *

1727 Room 692, Federal Trade Commission Building,
Sixth and Pennsylvania Avenue, N. W.,
Washington, D. C.,
Tuesday, January 19, 1954.

Met, pursuant to adjournment, at 11:00 a.m.

Before: Frank Hier, Hearing Examiner.

Appearances:

E. P. Schrup and F. C. Mayer, Attorneys for the Federal Trade Commission.

Charles R. Sprowl, 134 South LaSalle Street, Chicago, Illinois, Attorney for the Respondent.

1728 Proceedings.

Hearing Examiner Hier: We are still on the respondent's side of the case and in lieu of calling witnesses, which counsel in support of the complaint concedes that Mr. Sprowl can do, it is stipulated and agreed by and between counsel that if such witnesses were called they would, by testimony, establish that:

1. National Auto Supply Co. of East St. Louis, Illinois, first became a customer of respondent on December 13, 1949, at which time said account was known as Russ Nixon Auto Parts. Respondent's net billing to this account for

the month of December, 1949, was $265.34, consisting of three shipments of $9.12. $124.50, and $131.72, respectively. Respondent's net billing to this account in the year 1950 amounted to $15,977, consisting of 71 shipments ranging from $8 to $1,134, and averaging $225. This account was first acquired by the respondent in December, 1949, it was known to respondent that the account would make purchase from respondent in excess of $6,000 annually. On March 15, 1951, this account changed its name to National Auto Supply Co.

2. The only item purchased by John M. Walton of New Orleans, Louisiana, from Respondent in the years 1949, 1950, and 1951 was magnetos. In each of those years Respondent sold magnetos to all of its customers as a net item, that is, an item on which no volume discount or
1729 rebate was given to any purchaser, and no customer of Respondent purchased magnetos from it in any of said years at lower net prices than was paid therefor by John M. Walton.

3. Monger Bros. Auto Supply Company, one of Respondent's accounts in the years 1949, 1950 and 1951, had two locations during all of said years. One such location was at Pawhuska, Oklahoma, and Respondent's annual net billing to this account at that location is shown on Commission Exhibit No. 94. The other location was at Ponca City, Oklahoma, and Respondent's net billing to this account at that location was $965 in 1949, $903 in 1950, and $845 in 1951.

Both counsel agree to this stipulation which I just now read into the record. That is right, isn't it, gentlemen?

Mr. Sprowl: Yes.

Mr. Schrup: Yes.

Hearing Examiner Hier: All right. Now, Mr. Sprowl, you may go ahead.

Mr. Sprowl: I should like to have marked at this time for identification this document as Respondent's Exhibit No. 77.

(The document referred to was marked Respondent's Exhibit No. 77, for identification.)

Mr. Sprowl: Respondent's Exhibit No. 77 is a tabulation of information taken from the Respondent's books and records showing the same information respecting
1730 the seven accounts listed thereon for the calendar years 1950 and 1951 as is shown by Commission's

Exhibit No. 94 for the year 1949 respecting those same accounts. I offer that in evidence.

Hearing Examiner Hier: We will take them up all at once. He can make his objections in bulk. Take the next one, Exhibit No. 78.

Mr. Sprowl: I wish to have this document marked Exhibit No. 78 for identification.

(The document referred to was marked Respondent's Exhibit No. 78, for identification.)

Mr. Sprowl: Respondent's Exhibit No. 78 is a tabulation of information taken from the Respondent's books and records, showing the same information respecting the last 17 accounts named on Commission's Exhibit No. 94 for the entire calendar year 1951 as compared to the first 8 months of the year 1951 and shown by Commission's Exhibit No. 94.

Hearing Examiner Hier: All right.

Mr. Sprowl: I ask to have this document marked for identification Respondent's Exhibit No. 79.

(The document referred to was marked Respondent's Exhibit No. 79, for identification.)

Mr. Sprowl: Respondent's Exhibit No. 79 for identification is a tabulation of information taken from the Respondent's books and records pertaining to the calendar years 1950 and 1951, showing a comparison between
1731 the net proceeds received by the Respondent in such years from the Greiner Auto and Automotive Wholesalers' accounts in New Orleans, Louisiana, and Union Auto Electric and Stratton-Warren accounts in Memphis, Tennessee. This tabulation was prepared in the same manner as Commission's Exhibits Nos. 47-B and 47-D were prepared and shows the same comparative information respecting said four accounts for the years 1950 and 1951 as Commission's Exhibits Nos. 47-B and 47-D show respecting the same accounts for the year 1949.

I ask this document to be marked for identification Respondent's Exhibit No. 80.

(The document referred to was marked Respondent's Exhibit No. 80, for identification.)

Mr. Sprowl: Respondent's Exhibit No. 80 for identification is a computation showing a comparison between Respondent's order processing cost for the Greiner Auto account and the Automotive Wholesalers' account for the year 1949, which computation has been prepared by the same method as was used in preparing the similar compu-

tation which is Respondent's Exhibit No. 36; however, the computation which is Respondent's Exhibit No. 80 for identification shows the number of sales to the Greiner Auto account in the year 1949 to be 32 in number, in order to make this computation to conform to Commission's Exhibit No. 94 and Respondent's Exhibit No. 5.

I ask to have this document marked for identifica-
1732 tion Respondent's Exhibit No. 81.

(The document referred to was marked Respondent's Exhibit No. 81, for identification.)

Mr. Sprowl: Respondent's Exhibit No. 81 for identification is a computation showing a comparison between Respondent's order processing cost for the Greiner Auto account and Automotive Wholesalers' account for the year 1950, which computation has been prepared by the same method that was used in preparing Respondent's Exhibit No. 36. The source of the basic data from which this computation has been made is shown on the face of the computation.

I should like to say parenthetically that the Grenier account and Auto Wholesalers' account are the New Orleans accounts which we had earlier testimony about and that the Stratton-Warren and Union Electric account are the Memphis accounts concerning which we had earlier testimony about.

I should like to have this document marked for identification Respondent's Exhibit No. 82.

(The document referred to was marked Respondent's Exhibit No. 82, for identification.)

Mr. Sprowl: Respondent's Exhibit No. 82 for identification is a computation showing a comparison between Respondent's order processing cost for the Greiner Auto ac-
count and Automotive Wholesalers' account for the
1733 year 1951, which computation has been prepared by the same method that was used in preparing Respondent's Exhibit No. 36. The source of the basic data from which this computation has been made is shown on the face of the computation.

I ask to have this document marked for identification Respondent's Exhibit No. 83.

(The document referred to was marked Respondent's Exhibit No. 83, for identification.)

Mr. Sprowl: Respondent's Exhibit No. 83 for identification is a computation showing a comparison between Respondent's order processing cost for the Stratton-Warren

account and Union Auto Electric account for the year 1950, which computation has been prepared by the same method that was used in preparing Respondent's Exhibit No. 55. The source of the basic data from which this computation has been made is shown on the face of the computation.

I ask to have this document marked for identification Respondent's Exhibit No. 84.

(The document referred to was marked Respondent's Exhibit No. 84, for identification.)

Mr. Sprowl: Respondent's Exhibit No. 84 for identification is a computation showing comparison between Respondent's order processing cost for the Stratton-Warren account and Union Auto Electric account for the year 1951, which computation has been prepared by the
1734 same method that was used in preparing Respondent's Exhibit No. 35. The source of the basic data from which this computation has been made is shown on the face of the computation.

I offer in evidence Respondent's Exhibits 77 through 84.

Hearing Examiner Hier: State your objections.

* * * * *

1740 Hearing Examiner Hier: Those objections are all overruled and Exhibits 78 through 84 are admitted in evidence.

(The documents referred to, heretofore marked RESPONDENT'S EXHIBITS NOS. 78, 79, 80, 81, 82, 83 and 84 for identification, were received in evidence.)

Mr. Sprowl: Mr. Hier, at pages 324 and 325, and perhaps a page or two after that, in the record we were discussing the Crowell-Collier survey and in the transcript it is reported each time as Kroll-Corollary. I wonder if we could have a stipulation where the transcript refers to Kroll-Corollary it really is Crowell-Collier survey, and that the transcript be corrected accordingly.

Hearing Examiner Hier: That is agreeable.

* * * * *

1741 Mr. Mayer: We have an exhibit which we submitted a copy of to Mr. Sprowl in advance. Perhaps we can stipulate the entry of this exhibit into evidence, without the necessity of testifying to it.

Hearing Examiner Hier: It may be marked Commission's Exhibit No. 97 for identification.

(The document referred to was marked Commission's Exhibit No. 97 for identification.)

* * * * *

1745 Mr. Sprowl: All right.

Hearing Examiner Hier: Very well. Commission's Exhibit No. 97 is admitted in the record.

(The document referred to, heretofore marked COMMISSION'S EXHIBIT NO. 97 for identification, was received in evidence.)

Hearing Examiner Hier: Are you now wound up?

Mr. Schrup: We have been wound up for some time.

Hearing Examiner Hier: Are you through?

Mr. Schrup: Yes, sir.

Hearing Examiner Hier: How much time do you gentlemen want for proposed findings? Let us go off the record a minute.

(Discussion off the record.)

Hearing Examiner Hier: On the record. The taking of testimony in this case is closed. Proposed findings,
1746 if counsel wish to submit them, will be submitted on or before March 31, 1954.

(Whereupon, at 11:50 a. m., the hearings were closed.)

* * * * *

61 BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—5768) * *

RESPONDENT'S PROPOSED FINDINGS AND CONCLUSIONS.

The following proposed findings and conclusions are submitted in compliance with Rule XXI of the Commission's Rules of Practice for consideration by the Hearing Examiner, Respondent, C. E. Niehoff & Co., nevertheless reserving and saving any and all of the factual, legal or procedural questions in the record of this proceeding, including rulings on the admission or exclusion of evidence, which Respondent may subsequently present to the Commission or the courts for decision.

Proposed Finding No. 1.

Respondent C. E. Niehoff & Co. is an Illinois corporation organized in 1923, with its office and factory located at 4925 Lawrence Avenue, Chicago, Illinois. Continuously from the time of its organization to the present time, Re-
62 spondent has engaged in the manufacture, sale and distribution of automotive replacement parts and sup-

plies to purchasers located in the various states of the United States and in the District of Columbia. Originally, Respondent handled only vibrator-type ignition parts for Model T Fords, but now handles a complete line of replacement ignition parts, excepting spark plugs and generators, and a complete line of replacement hydraulic brake parts for all makes of automobiles and trucks, as well as a line of testing equipment and a line of rebuilt items. Respondent manufactures about 65% of all of the items which it sells.

Record Reference:

Amended Answers of Respondent, Paragraphs One and Two. Testimony of C. E. Niehoff, Tr. 28-32; 267-276; 1621-1625; 1632; 1651.

Proposed Finding No. 2.

Respondent makes no sales to any automobile manufacturers, its sales being almost exclusively limited to automobile jobbers. At some points in the record these jobber accounts are sometimes referred to as "distributors" but all such customers are in fact jobbers. It handles no private brand accounts, no chain or mail order accounts
63 and only a few manufacturing accounts.

Record Reference:

Testimony of C. E. Niehoff, Tr. 27; 35; 57; 119.

Proposed Finding No. 3.

Respondent's ignition and hydraulic lines are sold only to independent jobbers throughout the United States, who, in turn, sell these products to garages, fleet owners, gasoline stations and over the counter.

Record Reference:

Testimony of C. E. Niehoff, Tr. 26; 44; 81; 277; 278.
Testimony of Ray M. Ricketts, Tr. 1457.
Testimony of Richard Boland, Tr. 713.
Testimony of Louis Post, Tr. 212.

Proposed Finding No. 4.

Automotive parts manufacturers whose parts are sold to automobile manufacturers and installed in automobiles made by such manufacturers are known in the trade as "original equipment manufacturers". In the ignition field

in which Respondent competes, the principal original equipment manufacturers are Delco-Remy, which supplies original ignition parts installed in General Motors cars, Auto-Lite, which supplies original ignition parts installed in Chrysler cars, and Ford, which supplies its own
64 ignition parts. In the hydraulic brake parts field, the principal original equipment manufacturers are Chrysler, General Motors, Ford and Wagner Electric Corporation.

Record Reference:

Testimony of C. E. Niehoff, Tr. 315-323; 330; 337; 339; 476; 477; 500; 517; 692; 1612; 1637.
Testimony of Ray M. Ricketts, Tr. 1382.

Proposed Finding No. 5.

Respondent makes no sales of either ignition or hydraulic items to the automobile manufacturers, its distribution of such items being limited entirely to the replacement parts field, known as the after market. About one hundred manufacturers compete with Respondent in the replacement parts market.

Respondent's principal competition in the ignition field are the three original equipment manufacturers and the following sixteen companies:

American Motor Products, Fond Du Lac, Wisconsin.
Andrews Manufacturing Co., St. Louis, Missouri.
Echlin Manufacturing Co., New Haven, Connecticut.
F & B Manufacturing Co., Chicago, Illinois.
Guaranteed Parts Co., Inc., Seneca Falls, New York.
Kem Manufacturing Co., Inc., Fair Lawn, New Jersey.
The Machined Parts Corp., Detroit, Michigan.
P & D Manufacturing Co., Inc., Long Island City, New York.
Preferred Electric & Wire Co., Brooklyn, New York.
65 Standardized Products Co., Chicago, Illinois.
Shurhit Products, Inc., Waukegan, Illinois.
R. Sorenson Manufacturing Co., Inc., Woodside, New York.
Standard Motor Products, Inc., Long Island City, New York.
The Automotive Specialty Corp., Brooklyn, New York.
Tungsten Manufacturing Co., Inc., North Bergen, New Jersey.
Wells Manufacturing Corp., Fond Du Lac, Wisconsin.

Respondent's principal competitors in the hydraulic field are the four original equipment manufacturers and the following six companies:

Brake Parts Co., Chicago, Illinois.
Chefford Master Manufacturing Co., Inc., Fairfield, Illinois.
E. Edelmann & Co., Chicago, Illinois.
Eis Automotive Corp., Middletown, Connecticut.
Supco Products Corp., New York, New York.
Thermoid Co., Trenton, New Jersey.

Each of the above named ignition and hydraulic competitors of Respondent, including Delco-Remy, Auto-Lite, Ford and Wagner Electric, sells its products nationally to the jobber trade in competition with Respondent.

Record Reference:

Testimony of C. E. Niehoff, Tr. 326; 480-500; 559; 569; 580; 584; 585; 586; 1612; 1637; 1639.
Testimony of Fred H. Geyer, Tr. 663.
Testimony of Ray M. Ricketts, Tr. 1382-1399.
Testimony of Joseph N. Greiner, Tr. 256-260.
Respondent's Exhibits 3; 4.

66 Proposed Finding No. 6.

Respondent's ignition sales in 1949 represented about ½ of 1% of the total national market. From 1949 to 1951 the number of jobbers to which Respondent sold its products decreased in number from 866 to 805, notwithstanding the fact that in the same period the number of potential jobber customers available to Respondent increased from 7,500 to 8,676, although in this period Respondent did have a modest increase in gross sales volume. Expressed in tabular form, this information is as follows:

Year	Potential Jobber Customers	Jobbers Sold by Respondent
1949	7,500	866
1950	8,200	821
1951	8,676	805

In the year 1949, Respondent lost forty-two jobber accounts to eight of its competitors, and in other years has lost business to its other competitors.

Record Reference:

Testimony of C. E. Niehoff, Tr. 342; 343; 503; 504.
Testimony of H. L. Kirchschlager, Tr. 1149-1157.
Testimony of Fred H. Geyer, Tr. 659; 660; 662; 741; 764; 765; 1547.

67 Proposed Finding No. 7.

Respondent has found it impossible for either it or its jobbers to sell Respondent's lines to the franchised automobile dealers such as Cadillac, Buick, Oldsmobile, Pontiac, Chevrolet, Chrysler, Dodge, DeSoto, Plymouth, Studebaker, Ford, Mercury and Lincoln. The franchised automobile dealers handle only the original equipment lines either through compulsion or insistent urging by their respective manufacturers.

Record Reference:

Testimony of C. E. Niehoff, Tr. 319; 506; 517.
Testimony of Joseph N. Greiner, Tr. 258.

Proposed Finding No. 8.

Respondent has for many years granted to each of its jobber customers a volume discount based on the total annual dollar volume of purchases of all items in Respondent's lines. Respondent did not originate its method of volume discounts but adopted it sometime in the early 1930's after several of its competitors had first adopted it.

Record Reference:

Testimony of C. E. Niehoff, Tr. 338; 361; 362; 508; 1615; 1634; 1636; 1674.

68 Proposed Finding No. 9.

Prior to the adoption of its present annual volume discount plan, Respondent used a unit volume discount plan whereby a purchaser of any given item in Respondent's line received a discount only if he purchased a specified quantity of that item at the time he made his purchase. Under such method a small purchaser seldom received a discount, whereas under Respondent's annual volume purchase discount plan, each jobber receives the volume discount to which his annual purchases entitle him.

Record Reference:

Testimony of C. E. Niehoff, Tr. 360; 566; 567; 1633.

Proposed Finding No. 10.

Under Respondent's volume discount plan in force in the year 1949, each jobber customer was billed at Respondent's jobbers prices for all items. From this billing, jobbers classified in the following annual volume purchase brackets received the following discounts and allowances.

69

Annual Volume of Purchases	Discount on Face of Invoice	Prompt Payment Discount on Net Amount of Invoice	Discount Allowance Extended within 60 days After Year's End on Net Amount Paid on All Invoices
0 — $1,200	None	2%	None
$1,200 — $2,400	None	2%	5%
$2,400 — $3,600	None	2%	7%
$3,600 — $6,000	None	2%	10%
$6,000 — $8,400	10%	2%	5%
$8,400 — $12,000	10%	2%	6%
$12,000 and over	10%	2%	7%

Record Reference:

Testimony of C. E. Niehoff, Tr. 349; 417-424.
Commission Exhibits 16; 20.

Proposed Finding No. 11.

Under Respondent's discount system, each jobber receives a 2% discount from the net face amount of each invoice for payment thereof within ten days. Since this 2% discount is based on the net amount of the invoice, and since the discount allowance is based on the net amount paid after all other discounts, the maximum discount differential possible between the smallest and the largest of Respondent's jobbers is 16.3%.

Record Reference:

Testimony of C. E. Niehoff, Tr. 349.
Commission Exhibits 16; 20.

70 Reasons in Support of Proposed Finding.

A discount item costing $1.00 on Respondent's jobber price sheet would have the following net costs to jobbers

in the following annual volume discount brackets after taking all discounts and discount allowances:

Annual Volume of Jobber's Purchases	Discounts Received	Net Cost of $1.00 Item
0 — $1,200	2%	98 ¢
$1,200 — $2,400	5%, 2%	93.1 ¢
$2,400 — $3,600	7%, 2%	91.14¢
$3,600 — $6,000	10%, 2%	88.2 ¢
$6,000 — $8,400	10%, 5%, 2%	83.79¢
$8,400 — $12,000	10%, 6%, 2%	82.91¢
$12,000 and over	10%, 7%, 2%	82 ¢

Thus, the highest price paid for an item priced at $1.00 on Respondent's jobber price sheet is $.98 and the lowest price paid is $.82. Therefore, the largest volume purchaser has in fact only a 16.3% discount differential over the smallest volume purchaser.

Proposed Finding No. 12.

On certain items in Respondent's lines, namely service stocks, equipment and brake fluid, the Jobbers with Agreement do not receive any discount allowance, but pur-
71 chases of these items are included to determine the annual volume of such jobber's purchases for discount classification. This further reduces the actual discount differential between the smallest and the largest jobber.

Record Reference:

Testimony of C. E. Niehoff, Tr. 349.
Testimony of Fred H. Geyer, Tr. 699.
Commission Exhibits 20; 25.

Proposed Finding No. 13.

Each of Respondent's jobber accounts is classified for discount purposes at the beginning of each year on the basis of that account's purchases during the immediately preceding year, and the account is given the appropriate contract for the current year to which the volume of its previous year's purchases entitle it.

Record Reference:

Testimony of C. E. Niehoff, Tr. 87; 88; 368; 583.
Testimony of Fred H. Geyer, Tr. 629; 693-696.

Proposed Finding No. 14.

Jobbers whose annual purchases are less than $1,200 receive no agreement and are classified as "Jobbers with-

out Agreement". This class of jobber nevertheless
72 receives a 2% discount for payment of its invoices prior to the tenth day of the month following shipment.

Record Reference:

Testimony of C. E. Niehoff, Tr. 82; 349; 416; 417; 470.
Testimony of Fred H. Geyer, Tr. 640; 641.

Proposed Finding No. 15.

Jobbers whose annual purchases range from $1,200 to $3,600 receive Respondent's "Jobber's Agreement" and are classified as "Jobbers with Agreement". This contract affords the jobber a discount as follows:

Annual Volume of Purchases	Discount
$1,200-$2,400	5%
$2,400-$3,600	7%
$3,600 and over	10%

The discount under this agreement is extended in the form of a merchandise credit.

Record Reference:

Testimony of C. E. Niehoff, Tr. 82; 417; 470.
Commission Exhibit 16.

Proposed Finding No. 16.

Jobbers whose annual purchases range from $3,600 to $6,000 are classified as "Distributors without Agree-
73 ment" and receive a 10% discount off jobbers prices on all purchases.

Record Reference:

Testimony of C. E. Niehoff, Tr. 85; 349; 416; 470.

Proposed Finding No. 17.

Jobbers whose annual purchases are in excess of $6,000 are classified as "Distributors with Agreement" and receive Respondent's "Warehouse Distributor's Agreement", which agreement gives them a 10% discount off jobbers prices on all purchases and grants the following additional discount allowances paid in the form of merchandise credits:

Annual Volume of Purchases	Discount Allowance
$6,000-$8,400	5%
$8,400-$12,000	6%
$12,000 and over	7%

The discount allowance under this agreement does not apply to purchases of service stocks, equipment and brake fluid.

Record Reference:

Testimony of C. E. Niehoff, Tr. 85; 349; 416; 421; 422; 470.

Commission Exhibit 20.

74 Proposed Finding No. 18.

In 1949 Respondent's total sales to jobbers were $2,086,499, divided as follows between its four classes of jobber accounts:

Class	No.	Percent of 1949 Volume	Average Annual Purchases
Jobber without Agreement	299	7.5%	$ 524
Jobber with Agreement	228	18.788%	1,719
Distributor without Agreement	241	25.8%	2,241
Distributor with Agreement	98	47.8%	10,128

Respondent's 1949 sales to the jobbing trade of $2,086,499 were divided approximately as follows between its various lines: 90% ignition; 6% hydraulic; 2% testing equipment; and 2% rebuilt items.

Record Reference:

Testimony of C. E. Niehoff, Tr. 28-32; 309; 310; 470; 512-515.

Proposed Finding No. 19.

Respondent's discount plan is available to all of its jobber customers, is fairly and uniformly administered and all of Respondent's billings to its purchasers are
75 in line with Respondent's published prices and discount plan. Respondent's salesmen are not permitted to sell any jobber except at Respondent's published base jobber prices and volume discounts.

Record Reference:

Testimony of Melbourne C. Steele, Tr. 180.
Testimony of C. E. Niehoff, Tr. 338; 368; 583; 1621.
Testimony of Fred H. Geyer, Tr. 666; 778; 779.
Testimony of Ray M. Ricketts, Tr. 1400.

Proposed Finding No. 20.

Respondent grants uniform freight allowances to all of its jobber customers and treats all of its jobber customers uniformly in the handling of merchandise returned to Respondent for credit.

Record Reference:

Testimony of C. E. Niehoff, Tr. 61; 62; 63.
Commission Exhibit 6A.

Proposed Finding No. 21.

Respondent sells to only one buying group, which group is known as Cotton States, Inc. of Greenwood, Mississippi. This group consists of nine members and was organized in 1938. Prior to its organization, Respondent was selling half of the individual members of the group. In
76 1949, Cotton States purchased $68,000 of merchandise from Respondent. Since its aggregate purchases exceeded $6,000 per annum, it was classified by Respondent in 1949 as a "Distributor with Agreement" and was given Respondent's Warehouse Distributor's Contract applicable to that class of jobber customer. This was the identical contract which Respondent extended in 1949 and currently extends to all of its other jobbers classified as "Distributors with Agreement".

Record Reference:

Testimony of C. E. Niehoff, Tr. 93; 94; 97; 104; 490; 592.
Testimony of Louis Post, Tr. 206.
Commission Exhibits 25; 48.

Proposed Finding No. 22.

Since it is already determined by the first or second month of each year that Cotton States' dollar volume of purchases from Respondent for such year will exceed the $12,000 annual volume requirement for the 7% discount allowance extended by Respondent to Distributors with

Agreement, Respondent deducts that discount, as well as the 10% distributor's discount, from the face of each invoice rendered to Cotton States rather than withholding the 7% discount allowance until the end of the year.

77 This 7% discount allowance is not, however, extended on service stocks, equipment and brake fluid, which are net items.

Record Reference:

Testimony of C. E. Niehoff, Tr. 92; 100; 102; 109; Commission Exhibit 25.

Proposed Finding No. 23.

In 1949 eight of the nine members of the Cotton States group made purchases from Respondent in excess of $6,000, which volume was sufficient to have qualified each of such eight members in its own right for Respondent's Warehouse Distributor's Agreement.

Record Reference:

Testimony of C. E. Niehoff, Tr. 107; 108.
Testimony of Fred H. Geyer, Tr. 143.

Proposed Finding No. 24.

Respondent has only one base price schedule at which it sells to all of its jobbers. It is from this price schedule that Respondent's various discounts are granted.

Record Reference:

Testimony of C. E. Niehoff, Tr. 44; 48; 50; 57; 59; 81; 82.
Testimony of Fred H. Geyer, Tr. 57; 58; 59; 60; 751; 752.

78 Proposed Finding No. 25.

Respondent also issues several suggested resale price sheets for the use of its jobbers. These are designed to fit in large standard counter binders used by the jobbing trade. Respondent makes no sales at any of the prices shown on any of these suggested resale price sheets.

Record Reference:

Testimony of C. E. Niehoff, Tr. 44; 422-425; 428; 515; 555; 556; 558; 1609; 1639; 1640.
Testimony of Fred H. Geyer, Tr. 59.

Testimony of Ray M. Ricketts, Tr. 1337.
Commission Exhibits 6B, C, D; 7B, C, D; 8B, C, D; 9B, C, D; 10B, C, D; 11B, C, D; 12B; 13B, C, D; 14B, C, D; 15B, C.

Proposed Finding No. 26.

In establishing its jobbers price for an item, Respondent considers its own cost, the prices charged for such item by the original equipment manufacturers, and the prices charged therefor by Respondent's other competitors.

Record Reference:

Testimony of C. E. Niehoff, Tr. 344.
Testimony of Fred H. Geyer, Tr. 775.

79 Proposed Finding No. 27.

Respondent's jobber prices must, on the average, be under those charged by the original equipment manufacturers in order to overcome the prestige advantage which such original equipment manufacturers hold, and must be substantially comparable to the jobber prices charged by Respondent's competitors.

Record Reference:

Testimony of C. E. Niehoff, Tr. 316; 317; 318; 343-347; 365; 476-479; 1612; 1613.

Proposed Finding No. 28.

Respondent never prices any items in its lines below its own cost, and if it finds that an item which it proposes to add to its line must be sold below cost, it is Respondent's practice not to carry that item.

Record Reference:

Testimony of C. E. Niehoff, Tr. 368; 1616; 1618.
Testimony of Fred H. Geyer, Tr. 639; 640.

Proposed Finding No. 29.

Respondent reviews its jobber prices about twice a year against its own costs and against the prices charged
80 therefor by original equipment manufacturers and other replacement parts manufacturers with which it competes.

Record Reference:

Testimony of C. E. Niehoff, Tr. 365; 1608; 1609; 1616; 1618; 1619; 1630; 1675.
Testimony of Fred H. Geyer, Tr. 638; 639; 697; 775; 1548.

Proposed Finding No. 30.

Respondent's jobbers prices in effect for the year 1949 were established on the following dates: Prices established October 1, 1948 were effective for the first two months of 1949; prices established in February, 1949 were in effect for the months of March, April, May, June and July, 1949; and prices established August 1, 1949 were in effect for the balance of that year.

Record Reference:

Testimony of Fred H. Geyer, Tr. 1549.

Proposed Finding No. 31.

Respondent also reviews annually its volume discounts available to its jobbers from its jobber prices, but Respondent has made no change in these discounts since 1948.

81 Record Reference:

Testimony of C. E. Niehoff, Tr. 348; 365; 1617.
Testimony of Fred H. Geyer, Tr. 638; 639; 700.

Proposed Finding No. 32.

In establishing its discounts, Respondent considers the discount plans currently being offered to jobbers by its competitors in order to meet the competition of those plans, and also considers its own costs and its cost savings at increased quantity sales levels.

Record Reference:

Testimony of C. E. Niehoff, Tr. 344; 509; 510; 582; 583; 1616; 1617; 1630.
Testimony of Fred H. Geyer, Tr. 640; 643; 663; 697; 775; 777; 778; 779; 1548.
Testimony of Ray M. Ricketts, Tr. 1461.
Respondent's Exhibits 11; 12; 13; 14; 15.

Proposed Finding No. 33.

All of Respondent's competitors offer annual volume discount plans to the jobbing trade and have done so for many years. Respondent's volume discount plan is similar to the plans offered by its competitors but is not identical to the plan of any one of them.

Record Reference:

Testimony of C. E. Niehoff, Tr. 338; 561; 562; 762.
Testimony of Fred H. Geyer, Tr. 663; 1675.
Testimony of Sidney Goodman, Tr. 798.
Respondent's Exhibits 11; 12; 13; 14; 15.

82 Proposed Finding No. 34.

Respondent's net prices to the jobbing trade after all discounts available under its plan are higher at all annual volume levels than the corresponding net prices of any of its competitors after discounts at all annual volume levels, with the exception of the net prices of Delco-Remy and Wagner Electric, which are higher than Respondent's net prices, and the net prices of Auto-Lite, which are comparable to Respondent's net prices. This same relative situation has prevailed for over fifteen years.

Record Reference:

Testimony of C. E. Niehoff, Tr. 347; 367; 475; 481-502; 1614.
Testimony of Fred H. Geyer, Tr. 613-625; 664.
Testimony of Ray M. Ricketts, Tr. 1344; 1345; 1346; 1387-1391.
Testimony of Joseph N. Greiner, Tr. 259; 260.
Testimony of Richard Boland, Tr. 722.
Respondent's Exhibits 11; 12; 13; 14; 15.

Proposed Finding No. 35.

Respondent has been unable actually to grant net prices to the jobbing trade as low as the net prices of its competitors other than Delco-Remy, Auto-Lite and Wagner Electric because Respondent's costs do not permit any
83 larger annual volume discounts to its jobbers than it now grants. However, Respondent's net prices to its jobbers at its various annual volume discount levels are sufficiently comparable to the corresponding prices of such

competitors at those levels to enable Respondent to obtain a small part of the market. Respondent attempts to offset this net price differential by the better quality of its products and the better service it affords its jobbers at its factory and through its salesmen in the field.

Record Reference:

Testimony of C. E. Niehoff, Tr. 375; 379; 595; 1614.
Testimony of Fred H. Geyer, Tr. 663; 664.

Reasons in Support of Proposed Findings 34 and 35.

Herewith follows a digest of the jobber prices and volume purchase discounts offered by several of Respondent's principal competitors:

American Motor Products: This competitor's jobber prices are lower than Respondent's and its volume discounts are also lower. (See Testimony of C. E. Niehoff, Tr. 481-506. Testimony of Joseph N. Greiner, Tr. 259-260. Respondent's Exhibits 3; 10.)

84 Andrews Manufacturing Co.: This competitor's jobber prices are lower than Respondent's. From such prices it extends the following volume purchase discounts which are lower than Respondent's discounts:

Annual Dollar Volume	Discount
0—$1,000	10%
$1,100—$2,000	15%
$2,100—$3,000	20%
$3,100 and over	25%

This company also extends a 2% prompt payment discount to all. (See Testimony of C. E. Niehoff, Tr. 483. Testimony of Fred H. Geyer, Tr. 617-618. Respondent's Exhibits 3; 10; 14.)

F & B Manufacturing Co.: This competitor has lower jobber prices than does Respondent, and it also grants larger volume purchase discounts from those prices than are granted by Respondent. (See Testimony of C. E. Niehoff, Tr. 485.)

Guaranteed Parts Co., Inc.: This competitor's jobber prices are comparable to Respondent's, but it extends larger discounts at all volume levels, as follows:

85

Annual Dollar Volume	Discount
0—$5,000	10%
$5,000—$10,000	15%
$10,000 and over	20%

In addition, it gives a 2% prompt payment discount. (See Testimony of C. E. Niehoff, Tr. 485. Testimony of Fred H. Geyer, Tr. 615-616. Testimony of Ray M. Ricketts, Tr. 1345. Respondent's Exhibits 3; 10.)

Kem Manufacturing Co., Inc.: This competitor's jobber prices are comparable to Respondent's but it grants larger volume discounts from those prices than does Respondent. This company's volume discount brackets are as follows:

Annual Dollar Volume	Discount
0—$2,400	8%
$2,400—$3,600	11%
$3,600—$4,800	14%
$4,800—$6,000	20%
$6,000—$9,600	23%

A 20% discount is extended on purchases over $20,000. In addition, a 2% prompt payment discount is given to all. (See Testimony of C. E. Niehoff, Tr. 485. Testimony of Fred H. Geyer, Tr. 623. Respondent's Exhibits 3; 10; 15.)

86 P & D Manufacturing Co., Inc.: This competitor's jobber prices are comparable to Respondent's but it extends larger volume discounts therefrom, as follows:

Annual Dollar Volume	Discount
$2,400—$3,600	10%
$3,600—$4,800	13%
$4,800 and over	15%
$20,000 and over	30%

(See Testimony of Fred H. Geyer, Tr. 613. Respondent's Exhibits 3; 10.)

Shurhit Products, Inc.: This competitor's jobber prices are slightly under Respondent's. At annual volume levels over $3,600, this company grants a 15% discount from its jobber prices. (See Testimony of C. E. Niehoff, Tr. 488. Testimony of Fred H. Geyer, Tr. 620. Respondent's Exhibits 3; 10.)

P. Sorenson Manufacturing Co., Inc.: This competitor's jobber prices are substantially comparable to Respondent's but it grants larger discounts, as follows, from those prices than does Respondent:

87

Annual Dollar Volume	Discount
0—$1,800	5%
$1,800—$3,600	10%
$3,600—$5,000	15%
$5,000 and over	20%

In addition, this competitor grants a 2% prompt payment discount to all. (See Testimony of C. E. Niehoff, Tr. 489. Testimony of Fred H. Geyer, Tr. 616. Testimony of Joseph N. Greiner, Tr. 259-260. Testimony of Ray M. Ricketts, Tr. 1345. Respondent's Exhibits 3; 10.)

Standard Motor Products, Inc.: This competitor's jobber prices and volume discounts are substantially comparable to Respondent's but its volume discount granted to the larger account is greater than Respondent's. On graduated volumes up to $12,000 it grants discounts ranging from 3% to 15%. On larger volumes it grants a 20% discount. It also grants a 2% prompt payment discount to all. Respondent loses customers to this competitor, particularly through the formation of groups by the competitor, which groups are joined by Respondent's customers. (See Testimony of C. E. Niehoff, Tr. 489-492. Testimony of Fred H. Geyer, Tr. 604-607. Respondent's Exhibits 3; 10.)

88 Wells Manufacturing Corp.: This competitor's jobber prices are under Respondent's prices and this competitor also grants larger discounts than does Respondent from such prices. This competitor's volume discount plan is as follows:

Annual Dollar Volume	Discount
0—$1,799	10%
$1,800—$3,599	15%
$3,600—$6,399	17%
$6,400—$9,999	20%
$10,000 and over	30%

In addition, this competitor grants a 2% prompt payment discount to all. (See Testimony of Fred H. Geyer, Tr. 613-614. Respondent's Exhibits 3; 10; 13.)

Proposed Finding No. 36.

Respondent has no exclusive dealing arrangements with any of its jobbers, and many of its jobber customers also handle ignition and hydraulic lines manufactured by Respondent's competitors.

Record References:

Testimony of C. E. Niehoff, Tr. 12; 64.
Testimony of Sidney Goodman, Tr. 802.

89 Proposed Finding No. 37.

There is no proof in the record that any jobber to which Respondent sells its products in interstate commerce at one net price competes with any other jobber to which Respondent sells its products at a lower net price. In fact, the only direct evidence offered by the Commission on this point establishes that no such competition exists between such jobbers.

Reasons in Support of Proposed Finding.

Commission Exhibits 47A to E merely establish that in some thirty urban areas Respondent sells to two or more jobbers located in the same town at different net prices, but do not establish that any of these jobbers compete with each other, let alone establish that the price difference has any harmful effect on the ability of the jobber who buys at the higher price to compete with the jobber buying at a lower price.

Direct evidence was taken by the Commission in only two of these cities, Memphis, Tennessee, and New Orleans, Louisiana. In Memphis, the first witness called was Louis Post, president of D & M Auto Parts Company of
90 Greenwood, Mississippi, who testified categorically that, in the trade area served by his company, it competed with no other jobber who handled the Niehoff line. (See Testimony of Louis Post, Tr. 212; 214.)

The second witness called in Memphis, was Jake R. Fenberg, manager of Union Auto Electric, which company was classified by Respondent as a Jobber with Agreement and received a 2% cash discount and a 5% trade allowance on its purchases from Respondent. Fenberg stated his company's major lines were the Delco-Remy and Auto-Lite lines, and that it only bought the Ford ignition line from Respondent in order to round out its line. He testified that his company competed in the sale of its products with Automotive Electric Service, Bowers, Inc. and A & B. Not one of these companies handles the Niehoff line. He then added that his company possibly competed with J. B. Cook and Stratton-Warren. Both of these last named companies are jobbers buying the complete Niehoff line at lower net

prices than Fenberg's company pays Niehoff for its Ford line only. This is certainly no proof of any competition between Fenberg's company on the one hand and J. B. Cook and Stratton-Warren on the other, let alone proof
91 of competition between Fenberg's company and either of these companies on the Niehoff Ford line, which is the only part of the Niehoff line his company handles. This failure of proof is doubly apparent in view of the fact that, of Fenberg's 1949 purchases of ignition parts totaling some $52,000, only 2% of those purchases were Ford items purchased from Respondent. (See Testimony of Jake R. Fenberg, Tr. 220; 229. Testimony of Ray M. Ricketts, Tr. 1342-1344; 1401. Commission Exhibit 47D.)

In New Orleans, Louisiana, two witnesses were called by the Commission. The first was Archie B. Kiefer, owner of Automotive Wholesalers of that city, which company purchased Respondent's ignition line at a 10% discount, and the second was Joseph N. Greiner, vice president of Greiner Auto Parts, Incorporated, which bought Respondent's ignition line at a 10% discount plus a 7% volume rebate. (See Commission Exhibit 47B.)

Each of these witnesses described their competition in detail. It is certainly significant that Kiefer did not name Greiner Auto Parts as one of his competitors and that Greiner did not name Kiefer as one of his company's
92 competitors. Furthermore, Kiefer explained in great detail how his competition came from car dealers such as Buick, Ford, Chevrolet, Pontiac, Nash, Packard, Hudson and gasoline stations, none of whom handled the Niehoff line. (See Testimony of Archie B. Kiefer, Tr. 238-242. Testimony of Joseph N. Greiner, Tr. 242-260.)

Proposed Finding No. 38.

The Niehoff ignition line consists of approximately 2,000 different replacement parts for all makes and models of cars and trucks manufactured during the past twenty years, which parts range in unit price on Respondent's jobber base price sheet from $.02 to $4.50, the average unit price of all items being $.84.

Record Reference:

Testimony of Fred H. Geyer, Tr. 669.
Commission Exhibits 1; 6A.

Proposed Finding No. 39.

The Niehoff hydraulic line consists of approximately 1,200 different replacement parts for all makes and models of passenger cars and trucks manufactured during the
93 past twenty years, which parts range in unit price on Respondent's jobber base price sheet (exclusive of service stocks, complete tank and brake fluid over one gallon quantities), from $.02 to $2.25, the average unit price being $.36.

Record Reference:

Testimony of Fred H. Geyer, Tr. 669.
Commission Exhibits 4; 13A.

Proposed Finding No. 40.

With over 3,200 items in its line ranging in price from two cents to three or four dollars, it would not be possible for Respondent to have a single jobber's price without volume discount brackets and then reduce those prices at the point of sale where necessary to meet the equally low price of a competitor in order to keep the account. No salesman could be trained sufficiently to know Respondent's costs and therefore could not be given the discretion to grant the necessary price reductions which such a system would entail. Therefore, all such price reductions would have to be cleared with Respondent's home office. This would be prohibitively costly and the delay it would entail would undoubtedly lose the business. Such a one-price system would require many more salesmen on the road,
94 more home office help and would be very costly. In order to retain its jobber accounts Respondent would soon have to extend as many different prices as it has jobbers to meet the equally low prices currently offered to these jobbers by its many competitors. There would be no uniformity to Respondent's prices, jobbers would soon learn its prices are open to bargaining on the basis of better offers from competition, and Respondent would lose its integrity as a responsible manufacturer.

Record Reference:

Testimony of C. E. Niehoff, Tr. 371-374; 410-413; 1620; 1621.
Testimony of Fred H. Geyer, Tr. 665-771; 753.

Proposed Finding No. 41.

If Respondent were compelled by an order of the Commission to go on a single jobber price basis without a volume discount plan applicable thereto while its competitors were not under a similar compulsion, Respondent would be compelled to cease its operations and go out of business. On the basis of its 1949 operating costs, if Respondent used as its single price its present base jobbers price, it would lose all of its jobber accounts except those in the
95 Jobber without Agreement classification, which accounted for only 7.5% of Respondent's 1949 volume; if Respondent granted all jobbers a uniform 10% discount from its present jobbers prices, it would lose all of its jobber accounts in its Jobber with Agreement classification, which accounted for 47.8% of its 1949 volume and would incur an operating loss of $123,000 annually; and if Respondent used a uniform 15% discount, its losses would be so great in sales to the small jobber accounts, it would incur an operating loss of nearly $100,000 a year.

Record Reference:

Testimony of Fred H. Geyer, Tr. 753.
Testimony of C. E. Niehoff, Tr. 374-385.
Testimony of M. F. Eldridge, Tr. 1003-1059.
Respondent's Exhibits 17A, B, C; 37 to 68.

Proposed Finding No. 42.

Annually Respondent publishes two catalogs, one for its ignition line and one for its hydraulic line. In 1949 it published a third catalog limited to its ignition replacement parts for Ford, Mercury and Lincoln automobiles. These catalogs are illustrated and attractively printed in from two to four colors and average about seventy-five pages each, excepting the 1949 Ford catalog which was
96 twenty-four pages, including covers. As changes occur in Respondent's lines during the year, supplements are issued for these catalogs.

Record Reference:

Testimony of C. E. Niehoff, Tr. 6; 7; 8; 30; 31; 32; 80; 279.
Testimony of Fred H. Geyer, Tr. 671-679.

Proposed Finding No. 43.

Respondent's distribution covers the entire United States. In the New York City area, the New England area and the Pacific Coast area, distribution is handled through three separate factory representatives, one in each area, who cover their respective territories with their own salesmen, but in all other areas of the country, Respondent sells direct to the jobber trade through its own salesmen.

Record Reference:

Testimony of C. E. Niehoff, Tr. 33; 34; 440.
Testimony of Fred H. Geyer, Tr. 1083-1093.
Respondent's Exhibit 25.

Proposed Finding No. 44.

For the purpose of its sales distribution, Respondent divides the United States into fifteen territories, three of which are served by its factory representatives and
97 the remaining twelve by Respondent's own salesmen. Of these twelve territories, only one, the Chicago area, is confined to a metropolitan area. The other eleven territories all embrace from two to five states.

Record Reference:

Testimony of C. E. Niehoff, Tr. 280; 281.
Testimony of Fred H. Geyer, Tr. 1086-1091.
Testimony of Ray M. Ricketts, Tr. 1306.
Respondent's Exhibit 25.

Proposed Finding No. 45.

Respondent has fifteen salesmen continuously traveling the territories to which they are assigned. In the Chicago area, each jobber customer of Respondent is called upon from fifteen to seventeen times a year. In the other larger territories, each such jobber customer is called upon from three to twelve times a year. All jobber customers in all twelve territories served by Respondent's salesmen are, on the average, called upon five or six times a year.

Record Reference:

Testimony of C. E. Niehoff, Tr. 437; 451.
Testimony of Fred H. Geyer, Tr. 686; 1105-1109.
Testimony of Ray M. Ricketts, Tr. 1318-1320; 1402; 1403; 1359-1361; 1447; 1448.
Testimony of Leonard L. Malina, Tr. 1469.

98 **Proposed Finding No. 46.**

Each of Respondent's salesmen calls on all the jobber accounts in his territory in rotation and makes an equal number of calls on each such jobber, irrespective of size.

Record Reference:

Testimony of C. E. Niehoff, Tr. 286-290.
Testimony of Fred H. Geyer, Tr. 1087-1091; 1093; 1094; 1105-1107.
Testimony of Ray M. Ricketts, Tr. 1323; 1353.
Testimony of Leonard L. Malina, Tr. 1465-1469; 1485.

Proposed Finding No. 47.

In making a call on a jobber account, it is the salesman's practice first to review the Niehoff inventory which the jobber has on hand to see what items he is low on. Such an inventory review for the larger jobber who usually has a stock man and uses a perpetual inventory system does not require as much time as it does for the small jobber where it is necessary first to straighten and sort the stock so the inventory can be taken.

Record Reference:

Testimony of Fred H. Geyer, Tr. 644-647; 656; 1108; 1109.
Testimony of Ray M. Ricketts, Tr. 1324; 1325; 1326; 1327; 1366; 1367; 1368; 1404; 1451; 1459.
Testimony of Leonard L. Malina, Tr. 1472; 1473.
Testimony of Sidney Goodman, Tr. 799.

99 **Proposed Finding No. 48.**

The salesman next interviews the jobber in connection with the size order he wishes to place. In the case of the larger jobber, who usually has one employee who does all purchasing, the salesman is granted an interview promptly, but, in the case of the smaller jobber, the salesman frequently has to wait until the owner returns from a call or while he waits on customers at the counter.

Record Reference:

Testimony of Ray M. Ricketts, Tr. 1325-1326; 1327; 1329.

Proposed Finding No. 49.

The salesman next explains any new items in the line and goes over Respondent's catalogs, tune-up charts, display and other material available to the jobber, leaving with the jobber or ordering for him such of that material as he needs. The small jobber customarily takes more of this material than the larger jobber. The large jobber usually has several salesmen who call directly on his customers, and the larger jobber also frequently publishes his own catalog for distribution among his salesmen and customers, and, therefore, needs only a few of Re-
100 spondent's catalogs for his own use, whereas the small jobber with few or no salesmen distributes Respondent's catalogs among his customers as silent salesmen. Similarly, on display material, the large jobber carries so many lines he can use only a limited quantity of any one manufacturer's displays, whereas the smaller jobber with fewer lines more frequently uses Respondent's display material in his windows or on his counters.

Record Reference:

Testimony of Ray M. Ricketts, Tr. 1329; 1333; 1334; 1335; 1336; 1337; 1451.

Testimony of Leonard L. Malina, Tr. 1475-1479; 1484; 1485.

Testimony of Sidney Goodman, Tr. 804; 805.

Proposed Finding No. 50.

Respondent's salesmen assist all of Respondent's jobber customers, and particularly the smaller jobber customers, directly in calls on that jobber's trade, particularly to show him, the jobber, how to sell a "service stock". A service stock is an inventory cabinet designed to hold an inventory of Respondent's products sufficient to meet the customer's needs in an orderly manner on plainly marked shelves. At the initial sale, the cabinet and the inventory which it is designed to hold are sold the customer.
101 On subsequent calls the jobber or his salesman can, by looking at the cabinet, quickly ascertain where the inventory is low, and prepare an order for sufficient merchandise to bring up the stock to the level of the customer's needs.

Record Reference:

Testimony of C. E. Niehoff, Tr. 116.
Testimony of Fred H. Geyer, Tr. 648-651; 652; 1109.
Testimony of Ray M. Ricketts, Tr. 1330-1332; 1409.
Testimony of Leonard L. Malina, Tr. 1473; 1474; 1475.

Proposed Finding No. 51.

Since Respondent loses money on the small jobber until his annual purchases attain a volume of from $1,200 to $2,400, 50% more time is devoted by Respondent's salesmen to the small jobber than to the larger jobber in order to bring his annual purchases up to a level which is profitable to Respondent.

Record Reference:

Testimony of Fred H. Geyer, Tr. 647; 657; 747; 749.
Testimony of Ray M. Ricketts, Tr. 1330-1332.
Testimony of Leonard L. Malina, Tr. 1473; 1474; 1475.

Proposed Finding No. 52.

Respondent's salesmen are paid a salary, and some are also paid a commission on sales about a basic yearly
102 quota. All are paid their expenses. Each maintains an expense book which is turned in to Respondent.

Record Reference:

Testimony of C. E. Niehoff, Tr. 34; 437.
Testimony of Fred H. Geyer, Tr. 680; 769; 770.
Testimony of Ray M. Ricketts, Tr. 1307; 1308; 1356.
Respondent's Exhibits 60A to L.

Proposed Finding No. 53.

Salesmen send in daily reports of their activities, occasionally call on new prospects, and annually attend a sales meeting at the home office in Chicago.

Record Reference:

Testimony of C. E. Niehoff, Tr. 438; 439.
Testimony of Fred H. Geyer, Tr. 683-687; 1108; 1109; 1111.
Testimony of Ray M. Ricketts, Tr. 1317; 1321.
Testimony of Leonard L. Malina, Tr. 1471.

Proposed Finding No. 54.

Respondent's small jobber accounts have experienced no difficulty in attaining volume growth in Respondent's lines, thereby qualifying for greater discounts under Respondent's discount plan. From 150 to 200 of Respondent's present larger jobber accounts have grown from an original annual purchase volume of less than $1,200 on
103 which they received no volume discount. Respondent loses money on the small volume jobber account and for that reason has its salesmen spend more time with these accounts so they will attain an annual purchase volume which is profitable to Respondent. Respondent no longer solicits jobber accounts with annual volumes of less than $1,200, for Respondent's break-even point on small jobber accounts is at annual volumes from $1,200 to $2,400. However, it is interested in the small account for it is from the growth of the small account that it attains its large accounts.

Record Reference:

Testimony of C. E. Niehoff, Tr. 571-574.
Testimony of Fred H. Geyer, Tr. 641; 653; 654; 655; 656; 657; 691; 702; 746; 747; 749; 750.
Testimony of Sidney Goodman, Tr. 786; 787; 788; 794; 796; 801; 803; 811.
Testimony of William Kates, Tr. 729; 731; 733.
Testimony of Richard Boland, Tr. 712; 714; 715; 716; 717.

Proposed Finding No. 55.

As a jobber customer of Respondent grows in size, though he thereby attains a larger volume discount on his purchases and therefore attains a larger percentage of margin between the bare cost of his goods and his gross selling price, his percentage of net profit on his sales
104 decreases. This is because of the additional overhead which must be incurred in order for a jobber to grow beyond the sales volume attainable through a one-man operation. The principal overhead item incurred by a larger jobber is the expense of salesmen who must be paid a commission of from 8% to 10% on the selling price of the jobbers' merchandise, which is equivalent to 16% to 20% on the price the jobber pays Respondent for such

items. Other expense items incurred by larger jobbers are the car expense of salesmen, delivery expenses, stock clerks, catalogs, and the cost of extension of credit to customers. The additional discounts a larger jobber attains are never sufficient to offset his additional overhead incurred to attain volume size. As a consequence, a small jobber handling Respondent's ignition line actually has a competitive advantage over the large jobber handling the same line, and the small jobber actually can and does take business from the larger jobber in that line, notwithstanding the fact that the larger jobber pays a lower net price therefor to Respondent.

Record Reference:

Testimony of C. E. Niehoff, Tr. 570; 591.
Testimony of Fred H. Geyer, Tr. 653-656; 770; 771; 1550-1552.
Testimony of Sidney Goodman, Tr. 786-792; 794-796; 799; 800.
Testimony of William Kates, Tr. 730; 732.
Testimony of Richard Boland, Tr. 723; 724; 725; 726.

105 Reasons in Support of Proposed Finding.

Sidney Goodman, a Chicago jobber handling Respondent's line as a Distributor with Agreement and receiving the 10% discount from list and the 7% discount allowance, testified from his business records that when he started in business in 1936 as a small jobber, his total annual sales volume on all items was $80,000 and his percentage of margin between what he paid for his merchandise and what he sold it for was only 10%. As his volume increased he attained larger discounts on his purchases and, by 1950, when his annual sales were $636,600. his gross margin had risen to 27.5%. However, in this same period his percentage of net profits dropped. In the five years from 1938 to 1942, his average annual net profit on sales volumes averaging $200,000 was nearly 2%, while in the five years from 1946 to 1950, his annual net profit on sales volumes averaging $675,000 was only 8/10 of 1%, notwithstanding an abnormal profit of 4.8% in 1946 immediately following the war's end. (See Testimony of Sidney Goodman, Tr. 789-797.)

Fred H. Geyer, vice president and sales manager of

Respondent, and who, prior to his association with
106 Respondent, was sales manager for ten years of Andrea Company, the largest automotive jobber in Milwaukee, fully corroborated Goodman's testimony. (See Testimony of Fred H. Geyer, Tr. 770; 771; 1550-1552.)

Two small jobber customers of Respondent, buying its line at a 5% discount as Jobbers with Agreement, testified they competed with Mr. Goodman and other large jobbers in the Chicago area handling the Niehoff line, that these companies did not constitute a competitive problem and that they took Niehoff ignition business from him. Goodman acknowledged this as a fact. (See Testimony of William Kates, Tr. 731. Testimony of Sidney Goodman, Tr. 794; 801. Testimony of Richard Boland, Tr. 718.)

The Crowell-Collier survey and the National Standard Parts Association survey, improperly excluded from evidence herein by the Trial Examiner, also fully corroborated this evidence. (See Offer of Proof on Crowell-Collier survey, Tr. 324-326. Testimony of Elmer Oleson, Tr. 1563-1602. Respondent's Exhibits 73; 74; 75; 76.)

Proposed Finding No. 56.

There is no evidence in the record that the pricing policy used by the Respondent in any way lessens com-
107 petition or tends to create a monopoly in the lines of commerce in which Respondent is engaged or that Respondent's pricing policy in any way injures, destroys or prevents competition with Respondent.

Record Reference:

An examination of the entire record disclose that there is no such evidence.

Proposed Finding No. 57.

Respondent's differentials in price between its different jobber purchasers of its automotive products of like grade and quality do not have the effect of substantially lessening competition or tending to create a monopoly in the lines of commerce in which Respondent and its jobber purchasers buying its said products at lower net prices are engaged, or to injure, destroy or prevent competition with Respondent, with any of such purchasers or with the customers of either of them.

Record Reference:

The entire record.

Proposed Finding No. 58.

Respondent as a reasonable and prudent businessman, never believed or had any reason to believe that any
108 of the prices of any of its competitors were other than lawful prices.

Record Reference:

Testimony of C. E. Niehoff, Tr. 4; 1603-1676.
Testimony of Fred H. Geyer, Tr 51; 52; 634.
Stipulation, Tr. 1677.

Proposed Finding No. 59.

Respondent and its principal officers, in establishing Respondent's net prices at each of its annual volume discount levels to meet the equally low prices of Respondent's competitors, acted in good faith as would reasonable and prudent businessmen.

Record Reference:

See references following Proposed Finding No. 58.

Proposed Finding No. 60.

There is no evidence in the record that the pricing practices of any of Respondent's competitors which were in effect at and prior to the time of Respondent's pricing practices and with which Respondent's pricing practices are designed to be competitive, were or are unlawful or discriminatory in any manner.

Record Reference:

An examination of the entire record discloses that there is no such evidence.

109 Proposed Finding No. 61.

Respondent's net prices at all annual volume levels were and are made in good faith to meet the equally low prices of its competitors.

Record Reference:

See references appended to Proposed Findings No. 4; 5; 8; 26-29; 32-35.

Proposed Finding No. 62.

There is no evidence in the record of any competition between any one of Respondent's factory representatives, namely, House of Peaslee, Inc., in the New England area, L. C. Biglow Co., Inc., in the New York metropolitan area, and Paul G. Niehoff Company, in the West Coast area, and any other purchaser of Respondent's products at prices different from those at which they are sold to such factory representative.

Record Reference:

Ruling of Trial Examiner dated November 15, 1951, filed herein November 16, 1951, rejecting admission into evidence of Respondent's Exhibits 26, 27 and 28.

Proposed Finding No. 63.

Respondent's advertising costs consist of costs incurred in preparing, editing and publishing catalogs, the cost
110 of price sheets, tune-up charts, signs, displays and and special merchandise circulars and the cost of advertisements in trade magazines circulated to the jobber trade.

Record Reference:

Testimony of C. E. Niehoff, Tr. 6-8; 30-32; 80; 278; 279; 304-309; 671-676.
Testimony of Fred H. Geyer, Tr. 677; 734.
Testimony of Ray M. Ricketts, Tr. 1333-1337.
Testimony of Leonard L. Malina, Tr. 1476-1479; 1485.

Proposed Finding No. 64.

In the year 1949 Respondent's total advertising expenditures amounted to $100,437.11.

Record Reference:

Testimony of C. E. Niehoff, Tr. 304-306; 553-555.
Respondent's Exhibit 7.

Proposed Finding No. 65.

Respondent had 866 jobber accounts in 1949 and Respondent's advertising cost per account in 1949 was $115.97.

Record Reference:

Testimony of C. E. Niehoff, Tr. 304-306.
Testimony of Fred H. Geyer, Tr. 659; 1547.

111 Proposed Finding No. 66.

In the year 1949 Respondent's total expenditures for salesmen's salaries, salesmen's commissions, salesmen's travel and entertainment expenses and for sales conferences amounted to $159,433.59.

Record Reference:

Testimony of Fred H. Geyer, Tr. 1531-1538.
Respondent's Exhibit 69.

Proposed Finding No. 67.

Of Respondent's 866 jobber accounts in 1949, 781 of those accounts were serviced through Respondent's own salesmen, and the remainder of such accounts were serviced by the salesmen of Respondent's factory representatives.

Record Reference:

Testimony of Fred H. Geyer, Tr. 1531-1538.
Respondent's Exhibit 69.

Proposed Finding No. 68.

Respondent's 1949 salesman cost per jobber account serviced by its own salesmen was $204.00.

Record Reference:

Testimony of Fred H. Geyer, Tr. 1531-1538.
Respondent's Exhibit 69.

112 Proposed Finding No. 69.

Respondent's 1949 salesman cost per call on each jobber account serviced by its salesmen averaged $34.02. In 1949, Respondent's salesman cost for servicing the Automotive Wholesalers account was 16.1% of Respondent's sales to such account, whereas Respondent's salesman cost for servicing the Greiner Auto Parts account was only 1.6% of Respondent's sales to such account.

Record Reference:

Testimony of C. E. Niehoff, Tr. 281-284; 290-303; 574-576.

Respondent's Exhibits 8; 9.

Proposed Finding No. 70.

A time and cost study of the processing of seventeen orders received by Respondent from various jobbers through the twenty-one steps all such orders go through at Respondent's home office from the time of receipt to the time of shipment and invoicing was made by Louis Dreyer, a qualified engineer. From this study, Mr. Dreyer prepared four graphs, the first of which shows the relationship between the number of packages per order received and Respondent's net billing to the jobber on such order; the second shows the relationship between the number
113 of items per order received and Respondent's net billing to the jobber on such order; the third shows the relationship between Respondent's total processing cost per dollar of net invoice to Respondent's net dollar billing per invoice; and the fourth shows the relationship between Respondent's total processing cost per order received to Respondent's net dollar billing in connection with such order.

Record Reference:

Testimony of Louis Dreyer, Tr. 828-881; 894-1002; 1158-1160; 1185-1223.

Testimony of Fred H. Geyer, Tr. 1094-1104.

Respondent's Exhibits 18A, B, C; 19; 20; 21A, B; 30; 31; 32; 33; 34.

Proposed Finding No. 71.

The completion of this study of Respondent's order processing costs and of the related graphs required more than three months' time during the spring and summer of 1951. They were carefully, accurately and fairly prepared by Louis Dreyer, a well-qualified consulting industrial engineer. Mr. Dreyer graduated from Cornell University, Ithaca, New York, in 1914, and continuously from that time to the time of the hearing, he was actively engaged in the practice of his profession.

114 Record Reference:

Testimony of Louis Dreyer, Tr. 828; 829.

Proposed Finding No. 72.

From the established relationship between Respondent's total processing cost per dollar of net invoice and Respondent's total net dollar billing to the jobber on such invoice, Mr. Dreyer prepared calculations showing what percentage of the differential between the lower net price paid by Greiner Auto Parts, Inc., of New Orleans, and the higher net price paid by Automotive Wholesalers of the same city, for Respondent's products in the years 1949, 1950 and 1951, was justified by Respondent's higher order processing costs in processing the latter jobber's orders in such years over Respondent's cost in processing the Greiner Auto. orders in the same years. These calculations establish that in the years 1949, 1950 and 1951 respectively, 18.1%, 24.1% and 19.7% of this price differential was justified by Respondent's higher order processing costs on orders filled for Automotive Wholesalers.

Record Reference:

Testimony of Louis Dreyer, Tr. 882-885; 1181-1184.
Transcript 1731-1740.
Respondent's Exhibits 80; 81; 82.

115 Proposed Finding No. 73.

Similar calculations respecting the differential between the lower net price paid by Stratton-Warren of Memphis, Tennessee, and the higher net price paid by Union Auto Electric of the same city for Respondent's products in the years 1949, 1950 and 1951, establish that 28.2%, 19.3% and 23.7% of this price differential was justified in each of these years respectively by Respondent's higher processing cost on orders filled for Union Auto Electric.

Record Reference:

Testimony of Louis Dreyer, Tr. 882-885; 1181-1184.
Transcript 1733-1740.
Respondent's Exhibits 35; 83; 84.

Proposed Finding No. 74.

The differentials in Respondent's net prices for commodities sold by it at its various annual volume discount levels make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differ-

ing methods or quantities in which such commodities are to Respondent's jobber purchasers sold or delivered.

116 **Reasons in Support of Proposed Finding.**

It is clearly established by the evidence that Respondent's average salesman cost per jobber account in 1949 was $204.00. (See Testimony of Louis Dreyer, Tr. 1531-1538. Respondent's Exhibit 69.) Since Respondent's salesmen spend more time with the smaller jobber than the larger jobber, the use of an average cannot be complained of in an analysis of the evidence relating to cost because it is against Respondent. (See references for Proposed Findings No. 47; 48; 50; 51.)

Similarly it is already established by the evidence that Respondent's average advertising cost per jobber account in 1949 was $115.97. (See Testimony of C. E. Niehoff, Tr. 304-306. Testimony of Fred H. Geyer, Tr. 647; 659.) Since the smaller jobber uses as much or more of this advertising material as the large jobber, here again the use of an average in a cost analysis, if unfair to anyone, is unfair to Respondent and cannot be complained of. (See references for Proposed Finding No. 49.)

117 Thus, in round figures, Respondent's advertising and selling costs total $320.00 a year per account. For a jobber account classified as a Warehouse Distributor buying $12,000 of goods a year, these costs amount to $2.66 per hundred dollars of purchases.

Thus, to sell a Jobber without Agreement only $600.00 of its goods in any one year costs Respondent $320.00 for advertising and selling expense, whereas those same costs on an equal amount of goods sold to a Warehouse Distributor, whose total annual purchases equal or exceed $12,000, are at most $15.96. (6 x $2.66)

The following tabulation shows this cost savings at Respondent's various volume discount levels:

Purchase Volume Level	Advertising and Selling Costs Per Jobber Buying at This Level Only	For Largest Volume Jobber ($2.66 per $100 of Purchases)	Respondent's Additional Costs
$ 600	$320	$ 15.96	$304.04
1,200	320	31.92	288.08
2,400	320	63.84	256.16
3,600	320	95.76	224.24
6,000	320	159.60	160.40
8,400	320	223.44	96.56

This additional cost to Respondent is, at every one of the above volume purchase levels, in excess of the differ-
118 ential in price extended by Respondent to its largest volume purchase jobber at those levels.

The following tabulation shows the amount by which such costs exceed the price differential at each of these levels:

Purchase Volume Level	Price Differential Received by Jobber Classified as Warehouse Distributor Over Price Paid by Jobber Classified at This Level of Purchases	Amount by Which Respondent's Advertising and Selling Costs Exceed This Differential
$ 600	$ 95.82	$208.22
1,200	122.84	155.24
2,400	218.04	37.52
3,600	222.12	2.12
6,000	105.60	54.80
8,400	73.92	22.64

Thus, on Respondent's advertising and selling costs alone, there is a complete justification of its price differentials.

In addition, Respondent's order processing costs also justify from 18.1% to 28.2% of these price differentials. (See Respondent's Exhibits 35; 80; 81; 82; 83; 84.)

Careful studies of certain of Respondent's manufacturing costs prepared by Louis Dreyer also show that if
119 Respondent were to lose its sales volumes attributable to its large volume jobber customers in the Warehouse Distributor classification, Respondent's volume would drop substantially 50%, which drop would raise Respondent's manufacturing costs 14.5% on coils, 36.5% on the FF 40 rotor, 31.7% on the DR 55 distributor cap, 51.7% on the DR 13 rotor, and 4.5% on the DR 135-P plate. (See Testimony of Louis Dreyer, Tr. 1231-1301. Respondent's Exhibits 37; 38; 39; 40; 41; 42; 43; 44; 45; 50; 51; 52; 53; 54; 55; 56; 57; 58; 59.)

These same exhibits also show the additional manufacturing cost Respondent would incur at any reduced level of production from 1% to 50% below its 1951 operations.

Similar studies by Mr. Dreyer respecting Respondent's increased manufacturing costs on certain items in the event its production were reduced 52.5% through the loss of all jobber accounts classified as Jobbers with Agreement, show that the manufacturing costs and jobbers prices on the following items would rise in the following percentages:

120

Item	Increase in Manufacturing Costs	Increase in Jobber Price
AL 170 Coil	11 %	11 %
FF 170 Coil	6 %	9.5%
FF 173 Coil	5.5%	6 %
DR 13 Rotor	26 %	28 %
DR 55 Distributor Cap	18 %	18 %
FF 40 Rotor	33 %	31 %

(See Respondent's Exhibits 61 to 68.)

These same studies show the following increases in the event Respondent's production were further curtailed by the additional loss of all jobber accounts classified as Distributors:

Item	Increase in Manufacturing Costs	Increase in Jobber Price
AL 170 Coil	34%	30%
FF 170 Coil	17%	17%
FF 173 Coil	17%	17%
DR 13 Rotor	82%	78%
DR 55 Distributor Cap	55%	56%
FF 40 Rotor	102%	100%

Thus, all of Respondent's proven costs, namely advertising, selling, and order processing, clearly justify each of its price differentials. Fortifying this with the obvious savings in manufacturing costs indicated by the foregoing studies, the conclusion is inescapable that all of
121 Respondent's price differentials are fully justified by its costs.

Proposed Finding No. 75.

The filing of the complaint against Respondent in this matter constituted a misuse of the Federal Trade Commission's discretion and authority to bring such complaint.

Reasons in Support of Proposed Finding.

From the Commission's press release (Respondent's Exhibit 70) issued at the time the complaint was filed herein, it is clearly evident that several complaints were filed at the same time, principally directed at certain buying groups, and that to round out this picture, four manufacturers, of which Respondent was one, allegedly selling

certain of these groups also had complaints filed against them.

This press release clearly shows why the instant proceeding was filed and that it was obviously not filed because of any complaint made to the Commission by any jobber sold by Respondent.

122 It is clear from the record in this case that, prior to the filing of this complaint against Respondent, *no* person from the Commission's staff ever made inquiry of Respondent concerning any of the following matters: (See Transcript 1555; 1556.)

1. The nature of Respondent's discount plan.
2. Whether such plan was reasonable on its face.
3. Whether such plan was fairly administered.
4. Whether the price differentials extended to jobbers under that plan had any harmful competitive effect.
5. Whether Respondent's price differentials were extended to meet the equally low prices of competitors.
6. Whether Respondent's price differentials are cost justified.
7. The long established pricing methods in use in the automotive replacement field.
8. The dominant companies in that market.

All of the above factors should have been investigated beforehand. This is particularly true when dealing

123 with quantity discounts which are not illegal *per se*, and respecting which the Commission has the power both under the statute and its own rules to establish quantity limits for any commodity or class of commodity. (Section 2, Clayton Act, Commission Rule XXX.)

The automotive replacement parts field is highly competitive and is dominated by the original equipment manufacturers. Respondent has less than ½ of 1% of that market. It is a market in which volume discounts are universally extended to all buyers. If Respondent is put under a cease and desist order requiring it to sell at a single price while any one of its competitors is still free to extend quantity discounts, Respondent will lose its customers and be compelled to go out of business.

It is submitted that before filing this complaint, the Commission should have first examined Respondent's quantity discounts as well as those of its competitors. If the Commission had then been dissatisfied in any respect with any of those discount plans, it should have proposed discounts which it felt were reasonable for the industry in

the light of competitive effect and the actual cost
124 savings at various volume levels of sales, held hearings and, by rule, eventually have promulgated fair and equitable quantity discount limits applicable to all competitors in the field.

The Commission's failure to follow any of the procedures suggested above before filing this complaint discloses a serious misuse of its discretion.

125 Conclusions of Law.

First Proposed Conclusion of Law.

The Respondent's pricing practices do not violate the provisions of sub-section (a) of Section (2) of the Clayton Act, as amended by the Robinson-Patman Act approved June 19, 1936 (U.S.C. Title 15, Section 13a).

Second Proposed Conclusion of Law.

The Respondent's pricing practices have not injured or tended to injure competition, and therefore there has been no violation by Respondent of Section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act.

Third Proposed Conclusion of Law.

The Respondent's pricing practices and the differentials in the various net prices extended by Respondent to purchasers at different annual volume levels of purchase make only due allowance for differences in Respondent's cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are
to such purchasers sold or delivered, and therefore
126 all of Respondent's prices are justified under Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act.

Fourth Proposed Conclusion of Law.

The Respondent's pricing practices have been entered into in good faith by Respondent and each and every one of Respondent's net prices has been made in good faith by Respondent to meet the equally low price of a competitor, and therefore such pricing practices and net prices of Respondent are justified under Section 2(b) of the Clayton Act as amended by the Robinson-Patman Act.

Fifth Proposed Conclusion of Law.

The Respondent's pricing practices and each and every one of Respondent's net prices have been made in good faith by Respondent to meet the equally low price of a competitor, which competitor's prices Respondent, as a reasonable and prudent businessman, believes to be lawful, and therefore all of Respondent's said prices are justified under Section 2(b) of the Clayton Act as amended by the Robinson-Patman Act.

127 Sixth Proposed Conclusion of Law.

The complaint against the Respondent issued May 1, 1950, by the Federal Trade Commission should be dismissed.

.....
Hearing Examiner.

Respectfully submitted,

C. E. Niehoff & Co.
By James J. Meyers,
Whitney Campbell,
Charles R. Sprowl,
Its Attorneys.

Dated: April 29, 1954.

149 Before Federal Trade Commission.

* * (Caption—5768) * *

RULINGS ON PROPOSED FINDINGS AND CONCLUSIONS SUBMITTED BY COUNSEL FOR RESPONDENT.

(Received July 6, 1954.)

1. Adopted.
2. Adopted.
3. Adopted.
4. Adopted in substance.
5. Adopted in substance, but without identification of competitors.
6. Adopted.
7. Adopted in effect.
8. Adopted.
9. Adopted in part, refused in part.
10. Adopted.

11. Adopted.
12. Refused as immaterial.
13. Adopted.
14. Adopted.
15. Adopted.
16. Adopted.
150 17. Adopted.
18. Adopted.
19. Adopted.
20. Adopted.
21. Adopted.
22. Refused.
23. Refused.
24. Adopted.
25. Refused.
26. Adopted.
27. Adopted.
28. Refused as immaterial.
29. Refused as immaterial.
30. Refused as immaterial.
31. Refused as immaterial.
32. Adopted in substance.
33. Adopted in substance.
34. Refused as inaccurate.
35. Adopted in substance.
36. Refused as immaterial.
37. Refused as inaccurate.
38. Adopted.
39. Adopted.
151 40. Adopted in part, refused in part.
41. Refused as conjecture.
42. Adopted in less detail.
43. Adopted.
44. Adopted in substance.
45. Adopted in substance.
46. Refused as inaccurate.
47. Adopted in substance.
48. Adopted in substance.
49. Adopted in part, refused in part as immaterial.
50. Refused as immaterial.
51. Refused as erroneous.
52. Adopted.
53. Adopted.
54. Adopted in part, refused in part.
55. Adopted in part, refused in part.

56. Refused.
57. Refused.
58. Adopted.
59. Adopted in substance.
60. Adopted.
61. Refused.
62. Adopted in substance.
63. Adopted.
152 64. Adopted.
65. Adopted.
66. Adopted.
67. Adopted.
68. Adopted.
69. Refused.
70. Adopted in substance.
71. Adopted in substance.
72. Refused.
73. Refused.
74. Refused.
75. Refused as beyond the jurisdiction of the Hearing Examiner to make.

Conclusions. All conclusions denied.

/s/ Frank Hier,
Hearing Examiner.

July 6, 1954.

154 BEFORE FEDERAL TRADE COMMISSION.

(Caption—5768)

INITIAL DECISION

By Frank Hier, Hearing Examiner.

Received July 6, 1954.

The complaint in this proceeding charges respondent with violation of Section 2(a) of the Clayton Act (15 U.S.C. 13) by selling in commerce its automotive products at different prices to purchasers who compete with each other in the resale thereof, so that the effect may be to substantially lessen competition and tend to create a monopoly in both the seller's and buyer's lines of commerce, or to injure, destroy or prevent competition with the respondent, with those of its purchasers buying at respondent's lower prices or with the customers of either.

Respondent's amended answer admits its corporate

status, that it is engaged in interstate commerce and in competition with others selling comparable automotive products, that it charges different customers different prices for the same products based on the quantity thereof purchased. It denies that many of its customers compete in the resale of products sold them by it; denies that it discriminates in price between customers; alleges that most of its customers resell wholly in intrastate commerce; alleges that its price differentials make only due allowance for differences in the cost of sale or delivery resulting from the differing methods or quantities in which its products are sold or delivered; and finally alleges that any such price differentials were granted in good faith to meet an equally low price of a competitor, or the equally low prices of various of its competitors.

155 The pleadings therefore raise the following issues:

1. Do those who purchase from respondent at different prices compete with each other in the resale thereof?

2. If such competition is wholly or partially in intrastate commerce, is jurisdiction defeated?

3. Do the price differentials at which respondent's products are sold by it have any or all of the prescribed competitive effects on either line of commerce?

4. Are these price differentials made in good faith to meet the equally low prices of one or more of respondent's competitors within the meaning of Section 2(b) of the Clayton Act?

5. Are these price differentials cost justified under the first proviso of Section 2(a) of the Clayton Act?

The facts are found as follows:

1. Respondent C. E. Niehoff & Co. is, since 1923, an Illinois corporation with its principal office and place of business located at 4925 Lawrence Avenue, Chicago, Illinois, at which place it manufactures and from which place it sells, admittedly in interstate commerce, three general classes of automotive products—the hydraulic line, consisting of automobile wheel cylinders, hydraulic brake fluid, bleeder tanks, master cylinders, brake hoses and their respective parts; the ignition line, consisting of distributor, generator, starter and switch parts, contact points, condensers, brushes, and coils; and the testing equipment line, such as voltmeters, current indicators, timers, and compression and vacuum gauges. These products, when sold, are shipped by respondent to purchasers located throughout the United States and a constant course of trade and

commerce exists therein. Respondent manufactures about 65 percent of all the items which it sells.

2. In 1949, respondent's sales volume in all products amounted to $2,086,499—90 percent of which was in its ignition line; 2 percent, in its testing equipment; 3-6
156 percent, in its hydraulic line; and 2 percent, in rebuilt items. These products reach the user through the usual distributive hierarchy—respondent to jobber, jobber to dealer, dealer to consumer, except the testing equipment, which stops with the dealer, who is the user. Respondent suggests resale prices for each distributive level and the record shows these are generally maintained. These prices result from varying discounts of 33-1/3—40 percent to dealer, and 50-60 percent off list to jobber from respondent's list prices and are illustrated as follows:

Ignition Line 1949.

Part	List	Dealer	Jobber
AL83	$5.10	$3.06	$2.04
DR70	4.00	2.40	1.60
FF142	3.20	2.13	1.52

Hydraulic Brake Line 1948

Part	List	Dealer	Jobber
K3615	$2.20	$1.54	.88
3707	1.00	.70	.40

Testing Equipment 1949

Part	List & Dealer	Jobber
T-8	$12.00	$9.00
T-3	3.90	2.95

The above price differentials, representing functional discounts from list, are not challenged by the complaint in this proceeding and are noted merely by way of illustration. In addition, respondent sells special accounts at special prices in very small volume but these transactions are likewise not challenged here. Respondent has no house accounts or private brand accounts.

3. Respondent sells nationally[1] and only to jobbers (whether they be so called, or called wholesalers or distributors) and classifies all of them into four groups
157 for pricing purposes, largely according to annual cumulated purchase volume. To illustrate this with a

1. Excluding the Pacific Coast, the New England States and Metropolitan area of New York City where respondent distributes through manufacturer's agents. This distribution is not involved in this proceeding.

Classification[2]	Basis	Buying Price	Number	Annual volume percent of Resp.'s total sales	Average Annual Purchases
Jobber (J)	Annual purchases up to $1,200.00	Jobber—no discount	299	7.5	$ 524
Jobber with Agreement (JA)	Annual purchases more than $1,200 up to $3,600	Jobber plus volume rebate 5% on 1200-2400 7% on 2400-3600 10% on 3600-plus (not on brake parts)	228	18.79	1,719
Distributor (D)	Annual purchases over $3,600 plus buying entire line	Jobber plus straight 10% all products	241	25.8	2,241
Distributor with agreement[3] (DA)	Annual purchases[4] over $6,000 plus buying entire line	Distributor's plus volume rebate of 5% on 6000-8400 6% on 8400-12,000 7% on 12,000 plus all products	38	47.8	10,128

2. In 1950 designations were changed by respondent as follows: Jobber (J) became distributor (D); Jobber with agreement (JA) became distributor with agreement (DA); Distributor (D) became discount distributor (DD); and distributor with agreement (DA) became warehouse distributor (DW); basis and buying prices remained same for each class.

3. Includes Cotton States, Inc., the only buying group to whom respondent sells.

4. Discounts in this bracket do not apply on purchases of service stocks, equipment and brake fluid.

view of preventing confusion by reason of the nomenclature and changes therein, the following table shows respondent's classification, former and present, its basis, prices paid by each class, number in each class, percentage of respondent's total sales volume bought by each class, and the average size order, dollarwise, of each class:

4. Respondent's Customer Classification.

Classification[2]	Basis	Buying Price	Number	Annual volume percent of Resp.'s total sales	Average Annual Purchases
Jobber (J)	Annual purchases up to $1,200.00	Jobber—no discount	299	7.5	$ 524
Jobber with Agreement (JA)	Annual purchases more than $1,200 up to $3,600	Jobber plus volume rebate 5% on 1200-2400 7% on 2400-3600 10% on 3600-plus (not on brake parts)	228	18.79	1,719
Distributor (D)	Annual purchases over $3,600 plus buying entire line	Jobber plus straight 10% all products	241	25.8	2,241
Distributor with agreement[3] (DA)	Annual purchases[4] over $6,000 plus buying entire line	Distributor's plus volume rebate of 5% on 6000-8400 6% on 8400-12,000 7% on 12,000 plus all products	98	47.8	10,128

2. In 1950 designations were changed by respondent as follows: Jobber (J) became distributor (D); Jobber with agreement (JA) became distributor with agreement (DA); Distributor (D) became discount distributor (DD); and distributor with agreement (DA) became warehouse distributor (DW); basis and buying prices remained same for each class.

3. Includes Cotton States, Inc., the only buying group to whom respondent sells.

4. Discounts in this bracket do not apply on purchases of service stocks, equipment and brake fluid.

159 5. Respondent's officials testified that these classifications are reviewed at the end of each calendar year to ascertain if the year's purchase volume justifies the classification and its concomitant discount and that charges upward and downward are accordingly made. However, examination of the 1949 purchase volumes and rebates of 153 of respondent's accounts (there are actually 200 such accounts in the record, but 11 of these are members of Cotton States, Inc., of which more later, 15 do not have a full year's purchase, and 21 are or have branches whose purchase volumes may be aggregated) located in 144 cities in 12 southern states shows 39 instances of pricing at variance with respondent's stated basis, of which 28 received more rebate and 11 received less discount than they were entitled to on respondent's stated basis.[5]

6. Respondent sells to one buying group, Cotton States, Inc., composed in 1949 of 11 jobbers. Respondent treats this group as one purchaser and sells on its "distributor with agreement" basis, in other words, at 10 percent plus 7 percent, less than to its low volume jobbers. The aggregate purchases of the group members justify this under respondent's classification, but the classification is artificial and really a bookkeeping device, because each jobber sends his order direct to respondent and receives the merchandise, shipped back, direct from respondent. The jobber pays the invoice to the group headquarters, and it in turn remits monthly for all its members' purchases during that month. Except for one monthly billing, instead of twelve, the operation saves respondent nothing. In 1949, the annual purchases of only one member would have individually justified the discount given. The purchases of one other would have justified a discount of 10 percent plus 6 percent; 4 others, 10 percent and 5 percent; one other, 5 percent; three others, 5 percent; and the eleventh member, no discount at all.

160 7. It is the four price classifications set out in Paragraph 4 above which form the basis of the charges in the complaint. Thus, it is claimed that the effect of respondent's granting no discount to 299 jobbers was to lessen substantially their aggregate competition with the 567 other purchasers from respondent, or to tend to create

5. Commission's Exhibit 47A-E. This exhibit was sealed by the Examiner to prevent the unnecessary revelation of sales volumes, etc., to the public, hence the names, addresses and other details of these instances are not identified herein.

a monopoly in the 567, or to injure, destroy, or prevent competition by the 299 with the 567. Similar effects are claimed for the 527 buying at no discount or at the volume discounts for $3,600 annually or less, as against the 339 buying at higher discounts, i.e., the distributors and distributors with agreements. The same is claimed between the first three groups—jobbers, jobbers with agreements, and distributors—as against the 98 distributors with agreements. Finally, it is claimed that these differing sales prices of respondent have the effect of substantially lessening competition between respondent and its competitors in their attempts to sell to jobbers, tending to create a monopoly in respondent, and injuring, destroying or preventing competition with respondent.

8. Respondent's annual volume discount plan, as set forth in Paragraph 4, *supra*, is available to all its customers and respondent's salesmen are forbidden to deviate therefrom in quoting prices or making sales. All customers are treated equally in the granting of freight allowances and returned merchandise.

9. On the first issue of whether purchasers from respondent at whatever price are in competition in the resale with each other and with jobbers who buy from respondent's competitors, the record is clear that they are when located in the same trading area. Respondent's president unequivocally so testified[6], and a chart[7] of 144 trading areas in 12 southern states shows, 200 of respondent's 866 accounts buying from respondent at respondent's four different prices. In addition, there is the testimony of 2 jobber customers in each of two of these trading areas that they compete in their selling area (which varies in extent with the size of the jobber's business, of course) with all other jobbers of automotive parts located in the area.

161 10. On the second issue, respondent admittedly sells its products in interstate commerce and charges different prices, here alleged to be discriminatory, in the course of such commerce. Jurisdictionally, this is sufficient. The purchasers thereof need not be engaged in in-

6. Tr. 518-9, 537-9, 542-3.

7. Cx. 47A-E.

terstate commerce, in the use, consumption or resale thereof. See *Cosmetic Shoppe v. Elizabeth Arden Sales Corporation*, 178 Fed. 150; *Meyers* v. *Shell Oil Co.*, 96 F. Supp. 670; *Danko* v. *Shell Oil Co.*, 115 F. Supp. 886.

11. The third issue is whether respondent's price differentials have had the statutorily prescribed effects as described in Paragraph 7, *supra*. On this issue, the record shows that some of respondent's jobber customers in particular, and automotive jobbers generally, operate on a very thin margin of profit—4 percent of sales or less; that all of them must take the 2 percent discount for cash payment within 10 days, usually extended by suppliers, (this discount is not involved here because it is uniform to all); that failure to take it in many instances wipes out profit, in others, cuts profit in half or less; that automotive jobbers must stock many lines of products ranging from 15 to 20 for the small operator to more than 100 for the large jobber, consisting of many thousands of individual items; that profit is made up of an aggregate of very small amounts on each, or as one large jobber put it, 3¢ on a $1.00 sale meant the difference between staying in business and failing. Although there is some testimony by respondent's president and sales manager that quality, missionary work, checking stock, advertising, etc., are all factors in the competition to sell to jobbers, the record is clear that price is the most important and frequently the only factor considered. This is made quite clear by the testimony of one of the two respondent's salesmen in his statement that when he lost an account he deemed it sufficient only to report the loss without giving any reason since the home office had the price sheets of its competitors.[8]

12. This picture is confirmed in more interesting detail by a jobber buying from respondent at its highest discount, or lowest price, i.e., 10 percent plus 7 percent below the regular jobber price. This jobber, located in Chicago,
shipped into seven or eight states, employed 9 sales-
162 men and 3 merchandise trucks in 1951. His records revealed the following volumes and margins:

8. Tr. 1352

Year	Volume	Gross Margin	Net Profit
1938	$148,000	14.1%	0.75%
1939	184,000	15.6%	3.5 %
1940	194,000	17.2%	1.5 %
1941	252,000	18.5%	2.25%
1942	230,000	24.3%	1.25%
1943	314,000	25.3%	2.00%
1944	387,000	25.7%	2.6 %
1945	513,000	21.2%	2.2 %
1946[9]	978,000	25.5%	4.8 %
1947	757,000	24.8%	1.7 %
1948	525,000	29.9%	.6 %
1949	477,000	26.3%	3.9 % net loss
1950	636,000	27.5%	1.00%

Gross and net margins in the above are figured on sales volume, and gross margin represents the difference between net prices paid for merchandise after discounts, rebates and receipts from sales thereof before expenses and taxes. These figures, of course, show that although the witness's sales volume has shown a steady growth, his net profit percentage thereon has not, in fact, it has decreased since 1946. From this respondent contends, of course, that its more favorable price has had the opposite effect to that contended for by counsel for the complaint. However, when these net profit percentages are converted into actual profit totals we find the following:

Year	Actual Net Profit
1938	$ 1,100.00
1939	6,440.00
1940	2,910.00
1941	5,670.00
1942	2,875.00
1943	6,280.00
1944	10,062.00
1945	11,286.00
1946	46,944.00
1947	12,869.00
1948	5,250.00
1949	18,603.00-Loss
1950	6,360.00

9. This was an abnormal year, "Once in a lifetime you get a year like that", Tr. 791.

163 Excluding the three years 1945, 1946 and 1947, which the witness testified were abnormally profitable years for every automotive jobber, these actual profit figures do not show the same pattern as his net profit percentages. The contrast between percentage and actual profit indicates what is generally known, that in a reselling operation, as volume increases, overhead does also and net profit percentage of sales necessarily decreases, although actual profit may or may not. The record also shows that in 1950 his discounts and rebates on all his purchases were $8,953.98, contrasted with a net profit of $6,360.00; and in 1949, $6,132.00 of discounts and rebates as against a loss of $18,603.00. To the above must be added, also, that in 1945 the witness had an inventory of $67,000, but this by 1950 had grown to $174,000 and that his net worth in 1933 was only $6,300.00, whereas in 1951 this amounted to $115,000.00. The significance of discounts and rebates in this witness's profit picture is too apparent to need elaboration. As for his purchases from respondent only, he started out in 1933 paying the full jobber's price, apparently, and purchased in succeeding years at progressively lower prices from respondent until in 1949 and subsequent years, he was buying at 10 percent plus 7 percent, lower than the jobber's price. In 1950, he bought $15,000.00 of respondent's products, which, marked up for resale, amounted to $20,000.00 annual sales out of a total of $600,000.00 annual sales of all products handled.

13. Two other jobber-customers of respondent, competing with this large operator in the resale of respondent's products, testified that one entered business in 1946, and has for some years been buying from respondent on the basis of a jobber with agreement (see Par. 4, *supra*) and the other entered business in 1949, in which year he paid respondent full jobber's price, but in 1950, and since, has been buying on the basis of a jobber with agreement (see Par. 4, *supra*). Both testified that they have progressively grown, have by reason of personal contacts and solicitation taken business away from the jobber whose testimony is summarized above in Paragraph 12; that his competition with them has not bothered them, because of their better service, more frequent calls, low overhead, and personal contacts. One thought the large-volume jobber referred to, was buying at the same price from respondent as he was, the other knew that the large-volume jobber was getting a better price. On cross-examination they both

admitted the obvious—that they were interested in growing; that a greater discount or lower price would help
164 them do this; and that they wanted such lower price and would put the increased margin into their businesses to expand it. Both had some doubts that a lower cost of product acquisition would pay for hiring extra salesmen, or otherwise expanding, but both gave the impression that they would like to try.

14. Respondent's sales manager also testified that in his eighteen years with respondent he had seen many small jobber accounts grow and prosper upward into the more favorable discount brackets, identifying three of them. One in 10 years had grown from less than $1,200 to $6,000 annually; another, from $1,800 to $2,400 in two years, the third from $1,128 to $2,076 in one year. He further said that there were 10 to 15 such instances in each of respondent's 15 sales districts, and that the number of potential jobber customers—respondent's potential market—was about 7,500 in 1949, 8,200 in 1950, and 8,676 in 1951, although no breakdown as to size is mentioned.

15. From the above, and from other evidence in the record, respondent contends that its varying discounts have no adverse affect on the jobbing line because the jobber buying from respondent at its lowest price, due to his size, has proportionately more overhead than his smaller, price-disfavored competitor; that the latter by very reason of his smallness can and does take business away from his favored large competitor through low overhead, personal contacts, time for personal solicitation, and quick service; that the small-sized jobber has grown in size in spite of paying the higher price; and that the large and price-favored jobber has declined profitwise.[10] It seems to this Hearing Examiner, however, that Section 2(a) of the Clayton Act is concerned primarily, if not exclusively, with commanding equality of price among competitors at the time of purchase, rather than with the myriad factors of a reselling operation which may destroy the effect of that equality, or if there be no price equality, may offset disadvantage on the one hand or augment advantage
165 on the other.[11] Enforcement of the law would become

10. It is unfortunate that the record does not show the overall growth in the aggregate of automotive jobbing business in this particular area, nor sales volume figures for the two jobbers referred to in Par. 13 for comparison with comparable figures set out in Par. 12 above.

11. This idea of resale operational factors and efficiency, as affecting and justifying price discriminations, is pointedly illustrated by the cross-examination of respondent's president at Tr. 519-37; 570-3, 587-91.

well-nigh futile if the number of salesmen, their respective salaries, commissions, and efficiency, location of the business, rents paid, truck maintenance and the wisdom of employing this or that resale aid or the efficiency of any of them having to be gone into. If a price preference can be justified to one customer because the recipient's location is poorer or his rent higher or his maintenance more expensive than those of a customer not receiving such price preference, it would inevitably lead to an evaluation of the efficiencies of hundreds of purchasers and to a probable subsidization by the seller of inefficiency itself. Pricing by resale efficiency must inevitably lead to pricing by customer—the very practice at which the law was aimed to prevent. The Hearing Examiner does not believe such was the Congressional intention. He is of the opinion that the mandate requires only equal price opportunity, that what the purchaser does thereafter in the resale of his own merchandise, if he then operates inefficiently or fritters away his equal price start, is, presently at least, no concern of the law.

16. From the facts found in Paragraphs 11 and 12, supra, it is obvious that a much smaller discount or price differential than respondent grants directly and markedly affects profit margin; that the price differentials which the jobber (whose sales volumes and profit margins, covering a period of years, are set out above, Paragraph 12) enjoyed, accounted for all or most of his actual net profit, at least in two years;[12] that although his two smaller competitors, buying from respondent at higher prices, testified that they could ascertain no injury to them from his competi-
166 tion, they both wanted a greater discount which they would use to enlarge their businesses and expand their operations; they both wanted the opportunity to grow afforded by such price treatment, one of them believing he was under no price disadvantage as compared with his large competitor. And, it is also evident from the record that this large, price-favored jobber did not maintain suggested resale prices, as did all the other jobbers who testified, but cut prices on respondent's products to "meet competition" as he put it. From his financial picture, it is doubtful if he could afford to do this, without the discounts

12. This is confirmed and highlighted by testimony of respondent's sales manager that when in 1949, because of insufficient volume he reclassified 92 "SD" accounts to a "JA" basis (see Par. 4, *supra*) many of them strenuously objected to the lower discount or higher cost of product acquisition, Tr. 693-4.

and rebates he was receiving. The power to cut prices, thus vested, carries with it a direct potentiality of substantially lessening competition and of injuring, destroying or preventing competition with him. The record does not clearly show that either of these effects have as yet occurred.

17. The "fait accompli" of actual injury, however, need not be shown, for a violation of Section 2(a) to occur, if the Morton Salt doctrine[13] is to be followed. It is sufficient thereunder if there is a reasonable possibility (under the majority opinion) or a reasonable probability (under the minority opinion) that price differentials will result in these competitive effects.[14] It was there held "It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence." The discounts and rebates here are more substantial, comparatively, than those involved in that case. The Hearing Examiner is certainly bound by this latest decision on this point[15]—if there
167 is to be a reinterpretation, it is for the reviewing authorities to make it. The finding, therefore, is that respondent's price differentials constitute discriminations in price, the effect whereof may be to substantially lessen competition in the resale line of commerce, and to injure, destroy or prevent competition with those who buy from respondent at its lower or discriminatory prices.

18. The Hearing Examiner, however, sees no potential or actual tendency toward monopoly in those buying from respondent at these lower and discriminatory prices. It is true that the financial history of the only witness in this

13. *F.T.C.* v. *Morton Salt Company*, 334 U. S. 37.

14. See also *Corn Products Ref. Co.* v. *F.T.C.*, 324 U. S. 726, 738; *F.T.C.* v. *Staley Mfg. Co.*, 324 U. S. 746.

15. The implications of the *Morton Salt* holding are made unmistakably clear by Justice Jackson's dissent "The Court uses overtones of hostility to all quantity discounts, which I do not find in the Act, but they are translated into a rule which is fatal to any discount the Commission sees fit to attack."

category is one of growth, but it also shows that for several years that growth has been uncertain and vacillating, and profitwise has been arrested and even retarded to the extent that profit existence rests on the discriminations received. Unfortunately, the economic picture of at least one other favored discriminee for comparative purposes is not in the record. The record as a whole, though, shows no substantial concentration in the coffers of the few, it shows rather the power to lessen, injure or prevent competition with them, but as yet nothing to indicate that they may monopolize to the extent of substantially influencing or dictating the competition of the unfavored.

19. The record is barren of anything substantial indicating that competition in respondent's line of commerce has been affected in its favor. What little evidence there is, is to the contrary. Respondent has, and for many years has had, severe, even bitter, competition from other automotive parts manufacturers and suppliers, particularly the subsidiaries of automobile manufacturers who secure practically all of the replacement parts business done by automobile agency service garages through their corporate connections and the consumer advertising campaign to get "genuine" parts when having an automobile repaired. It is ridiculous to claim on this record that the competition of respondent's competitors has been substantially lessened by reason of respondent's price differentials, or that the latter are tending to vest in respondent any monopoly. The financial growth or condition of respondent over a period of years is not shown. There is evidence that respondent's gross volume was less in 1950 than in 1949, on the other hand respondent's sales manager said the gross volume increased in 1950 over 1949, and in 1951 over 1950. Although not truly indicative of a volume trend, the 168 record does show that respondent's jobber customers declined in number from 866 in 1949 to 821 in 1950, and to 805 in 1951, while its market of potential jobber customers increased from 7,500 in 1949 to 8,200 in 1950, and 8,676 in 1951. There is nothing substantial in the record either to show that respondent's price discriminations have injured, destroyed or prevented competition with it. The finding is that there is no substantial evidence showing, or from which one can infer, an adverse competitive effect on the seller line of commerce.

20. The fourth issue is whether respondent's price discriminations were made by it in good faith to meet the

equally low price or prices of a competitor or of competitors. In support of this, respondent's founder and president testified that he incorporated in 1923, had Model T Ford parts, principally vibrator parts, manufactured for him by others, assembled and packaged them under his own brand and sold them to jobbers. This activity continued until 1936 when he began his own manufacturing and expanded to making also General Motors and Chrysler parts, and since 1939 has done this in his own factory, built that year. Respondent has never sold automotive parts for original equipment.

21. He further testified that respondent's present volume discount plan goes back to the early 1930's. Before that in the 1920's it was an item quantity discount, but neither of these discount plans originated with the respondent, they were general in the industry. The present volume discount plan was adopted by respondent because it felt that it was more equitable to allow small customers to get the advantage thereof because the previous discount plan was an item quantity discount and only the larger buyers could obtain it. It was first adopted by respondent's competitors in the fields of ignition and automotive parts and this competition forced the issue on the respondent who went on a volume discount basis in 1934, 1935 or 1936. In that period, competition forced respondent to quote 10 percent to a majority of its accounts. The original parts manufacturers, such as General Motors, Chrysler and Ford set the pattern for the industry, but respondent must also contend with many replacement parts manufacturers, whose price schedules respondent must study to be competitive, along with the list prices of the original parts manufacturers. Respondent knows the prices of its competitors because they all issue price lists and furnish these to respondent's jobbers. In most cases, com-
169 petitors' discounts are somewhat longer (their prices somewhat lower) than respondent's. Jobbers will not handle respondent's line, unless respondent gives a profit incentive in its lines over other lines. It has always been a strenuous battle for respondent to get a jobber to buy respondent's line, and merchandise and resell it in competition with the original parts manufacturers and their outlets. Respondent has not been able to achieve the lowest price offered by its competition—its prices on single items in some instances are lower than its competitors'—

but in other instances its prices are the highest. The average of respondent's prices is higher than those of its rank and file competitors. To achieve a lower price than any other competitor, respondent would have to sell below cost. Respondent's prices are fixed somewhere between cost of production and the prices of original parts manufacturers. Respondent's president does not know how any concern can maintain itself in business if all volume discounts were eliminated and salesmen sold only at a jobber's price, reducing such price only at the actual point of sale when necessary to meet the equally low price of a competitor. In such case, respondent would have as many different prices as it has customers, and it would be disastrous to respondent to operate that way. If respondent dealt in only one or two items, and then only in large quantities, perhaps it could do so. Operating from a single price and granting a reduction therefrom to meet the particular price of an individual competitor would mean that respondent's salesmen, in the field, would have to be competent to determine the extent to which respondent could go to meet the price of a competitor, which respondent does not think they could. This would require more personnel; far greater expense; and would preclude respondent from maintaining the business it now has, particularly the large volume customers who account for nearly one-half of respondent's volume. The result would be that respondent's costs would be higher due to lower volume. Selling on the basis of a single price from which deviations would be made only in particular instances would involve a great deal of extra detail and work. Salesmen would have to check with the customer and sales manager and determine the cost that would have to be met in the particular case. Two or three times the number of salesmen would be required to contact customers and to maintain close surveillance of prices offered by competitors. This would be impossible to follow through, and in view of the extent
of respondent's lines of products would be tremen-
170 dously costly.[16] The delay ensuing from the time that salesmen discovered a competitor's low price until the home office approved (as not being below cost) an equally low price, and the customer could be informed thereof, would mean that the respondent would be too late

16. 2,000 items on the ignition line ranging in price from $.02 to $2.25; 1,200 in the hydraulic brake line ranging in price from $.02 to $4.50, Tr. 668-9.

to get the business. It would not be feasible to give salesmen sufficient authority to reduce a price to meet a competitor's lower price without consulting the home office, because the salesmen would have no means of determining the cost factors involved in the particular product.

22. He further testified that if respondent were ordered by the Federal Trade Commission to discontinue its volume rebate plan and adopt a uniform price regardless of volume, while respondent's competitors are not similarly enjoined, the effect would be disastrous. Respondent would have to give every purchaser its extreme discount 10 percent plus 7 percent to maintain its business, in which case, it would make no profit. If such price were set at any higher level, respondent would lose about 50 percent of its volume which in turn would skyrocket respondent's costs.[17]

23. Respondent's president further testified that jobbers" prices must be competitive with Auto-Lite and Delco Remy's prices. Delco Remy is considered a prestige line because it is on the car when it comes from the manufacturer, it has a larger sales force, probably many times greater than respondent's. Auto-Lite operates in a slightly different manner, but is definitely a prestige line. Respondent's net price must be under Auto-Lite's and Delco Remy's prices, otherwise respondent's jobbers will not handle its lines. These concerns have this advantage over respondent, inasmuch as they supply for replacement "original" parts, and there is a definite preference on the part of the car owners to replace a worn out part wtih the same part made by the car manufacturer as that which is worn out. For this reason, respondent must sell more cheaply
171 to many customers than either of these concerns, to overcome this disadvantage. Respondent's president has never known his ignition line to be handled by an authorized automobile dealer, except during the war when the dealer was unable to obtain parts from car manufacturers. Respondent's president stated that there are other ways (unspecified) than respondent's present pricing methods to meet competition, but thinks its present method is best because it gives the jobber the best opportunity of meeting the original parts competition.

24. Respondent has seven competitors on its hydraulic parts line and some thirty competitors on its other lines.

17. The foregoing testimony of respondent's president is corroborated in all material aspects by that of respondent's sales manager. Tr. 665-71, et al.

It is obviously impossible for it to exactly meet the prices of all of these competitors. According to respondent's president, some of these competitors are lower on all lines than respondent; some of them are lower on some items and higher on others; some of them are higher than respondent; and others are approximately in line with respondent. Auto-Lite and Delco Remy set the price pattern for the entire industry with differential prices for different classes of their trade, and respondent tries to keep its prices slightly lower than both of them. The Ford Motor Company's distribution method is a little different and its price competition is sometimes lower than respondent's. Respondent cannot sell the Ford dealer and meet Ford's prices. Respondent maintains its pricing system as is, under the volume discounts established, and never departs therefrom regardless of specific price cutting.

25. Of fourteen replacement parts competitors (as distinguished from original parts manufacturers and sellers) on ignition parts, respondent's president testified that with 3, respondent had no competition; and of 2 others, he did not know whether their prices were lower or higher than those of respondent. Of the remaining nine, 5 were lower than respondent, none were higher, and 4 were about the same. Of his seven competitors on brake parts (not original parts manufacturers or sellers), he testified he had no appreciable competition with 3, 1 was higher in price than respondent, and 3 were lower.

26. Respondent's sales manager testified that of the sixteen identified competitors of respondent on ignition parts, none had a net price to a jobber that was higher than respondent's similar price, and that none of them had a jobber price classification such as respondent's (see Par. 4, *supra*). He further stated that the ignition parts line which respondent sells ranks seventh in sales volume
172 among all automotive parts. Respondent never has and cannot afford to sell on a net price basis.

27. One of respondent's fifteen district salesmen (Arkansas, Mississippi, Alabama, and parts of Tennessee and Louisiana) testified that a number of his customers had been offered ignition parts at lower prices than respondent's prices; that he knew this from seeing proffered contracts, price sheets, and from what his customers told him; that these competitors were seven of the sixteen identified in the record; that he had lost customers to them (he identified 5 which he had lost and to which competitors he lost

them, as well as one which he gained) because of a lower price; and that it is harder to regain a former customer taken away by a competitor, than to take away one not previously sold from a competitor.

28. A comparison chart of 1949 jobber (without any discount) prices of respondent, with the jobber (without any discount) prices of ten of its principal replacement parts competitors on 57 of its most popular parts (representing 80 percent of respondent's ignition line volume) with the same or comparable (interchangeable) parts of these ten competitors shows:

Parts	Respondent Was Higher	Lower	Same
7 point sets	37	11	18
7 condenser	17	15	31
10 distributor cap	53	10	25
7 rotor	22	22	23
6 brush set	22	8	26
3 regulator	7	21	0
14 switch	57	54	16
3 relay	10	11	6

Any discrepancies between the lineal aggregates above and the total number of comparisons is due to one or more of the competitors not making one or more of the parts selected for comparison, hence price comparisons could not be made. The same comparison made by individual competitors on all 57 parts shows:

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Competitor[18]	Respondent Was Higher	Lower	Same
1	19	18	19
2	18	18	21
3	40	4	11
4	13	27	15
5	18	20	14
6	18	15	24
7	27	12	17
8	13	8	2
9	22	21	13
10	38	9	8

18. The ten competitors are referred to in the transcript by numbers, which numbers are keyed to the names in an exhibit sealed by the Hearing Examiner at respondent's request to prevent unnecessary disclosure of identity.

On overall totals this shows repondent higher in net price on 226 comparisons, lower on 152, and the same on 144.

29. Respondent has also shown the annual volume rebates given by these same ten competitors. In some instances, printed contract forms setting these rebates out are in the record, in others, it comes from the sales manager of respondent and is based on what he has gleaned in the industry, from customers, from his salesmen, or from his competitors. Comparison of respondent's annual volume rebates with those of these ten competitors follows below:

Respondent—	Up to $1,200.00— 0
	$1,200.00 to 2,400.00— 5%
	2,400.00 to 3,600.00— 7%
	3,600.00 to 6,000.00—10%
	6,000.00 to 8,400.00—10% plus 5%
	8,400.00 to 12,000.00—10% plus 6%
	12,000.00 and over —10% plus 7%
Competitor No. 1.	$ 1,800.00 to $2,400.00— 3%
	2,400.00 to 3,600.00— 5%
	3,600.00 to 5,000.00— 7%
	5,000.00 to 6,500.00— 9%
	6,500.00 to 8,000.00—11%
	8,000.00 to 10,000.00—13%
	10,000.00 to 100,000.00—15%
	Over $100,000.00 —20%

Competitor No. 2	$ 200.00 to $ 299.00—10%
	300.00 to 399.00—13%
	400.00 to 20,000.00—15%
	20,000.00 and over —20%
Competitor No. 3.	Up to $1,800.00 —10%
	$ 1,800.00 to $ 3,599.00—10% plus 5%
	3,600.00 to 6,399.00—10% plus 7%
	6,400.00 to 10,000.00—10% plus 10%
	10,000.00 and over —20%
Competitor No. 4.	Up to $5,000.00 —10%
	$ 5,000.00 to $10,000.00—15%
	10,000.00 and over —20%
Competitor No. 5.	Up to $1,800.00 — 5%
	$ 1,801.00 to $ 3,600.00—10%
	3,601.00 to 5,000.00—15%
	Over 5,000.00 —20%
Competitor No. 6.	Up to $1,000.00 —10%
	$ 1,001.00 to $ 2,000.00—15%
	2,001.00 to 3,000.00—20%
	Over 3,000.00 —25%
Competitor No. 7.	Up to $3,600.00 —?
	$ 3,600.00 and over —15%
Competitor No. 8.	23% to a central distributor reselling to jobbers at 10 percent off jobber's price. No volume discount.
Competitor No. 9	
Up to $3,600.00	— 8%
$3,600.00 to $4,800.00	— 8% plus 3% on the full $1,200.00 in excess of first $2,400.00.

4,800.00 to 6,000.00	— 8%	plus 6% on the full $1,200.00 in excess of first $3,600.00.
6,000.00 to 7,200.00	— 8%	plus 12% on the full $1,200.00 in excess of first $4,800.00.
7,200.00 to 9,600.00	— 8%	plus 15% on the full $1,200.00 in excess of first $6,000.00.
Over $9,600.00	— 8%	plus 15% on the full $2,400.00 in excess of first $7,200.00.

Competitor No. 10. Straight 10 percent off invoice regardless of volume.

175 Some of the above discounts are advanced monthly; some rebated yearly; some are conditioned on carrying stock or carrying stock in certain amounts, others are not. Six other competitors of respondent on ignition parts do not have any volume discount allowance, but sell on net prices, fixed in accordance with volume—the net effect so far as respondent is concerned being the same.

30. It is obvious from the above comparisons, and from the other evidence in the record, including the testimony of respondent's president, that there has not been in fact, there could not be, a meeting of the equally low prices of all these competitors on all the hundreds of parts involved. Section 2(b) of the Act, under which this defense is offered, has been twice construed by the Supreme Court in the Staley[19] and Standard Oil[20] cases. The Hearing Examiner construes the first of these as holding that the statute is inapplicable, or the defense thereunder not made out, unless the seller's discrimination was:

1. Temporary;
2. Localized;
3. Individualized as to a particular competitor;
4. Not part of a pricing system;
5. Defensive rather than aggressive.

The facts set out in Paragraphs 20 to 29 above do not meet these requirements. Respondent's price differentials are part of a nation-wide pricing system, which is permanent in essentials, with minor adjustments from time to time, is continuing in nature, prospective as well as for the present, constructed for all of its competition rather than any particular competitor, and not exactly meeting any one or all competitive prices in the great majority of instances, undercutting and overshooting out number matching. It is deliberately set to be lower than respondent's most powerful competition—the original parts manufacturers. In fact, respondent's officials impliedly admit

19. *F.T.C.* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746.

20. *Standard Oil Company* v. *F.T.C.*, 340 U. S. 231.

they have never met these Staley requirements by offering cogent reasons why they cannot. They point out that they sell over 3,000 items instead of one homogeneous com-
176 modity; in comparatively minute quantities, rather than in carload or tank car lots; that they cannot meet the different prices of 30 or 40 competitors (in the Staley case, of course, all competition sold at a uniform price in every town and hamlet in the United States); and finally, based on more than 30 years experience in the industry, they say that to establish a uniform price to all and then deviate therefrom only in individual localized instances would make it impossible for them to remain in business. These are indeed persuasive facts and make out a hardship case.[21] But, unless the factual setting of the Staley case can be basically differentiated from that in this proceeding, the defense must fail. The Hearing Examiner is merely a judicial delegate of the Commission and as the low man on the judicial totem pole, is bound to follow the mandate of the highest body on that same pole. Any reassessment or exceptional reinterpretation of the statute must come from the courts or from that body of experts, the Commission.

31. The facts show distinctions, but without basic differences, between this proceeding and the Staley case. In the latter, there was but one homogeneous commodity involved, sold in tank car lots for the most part, and there was but one price to meet. Here there are myriad products, prices and competitors. But the fundamental condemnation there is present here—a nation-wide pricing system which inevitably spawns systematic and continuing price discriminations. Any such system cannot be wholly defensive. There was in the Staley case at least an exact meeting, here, there is not. It is believed, accordingly, that no fundamental difference is shown and that the defense fails for that reason.

Regardless of approach or criteria, respondent's pricing system is one which favors, progressively upward, its financially powerful customers and as Justice Black said in the Morton Salt case, *supra*, "theoretically these discounts are available to all, functionally they are not".

32. The finding, therefore, is that respondent has not met the equally low price or prices of a competitor or competitors. There is, therefore, no necessity for any finding

21. "Hardship cases make bad law", Rolfe, M. R. in *Winterbottom* v. *Wright*, 10 M & W, 109, 116.

as to good faith or otherwise. The Hearing Examiner
177 has no doubt on this record that what respondent has done, it has done in good faith, in an ordinary if not legal sense, but what it has done is not what the statute, as interpreted requires it to do.

33. Discussion of the Standard Oil case construction of the Act is therefore probably academic, but since the Commission may reach a different conclusion as to the applicability of the Staley holding, a finding on this point may be necessary. The Supreme Court in the Standard Oil case[22] interpreted the Act's phrase "equally low lawful price of a competitor" and counsel for the complaint contends that there is no showing that the prices of respondent's competitors were or are lawful, i.e., non-discriminatory. This is true. There is nothing in the record to show that such prices are either lawful or unlawful as an absolute, unless one adopts the rigid contention that every quantity or volume discount is per se discriminatory and therefore illegal, which this Hearing Examiner does not. However, this legality test or requirement has in effect been replaced, amplified or supplemented by the Commission to be whether respondent's officials knew, or, as reasonably prudent businessmen, had reason to believe that the prices of their competitors were unlawful.[23]

34. As to this, the testimony of respondent's president and sales manager is that they had no knowledge of the lawfulness of competitor's prices one way or another; that they assumed them to be lawful; that although competitors had different prices to different purchasers, whether net or by reason of quantity or volume discounts, respondent's officials did not know whether such differentials were cost justified or not, and could not find out; that they knew of no court or Commission decisions holding that such prices were discriminatory, although they knew complaints had been filed against some of them charging price discrimination, but that charges were not proof. Cross-examination indulged in legalisms and technicalities which were obviously beyond the scope of the witnesses' knowledge. Without more detail, the Hearing Examiner is satisfied that respondent's officials did not know of any illegality in their competitor's prices, and, without expert legal knowledge of the intricacies involved in the appli-

22. 340 U. S. 231.

23. Ruling on appeal May 21, 1953, Docket No. 5770, E. Edelmann & Company.

cation of the Act, had no reason to believe so—a matter on which experts themselves disagree. Other holdings
178 by the Commission condemning as illegal volume or quantity discounts must, of course, be assessed in the light of each individual record and these witnesses could hardly be expected to do that. The "reasonable prudence" required must be interpreted through commercial, not expert or legal, eyes.

35. Counsel in support of the complaint contend that since respondent's prices have not been shown to be cost justified (hereinafter discussed), it follows that respondent's officials knew or must have suspected that their competitor's prices likewise could not be so justified, assuming that respondent has not, or cannot, cost justify its discounts. It has since the inception of this proceeding claimed that it can and does so justify and there has as yet been no holding that such cost justification is invalid. Counsel therefore imputes to respondent a rejection not so far made, and then upon this, further imputes a similar rejection of any cost justification which may or may not exist of competitor's discounts. This is to pile inference upon imputation. It is further to impute to respondent that its competitors' discounts had the same prohibited competitive effects herein found to follow respondent's pricing. The knowledge of illegality contended for by counsel in support of the complaint to be imputed to respondent can only be done by holding that any cumulative annual volume discount is per se illegal. No case yet so holds.[24]

36. The finding on this point, therefore, is that respondent's officials are reasonably prudent businessmen of life-long experience in the industry; that they had no knowledge of any price of their competitors being illegal, although they did know that different prices for the same merchandise were charged by such competitors; that they had no knowledge and could obtain none, as to whether such competitors' price differences could be wholly or partially cost justified, nor whether such competitors' differing prices had the statutorily proscribed competitive effects and that, therefore, assuming as the Hearing Examiner
179 must, that the standard recently set up by the Com

24. *Bruce's Juices Inc.* v. *American Can Co.*, 87 F. Supp. 985; 187 Fed 919 presents a far different factual picture in that, in that case, pooling of purchases from other plants was counted toward the qualifying volume, although, of necessity, costs thereat invoiced and the volume brackets were so wide in spread as to intentionally exclude 98 percent of purchasers.

mission on this point is a defense, such defense has been made out, on this legality issue.[25]

37. The final issue is respondent's defensive contention that its price differentials resulting from its cumulative annual volume discounts "make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." Since respondent sells to all by the same method, this defense is necessarily grounded on whether the different quantities in which it sells, justify the differing prices. To establish this, respondent has shown advertising expense, direct sales expense on a per account basis, and time and cost studies on a per order basis showing the cost of processing orders of various dollar size through the 21 steps each order must traverse from receipt to shipment.

38. To ascertain the latter, respondent employed in 1951, a qualified industrial engineer, who requested from, and was furnished by, respondent's sales manager over a period of time 17 orders, selected to show a range of dollar amounts.

These orders were time studied through their filling process, and cost of each ascertained by multiplying the handler's wage rate by the time consumed in each processing step with the following results:

Sales Order No.	Net Billing	No. of Packages	No. of Items	Processing Cost Per Dollar of Net Invoice
44524	$ 12.00	2	1	$.0992
44525	37.66	23	6	.0349
44576	45.14	29	20	.0431
44575	56.51	49	8	.0366
45968	125.20	69	33	.0211
180				
44572	134.47	116	25	.0233
46162	206.79	171	37	.0174
44577	208.64	86	36	.0150
44573	223.76	163	63	.0211
45969	259.80	110	49	.0147
45945	305.01	163	56	.0177
46161	341.79	236	49	.0130
44991	496.98	391	68	.0144
45078	523.22	334	81	.0166
45301	785.80	623	101	.0136
45079	811.57	598	94	.0141
44993	846.66	469	89	.0123

25. A number of comments, observations and reasons made by this Hearing Examiner in his initial decision in Docket No. 5770, E. Edelmann Company are apposite to the third and fourth issues in this proceeding, but their repetition herein would unnecessarily extend this opinion.

Graphs plotted from these figures, of course, show the obvious—the greater the net billing, the more packages per order, or the more items per order—the lower the total processing cost per dollar of net invoice. From this last graph it is then computed that, in even billing amounts, the processing cost per dollar and per order is as follows:

Net Billing	Total Processing Cost Per Dollar of Net Billing	Total Processing Cost Per Order
$ 20	$.0660	$1.32
40	.0500	2.00
60	.0420	2.52
80	.0380	3.04
100	.0340	3.40
150	.0270	4.05
200	.0225	4.50
250	.0190	4.75
300	.0170	5.10
350	.0150	5.25
400	.0145	5.80
500	.0125	6.25
600	.0115	6.90
700	.0105	7.35
800	.0100	8.00

39. Having thus arrived at the total processing cost per dollar of net billing, respondent then takes any customer in any discount bracket, totals his year's net billings and divides by the number of orders, to ascertain the average size order over the year, and multiplies this by the total processing cost per dollar of net billing applicable to that size order to obtain the actual processing cost of that customer's business. It is this latter computation
181 which contains a basic fallacy. Respondent's discounts are not granted on a quantity per order basis but upon an annually cumulated volume basis. If each customer's order was in exactly the same amount each time, this method might be acceptable, but a customer buying $15,000 annually of respondent's product might well send in as a substantial part of that volume a number of small and high cost orders, whereas contrariwise $500 of annual purchases could well be in two orders of $250 each.

As was said in *H. C. Brill Co., Inc.*, 26 F. T. C., 678:

"Purchasers of large annual amounts sometimes buy in larger individual shipments than do buyers whose purchases do not amount to as large a sum. Large buyers, however, also place numerous small orders and the average size of such orders is frequently less than the average size of orders placed by buyers whose aggregate annual purchases are less in volume. Indeed under a discount plan based on aggregate volume purchases for a given period, * * *, it may cost the seller more per dollar of sales to serve a customer who places a large number of small orders which are sufficient in the aggregate to earn the discounts, than to serve a customer who places a few large orders whose total is not sufficient to obtain the discount."

Reference to Commission's Exhibit 94 shows that the customer who sent in Sales Order 44993[26] in 1949 sent in 90 orders that year totaling $4,076.08 for an average of only $45.29 per order; whereas, the customer who sent in Sales Order 46162[26] bought in 1949 $6,304.88 in only 30 orders for an average order of $210.16. There is no showing of the number of orders received over the year 1951 from each of the 17 customers whose single orders were cost analyzed, nor any showing of their individual amounts, and hence it is impossible to tell how many orders varied precipitately from the average and hence how much actual cost variance there may have been. Respondent's actual records could have shown the exact processing cost of each and all orders from the 17 selected customers for 1951, but this was not done.

40. The point is made clearer by the same exhibit which shows the total year's billings in 1949, 1950 and 8 182 months of 1951 of the 17 selected customers, together with dollar size range of all orders received during each period, the number of shipments, and the average dollar size of total year's shipments. From this it is seen, for example, that the customer who in 1951 sent in Sales Order No. 44577[26] bought $378.63 worth of merchandise from respondent in 7 orders ranging in amount from $2.00 to $160.00 for an average of $54.09 per order; whereas in 1950, the same customer bought $844.68 worth of merchandise in only 3 orders ranging in amount from $189.00 to $445.00 for an average of $281.56 per order. This customer received no discount from jobber's list in either year, yet

26. Par. 38, *supra*.

respondent's processing cost was obviously markedly different. The same is true of the customer who in 1951 sent in Sales Order 44525[26] and received 10 percent off list as a discount. His total net billing for 1949 was $1,786.30 on 17 orders ranging in dollar size from $1.00 to $322.00 for an average of $105.08; whereas in 1950, $2,696.08 was bought in 11 orders ranging from $4.00 to $645.00 for an average of $245.10. This unreliability of averages as between customers in any one year and as between averages between the same customer in different years, where cumulation is practiced, is further illustrated by the fact that Sales Order 44577[26] used as a sample or typical instance, was in the amount of $208.64, far in excess of the average of $54.09 in 1949, and that in 1951 Sales Order 44525,[26] likewise used as a typical sample, was for only $37.66; whereas this customer's average order in 1949 was $105.08 and in 1950, $245.10. The latter lends support also to the contention of counsel in support of the complaint that 17 orders out of thousands received and processed annually (10,008 during 1949) cannot be typical and are far too few to be relied upon either absolutely or as a basis for averaging.

41. The finding, accordingly, is that respondent has failed to show by reliable, probative, substantial, and the best available evidence any justification for its price differentials due to actual different processing costs applicable to the different quantities to which the different prices apply.

42. The next item of cost offered as justification is respondent's advertising expense incurred in preparing, editing, and printing catalogs, price sheets, tune-up charts, signs, displays, circulars and trade magazine insertions, samples and show expense. In 1949, this amounted to $100,437.11 and by dividing this total by its 866 accounts, respondent arrives at a per account cost of $115.97, and it argues therefrom that for advertising alone respondent spent $115.97 for $600.00 worth of business at its no discount level, but for the same expenditure realized $12,000.00 worth of business at its 10-7 percent level.

43. Analysis of respondent's advertising expense, however, shows that the great majority of it cannot be properly allocated on a customer basis because it is general advertising not geared to any particular customer, to any particular product or line of products or to any particular

class, discount or otherwise, of customers. The breakdown is as follows:

Executive salaries	$ 6,200.00
Advertising office	9,249.61
Advertising trade papers	28,279.45
Advertising catalogs	32,389.07
Advertising printed matter	15,460.93
Advertising miscellaneous	650.76
Show expense	3,390.23
Display	3,531.88
Photo expense	1,169.29
Samples	115.87
	$100,437.11

It is obvious that the effectiveness of trade paper advertisements, broadcast generally throughout the trade, or show expense cannot be measured by any customer's volume—it can only be measured by respondent's over-all sales volume. The same is true of every other item except catalog expense. Respondent's president admitted that averaging this total expense on a per customer basis was arbitrary. It can only be allocated on a per dollar of sales basis which, of course, furnishes no cost justification for differing prices as between customers.

44. It is believed, however, that the catalog expense can properly be allocated on a customer basis because the record shows on the whole that these are distributed evenly, in fact, if there is any variance from this, it is in favor of the smaller-volume customer, inasmuch as respondent's salesman stated that the smaller the account volumewise, the greater the number of catalogs. It is from these catalogs, price sheets, tune-up charts, etc., that each jobber directly makes his sales, and his purchase volume can
184 be directly attributed to this material furnished by respondent. On this basis a total expense of $32,389.07 gives an expense of $37.40 per customer. Taking the median figure[27] of each volume discount bracket, the following results obtain:

27. Respondent in its proposed findings uses a median figure for the lowest discount bracket and the bottom or minimum figure for each other bracket. It is believed a median figure for each bracket is more accurate.

Median Purchase Volume for Each Discount Bracket	Catalog, etc. Expense	Percent of Sales	Cost Difference Percent	Price difference Percent	Percent of price not Justified
$ 600	$37.40	6.23			
1,800	37.40	2.08	4.15	5	0.85
3,000	37.40	1.25	0.83	2	1.17
4,800	37.40	0.78	0.47	3	2.53
7,200	37.40	0.52	0.26	4.5	4.24
10,200	37.40	0.37	0.15	0.9	0.75
	37.40	0.31	0.06	0.9	0.84

The above represent the amount of cost justification of the various discounts between each successive bracket, but therefrom can be ascertained also the amount of cost justification between non-successive brackets as, for instance, between the lowest and highest bracket,

$ 600	$37.40	6.23%			
12,000	37.40	0.31%	5.92%	16.3%	10.38%

The net result is that the price differences are partially, but not wholly, justified by cost savings.

45. The finding on advertising cost therefore is that $68,048.04 of respondent's advertising costs cannot be allocated on a per customer basis, but can only be allocated on a per dollar of sales basis, which furnishes no cost justification for the price differentials charged; that $32,389.07 representing cost of catalogs, price sheets, tune-up charts, etc., can be allocated as urged and when so allocated partially justify, but do not wholly justify, the price differentials charged.

185 46. The last record item of cost justification is that of direct selling expense totaling $159,433.59 in 1949 broken down as follows:

Salesmen's salaries	$67,662.00
Salesmen's commissions	11,217.20
Travel expense	70,433.12
Entertainment	4,652.73
Sales conferences	5,468.54

This expense covers 12 districts embracing all of the United States, except New York City, the New England States and Pacific Coast States which are serviced by factory representatives who employ their own salesmen. There is one salesman to each of the 12 districts. Respondent's president and sales manager testified that each such salesman calls on each account in rotation 5 or 6 times a year and makes an equal number of calls on each jobber, irrespective

of size, but spends more time per call with the smaller-volume jobber than with the larger-volume jobber because with the former it is necessary to physically check his inventory; whereas, the latter usually has a perpetual inventory system; and because it is often necessary for the salesman to wait around to see the smaller-sized jobber to get an order because the latter must make deliveries and calls himself and must himself wait on a counter customer; whereas, the larger-sized jobber has a purchasing agent who is readily available.

47. On this basis of the same number of calls per salesman, per customer, respondent then divides total direct selling cost by number of accounts and arrives at an average cost per account of $204.00 and contends that since that expenditure with a small jobber brings in only $1,200.00 or less, that same cost with the largest jobber brings in $12,000.00 or more and therefore the price differential of 10-7 percent in favor of the latter is pro tanto cost justified.

48. This claimed result must stand or fall on the soundness of its basis—namely, that respondent's salesmen make the same number of calls per year on each customer regardless of size. This is supported by the generalizations of respondent's president and sales manager, but is not corroborated by any record of such calls. Salesmen must routinely report itinerary, expense and time to re-
186 spondent, but such records were not produced, it being stated that they had been destroyed. The testimony of the one typical district salesman who testified refutes the generalizations of his superiors. His territory embraced Alabama, Arkansas and Mississippi and parts of Florida, Kentucky, Louisiana and Tennessee, and customers of respondent called on therein were located in 43 towns.[28] The salesman testified he not only called on respondent's jobber customers in these towns, but also contacted 18 prospective customers located in other towns one or more times during 1949, and called on prospective dealer customers with jobbers' salesmen on an average of 15 or 20 times a month.[29] Time spent on such missionary work can obviously not be allocated on a per customer basis. Furthermore, this salesman's headquarters were in Memphis, Tennessee; his trips therefrom ranged from one day to three weeks at a time. The number of his visits to towns where

28. RX 60A-L; RX 25; CX 47A-E.

29. Tr. 1354; 1418-34.

respondent's jobber customers were located ranged from 1 to 7 calls, except Memphis, during 1949, with the majority receiving only 2 or 3 visits. He called on the 4 jobber customers in Memphis between 3½ and 4 times during 1949. A comparison of the itinerary [30] of this salesman for 1949, taken from his weekly expense books with the location of his customers in his area,[31] shows the following:

Frequency of 1949 Calls	Number of Jobbers J	JA	D	DA
No calls	2	1	1	0
1 call	1	5	3	1
2 calls	2	5	5	7
3 calls	5	1	1	6
4 calls	0	1	2	6
5 calls	0	0	1	1
6 calls	1	0	0	0
7 calls	0	0	0	1

The testimony of this salesman and the exhibit of his 1949 itinerary were apparently offered as typical of other salesmen of respondent and in corroboration of the general testimony of respondent's officials that salesmen make the same number of visits to every account. Instead of
187 corroboration, it is refutation, and since it is specific and in detail has greater weight than the aforementioned generalizations. It is concluded, therefore, that the asserted basis for allocation is not established by reliable and substantial proof and therefore that any computations or extensions or conclusions upon such basis are untenable and unacceptable.

49. The defense of cost justification to price discrimination is an affirmative one, and the burden is upon him who asserts it to establish it by detailed specific evidence rather than by conjecture, speculation, arbitrary allocation or broad averaging,[32] because such costs are peculiarly and solely in the possession of and under the control of respondent. Failure to keep detailed records cannot be accepted as an excuse for substituting generalizations for actual outlays. Respondent herein has largely failed to sustain this burden.

30. RX 60A-L.

31. CX 47A-E.

32 See *Russellville Canning Co.* v. *American Can Co.*, 191 F. 2d 38.

50. In summary, respondent has attempted to establish its defense of cost justification in much the same manner as its defense of meeting competition in good faith—generally, instead of specifically, with generalizations and opinion rather than with detailed records which are solely within its knowledge and ability to keep and maintain and under its control. Judicial interpretation of the statute involved is to the contrary.

Conclusion.

Respondent has violated the provisions of Section 2(a) of the Clayton Act (15 U. S. C. 13) by discriminating in price between its customers competitively engaged in the resale of products purchased by them from respondent at differing prices and has failed to establish either of the two asserted defenses which are provided in the statute, by substantial, reliable and probative evidence.

Order.

It Is Ordered that respondent C. E. Niehoff & Co., a corporation,[33] directly or through any corporate or other device, in or in connection with, the sale for replacement purposes of automotive products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from discriminating, directly or indirectly, in the price of said automotive products of like grade and quality, by selling to any purchaser at net prices higher than the net prices charged any other purchaser, which purchasers compete, in fact, in the resale of said products; except insofar as such price differences do not exceed the amounts thereof, under respondent's current pricing practices, herein found to be cost justified.

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Frank Hier,
Hearing Examiner.

July 6, 1954.

33. The phrase "officers, representatives, agents and employees" is omitted on the authority of *R. J. Reynolds Tobacco Co.* v. *F.T.C.*, 192 F. 2d 535, 540-4, which case the Hearing Examiner regards as apposite and binding on himself and upon the Commission.

345 UNITED STATES OF AMERICA.

• • (Caption—5768) • •

Commissioners:

Edward F. Howrey, Chairman,
Lowell B. Mason,
James M. Mead,
John W. Gwynne,
Robert T. Secrest.

FINAL ORDER.

Counsel for respondent C. E. Niehoff & Co., and counsel supporting the complaint, having respectively filed on November 18, 1954, and November 19, 1954, their cross appeals from the initial decision of the hearing examiner in this proceeding; and the matter having been heard by the Commission on briefs and oral argument; and the Commission having rendered its decision denying the respondent's appeal and granting in part the appeal of counsel supporting the complaint and affirming the initial decision as modified:

It Is Ordered that the order contained in the initial decision be, and it hereby is, modified to read as follows:

It Is Ordered that respondent C. E. Niehoff & Co., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in, or in connection with, the sale of automotive products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from discriminating, directly or indirectly, in the price of said auto-
346 motive products of like grade and quality, by selling to any purchaser at net prices higher than the net prices charged any other purchaser, which purchasers compete, in fact, in the resale of said products.

It Is Further Ordered that the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist.

By the Commission.

Issued: May 17, 1955. Robert M. Parrish,
Secretary.

L. B. M.
J. M. M.
J. W. G.
R. T. S.

347 BEFORE FEDERAL TRADE COMMISSION.

Commissioners:

Edward F. Howrey, Chairman.
Lowell B. Mason,
James M. Mead,
John W. Gwynne,
Robert T. Secrest.

* * (Caption—5768) * *

OPINION OF THE COMMISSION.

By Secrest, Commissioner:

Presented for our determination here are the cross appeals filed by the respondent and counsel supporting the complaint from the initial decision of the hearing examiner. The initial decision held that respondent had discriminated in price in violation of Section 2(a) of the amended Clayton Act, and ordered respondent to cease and desist from:

> "* * * discriminating, directly or indirectly, in the price of (its) automobile products of like grade and quality, by selling to any purchaser at net prices higher than the net prices charged any other purchasers, which purchasers compete, in fact, in the resale of said products; except insofar as such price differences do not exceed the amounts thereof, under respondent's current pricing practices, herein found to be cost justified."

In urging under its appeal that the complaint instead should be dismissed, the respondent contends, *inter*
348 *alia*, that the hearing examiner erred in concluding that the effects of respondent's price differentials may be to injure, destroy and prevent competition among and between purchasers who pay respondent's higher prices and those accorded its lower prices, and also in concluding that a violation of Section 2(a) of the Act had been established by the record. Additionally urged as error under the appeal was the hearing examiner's failure to find that the respondent's price differentials were established in good faith to meet the equally low prices of its competitors and his declining to rule that a complete defense had been

established by respondent under Section 2(b) of the Act. Also excepted to is the examiners' rejection of respondent's contention that the evidence submitted in the course of its defense showed its price differentials to be fully cost justified under the Act, rather than only partially so.

Respondent, an Illinois corporation, with its office and factory located in Chicago, is engaged in the manufacture, sale, and distribution of a complete line of automotive replacement ignition parts (excepting spark plugs and generators), a complete line of hydraulic brake parts for all makes of automobiles and trucks, as well as a line of testing equipment and a line of rebuilt items. Respondent manufactures about 65% of all the items it sells. Respondent's sales are limited to the replacement parts field commonly known as the "after market", making no sales to the original equipment market (automobile manufacturers); thus, except for certain areas in which it affects distribution through manufacturers' agents, respondent sells its products almost exclusively through independent automotive jobbers who in turn resell to garages, fleet owners, gasoline stations, and over-the-counter.

In 1949 respondent's wholesale customers, said to number 866, were divided into four classifications for pricing purposes, namely, Jobber, Jobber with Agreement, Distributor and Distributor with Agreement. Classified as a "Jobber" were those purchasers with an anticipated annual volume in respondent's products of under $1200. Buyers in this classification purchased respondent's products at its base price and received no discount other than the 2% cash discount for prompt payment accorded all purchasers. Jobbers with annual purchases ranging from $1200 to $3600 were classified as "Jobbers with Agreement", and as such received discount allowances ranging from 5% to 10%, depending on their volume. Dis-
349 tributors purchasing $3600 to $6000 from respondent, received a 10% discount off of the jobber's base price on their purchases. Jobbers whose annual purchases exceeded $6000 were classified as "Distributors with Agreement" and in addition to respondent's 10% discount, these purchasers received certain additional discounts ranging from 5% to 7% depending on their annual volume; hence, it appears that respondent's prices differed between customers in its four classifications and as between individual members in these classifications. All of respondent's jobbers were classified for discount purposes at the be-

ginning of each year using as a basis therefor their purchases for the preceding year.

In addition to these jobber classifications, respondent also sells to one buying group, Cotton States, Inc., of Greenwood, Mississippi, and respondent treats this group as one purchaser and sells it as a "Distributor with Agreement", using as its basis the aggregate purchases of the group. However, respondent admits, and the hearing examiner so found, that all individual members of this group could not qualify under respondent's stated basis for the individual discounts allowed.

In objecting to the initial decision's conclusion that the effects of respondent's price discriminations may be to injure, destroy and prevent competition between purchasers receiving the benefits of the discriminations and those paying respondent's higher prices, respondent states that the record does not show that purchasers of its goods which are located in the same trading area in fact compete with each other. In appraising this contention, we have considered the testimony received, which expressly relates to the Memphis and New Orleans trading areas, and to Chicago and other areas as well. The competitive situation prevailing among respondent's Chicago wholesalers would appear to be broadly representative of other metropolitan areas, and we are of the view that the record conclusively shows that competition, both actual and potential, exists among and between many of respondent's customers who are required to pay different prices for its merchandise. Respondent's contention that the competitive situation prevailing among its Chicago wholesalers cannot be considered because this area represents a purely intrastate phase of respondent's business, not subject to the Commission's jurisdiction, is without merit. The intra or inter state nature of respondent's business in the Chicago area is not controlling to our conclusion that this area is broadly representative of other areas and that competition does, in fact, exist between respondent's customers.

350 The initial decision correctly held that a much smaller discount or price differential than respondent herein grants directly and markedly affects profit margins; that the price differentials which a jobber enjoyed accounted for all or most all of his actual net profits, and that the failure of respondent's jobbers to take advantage of the 2% discount for cash, which respondent affords to

all of its purchasers, would, in instances, wipe out or materially reduce small jobbers' net profits. Rejected is respondent's contention under the appeal that its discounts are only important to its large jobbers. Consonant with the hearing examiner's findings, we believe the record clearly shows that respondent's discounts and rebates to its favored customers carried a direct potentiality of injuring, destroying and preventing competition among its purchasers.

Relevant to this conclusion is evidence in the Chicago area which indicates that one of the respondent's price-favored customers did not uniformly maintain respondent's suggested resale prices, but, in instances, cut prices in situations where it was believed others were offering reduced prices on respondent's merchandise. Objection is interposed under respondent's appeal to the initial decision's statement that it was doubtful that this particular purchaser could have made those price reductions in the absence of the additional discounts afforded him under respondent's pricing program. This particular purchaser sold over a large territory into several states and he stated that his net margin of profit incident to his extensive operations was very low. It would be unrealistic to conclude that his decision to reduce prices in the instances referred to was not materially influenced by the greater gross profit margin afforded under the respondent's pricing program. The initial decision's views on this score are nowise refuted by the circumstance that the lead in reducing prices may have been taken by small volume purchasers who elected to reduce their profit margins in the interests of increasing sales volume in their territories.

In further support of its contentions that no injurious competitive effects may result from its discriminations, the respondent states that its additional discounts and allowances do not entirely compensate wholesalers selling in larger volume for the additional sales efforts and expense incurred in obtaining sales, and that these extra expenses must be absorbed in part from regular margins afforded to all customers. This, however, does not signify, as also urged by respondent, that jobbers denied the additional discounts have a marked competitive advantage over their price-favored rivals. The jobber paying list prices likewise must canvass or otherwise maintain contact with the repair shops and other outlets for respondent's
351 merchandise; he, too, must incur expense in selling those customers on the merits of the Niehoff products

and promptness of his service in filling their requirements and his necessity in those respects scarcely lessens when other Niehoff dealers, whether local or distantly situated, are enabled by respondent's additional discounts to extend or intensify their efforts in those regards. We do not share respondent's view, therefore, that no adverse effects are probable from respondent's pricing practices which accords greater profits to purchasers who resell in higher volume brackets.

Respondent's additional discounts and volume allowances clearly are available for innumerable purposes which in this highly competitive resale field can be used to promote the commercial growth of jobbers granted them. It is not controlling, therefore, that certain of the witnesses who competed with recipients of respondent's larger discounts stated that they had observed no adverse effects from competitive selling activities. Some unfavored jobbers testified that they wanted respondent's lower prices for the purpose of expanding their businesses. It is true that no evidence was presented relating to any specific instances in which financial failure may have stemmed from respondent's pricing practices but this does not support the appeal's position that conclusions below respecting the illegality of respondent's pricing program are based on a doctrine that the differentials are illegal, per se. Contentions in this regard ignore other matters revealed in the record, including the fact that the differentials are substantial and materially influence the competitive positions of purchasers who resell respondent's merchandise in this highly competitive field.[1]

Only brief reference is warranted with respect to the matters additionaly raised by the respondent in connection with this aspect of its appeal. The fact that a
352 number of respondent's larger volume jobbers began handling its lines originally as small jobbers and were not then eligible for discounts under its pricing program does not mean that its discounts are attainable by all of its jobbers. For example, in 1949, more than one-third of respondent's jobbers were in a volume bracket which en-

1. Observations on factors other than financial failure which may contribute to or materially affect an unfavored purchaser's ability to compete are discussed in our opinions in Docket 5770, E. Edelmann & Co., Docket 5723, Moog Industries, Inc., and Docket 5722, Whitaker Cable Corporation. The testimony of the small jobbers in the present record would support many of our comments and observations made in these decisions in this regard.

titled them to no extra allowance and only slightly less than 50% of its domestic volume was purchased by fewer than 100 jobbers who were in the highest discount brackets. As pointed out by appellant, the initial decision held there was no showing in the record that respondent's pricing practices had injured manufacturers competing with it in the sale of similar merchandise or that respondent's price-wise favored purchasers were achieving a monopolistic position in the resale of its merchandise. However, in opposition to appellant's contention, these matters are no-wise inconsistent with that decision's rulings that the effects of respondent's discrimination in price may be to injure, prevent and destroy competition among its purchasers competing in the resale of such merchandise.

We consider now the respondent's contention that the initial decision erred in failing to find that respondent's price differentials were made in good faith to meet the equally low price of a competitor or competitors within the meaning of Section 2(b) of the Act.[2] The evidence received indicates that the prices of many of respondent's rival independent replacement parts manufacturers are somewhat lower than its prices. The average of respondent's prices is higher than those of its competitors in this category yet lower than the prices of original parts manufacturers such as Autolite and Delco-Remy, who likewise sell into the replacement field. Respondent's discount program is generally similar to some but is not identical with the schedules adopted by ten of its principal independent competitors. The respondent has one basic price schedule and it is from this that its various discounts and rebates are granted. Its accounts, as previously noted, are classified for discount purposes at the beginning of each year on the basis of their purchases for the preceding year. The initial decision correctly found that respondent's price differentials are a part of a nationwide pricing system formulated to meet competition generally and not designed to meet exactly any competitor's prices.

353 Respondent contends that the ruling rejecting its defense represents an erroneous application of the legal

2. Price discriminations prohibited by Section 2(a) of the Clayton Act are nevertheless justifiable by virtue of Section 2(b), which declares that nothing in the Act "shall prevent a seller rebutting the *prima facie* case thus made by showing that his lower price * * * to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor * * *".

principles enunciated by the Supreme Court in the *Staley* and *Standard Oil* cases[3]. We do not agree. Controlling in our evaluation of the examiner's findings is the circumstance that it is individual competitive situations to which the exemptive provisions of the statute relate and not general systems of competition. This is not to say, however, as suggested in the initial decision, that evidence directed to showing that the sellers' discriminations were temporary and localized in area is an indispensable prerequisite to establishing a defense under the subsection. We do find, however, that a pricing program which provides for an inherent pattern of discrimination among competing customers and is geared generally to competing for business and not specifically for meeting competing prices is not within contemplation of this defense. Respondent has not shown by substantial, reliable and probative evidence on this record that its lower price or prices were made to meet an equally low price or prices of a competitor or competitors.[4]

The respondent introduced evidence which was the basis for its contention below that the price differentials resulting from its volume discounts were justified by differences in costs incurred in selling and delivering merchandise to customers in the various discount classifications[5]. This evidence related to justification stemming from alleged differences between its four jobber classifications; (1) in the cost of processing and filing purchase orders, (2) in selling costs, and (3) in advertising expenditures. The initial decision rejected respondent's contentions of justification for its differentials resulting from matters in the first two categories and also rejected in part but 354 adopted insofar as they related to partial justification of catalogue expense those included in the third category. Respondent's appeal challenges the initial decision's conclusions adverse to its position and the appeal of counsel supporting the complaint interposes objections to the holding relating to catalogue expense.

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3. *F.T.C.* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746; *Standard Oil Company* v. *F.T.C.*, 340 U. S. 231.

4. Cf. Opinion of the Commission in Docket No. 5770, *E. Edelmann & Company*.

5. Section 2(a) provides that nothing in the Act "shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

Among other evidence received bearing on the first issue, respondent offered data pertaining to the purchases of two customers in one city who were accorded different prices and to those of two others similarly buying at different prices in another city. This evidence was directed to showing that approximately one-fourth of the price differentials between the customers in each of these respective areas may have been justified in certain years by differences in cost of filling and processing orders. Respondent's price differentials are not scaled on a quantity per shipment or order basis but formulated instead on annual volume of purchases, and, as previously stated, contemplate that the progressively high discounts afforded for each corresponding volume bracket in respondent's schedule be applied retroactively or cumulatively. When weighed with the other evi nce, the matters pointed to by respondent do not suffice for informed conclusions that particular average ranges or sizes of purchase orders are in fact representative or typical for customers in each of respondent's volume classifications. We concur in the initial decision's conclusion that the respondent has failed to show by reliable, probative and substantial evidence that its price differentials have been justified by actual differences in costs of filling and processing orders among purchasers in respondent's various annual volume brackets.

On the basis of evidence indicating that direct selling expense incurred in twelve sales districts totaled $159,433.59 in 1949, and other evidence relied upon in support of its contentions that each customer, large and small, was called on substantially the same number of times, respondent states that this expense represents $204.00 per account. Its method of apportionment relates to each $100.00 of sales; to illustrate, respondent's sales cost for a jobber on a basis of annual purchases of $600.00 would be deemed $34.00 per $100.00 of sales; for a purchaser in the $6,000 bracket $3.40 on $100.00 of sales. When so allocated, salesman's cost affords complete cost justification at the first two volume classifications and substantial justification at all other levels. The initial decision held that the evidence

relied upon by respondent in support of its contention
355 that the same number of visits are made on accounts large and small was general and conjectural in nature and that it was refuted by specific testimony and evidence showing details of the sales activities engaged in in a typical sales territory.

In contending that the initial decision erred in this respect, the respondent states that the testimony relating to that particular territory shows that in each trading area which he was able to visit, the salesman called on each jobber account an equal number of times. The contrary inferences drawn from the expense book exhibits referred to in Paragraph 48 of the initial decision are unwarranted, respondent also argues, for the reason that the exhibits merely designate the towns where the witness stayed over night or headquartered for the purpose of making calls in nearby towns rather than showing the towns in which the salesman actually made calls. Respondent also states that the exigencies of its business, including the constant efforts of its competitors to lure away respondent's accounts, require its salesmen to make a substantially equal number of calls on accounts under a rotation plan pursuant to predetermined travel schedules.

The desirability of frequent contacts with the jobber accounts by respondent's representatives is plainly apparent. This does not mean, however, that the evidence presented by the respondent fairly supports conclusions that accounts, large and small, are contacted a substantially equal number of times. Salesmen are not only expected to contact prospective jobber customers, but they also are required to make missionary calls on prospective customers of dealers with jobbers' salesmen. The salesman whose testimony was referred to in the initial decision likewise performed these duties. Respondent's contentions to the contrary, an appraisal of the testimony and exhibits permits reasonable inferences regarding sales contacts actually made. Irrespective, however, of the accuracy of the tabulation of sales calls which appears in the initial decision, there can be no doubt but that this salesman's calls as between large and small customers were disproportionate. For example, an undisclosed number of his 59 jobber accounts, necessarily larger ones, maintained branches; but the witness, in addition to keeping regular contact with such accounts' main offices, followed an apparent policy of making calls on branch operations. The record, we believe, requires our denial of this aspect of the respondent's appeal from the initial decision.

The third item of cost pointed to by respondent as asserted justification for its price differentials relates
356 to advertising expense. Its expenditures in this connection falls into ten categories, including those for

salaries, advertising office, trade papers, catalogues, other advertising printed matter, miscellaneous advertising, show expense, display, photo expense and samples. In 1949 they aggregated $100,437.11, and by dividing this amount by its asserted total of 866 jobber accounts, respondent has arrived at a per account cost of $115.97 and the respondent would allocate this in the same manner as salesman's expense.

The initial decision, however, ruled that the effectiveness of trade paper advertisements, show expense and the other items, except for catalogue expense, cannot be measured by an individual customer's volume but must be allocated only on the basis of respondent's overall sales volume. With respect to catalogue expense, however, in which category the hearing examiner included expenses for price sheets and certain tune-up charts, the decision below expressed views that customers' purchases were directly attributable to this promotional material as furnished by respondent, and it ruled that advertising expense of $37.40 per customer properly could be prorated equally as against each $100.00 of purchases in the various volume brackets. Under that holding, respondent's price differentials were regarded as partially justified as outlined in the table set forth in Paragraph 44 of the initial decision.

In objecting in part, respondent states that the primary and over-all purpose of respondent's advertising in trade publications and through direct mail is to gain new jobber accounts and to retain old ones, and that equal apportionment of all forms of advertising expenses among current accounts accordingly is a practical and realistic business procedure. Detailed evidence relating to the form and make-up of the advertising engaged in under each of the foregoing categories was not submitted for the record. We think, however, that the hearing examiner correctly held, in effect, that the foregoing items do not furnish a proper basis of cost justification for respondent's price differentials.

Counsel supporting the complaint urge under their appeal that the initial decision erred in finding that the respondent had successfully carried its burden of showing the necessary proof relative to partial cost justification incident to catalogue expense; and in opposition there-
357 to, respondent maintains that the hearing examiner limited the cost justification to the catalogue expense through inadvertence and really intended to include in that

category additional expenses incurred for other printed matter and for photographic expense for a total additional outlay of $49,019.29.

In this connection, the initial decision stated that the record as a whole shows that the catalogues are evenly distributed and that, according to the testimony of one of respondent's salesmen, any variance therefrom favors the smaller volume customer. Although the record is lacking in clarity as to policies adopted and procedures followed in distributing catalogues and printed matter, we think that the initial decision's basic premise of substantially equal distribution to, and utilization by, the stated 866 jobber accounts is refuted by the record. Bearing on this is the testimony of respondent's sales manager who stated that, on original mailings, respondent submits catalogues to the jobbers for all of their binders used at counters and carried by salesmen plus catalogues for buyers and for sales managers. The witnesses pointed out that the small jobber might require two or three, others six or eight, and that some jobbers have 18 salesmen out and use six counter binders. When taking on a new account, respondent makes inquiry of the number of catalogues which it will require. Both small jobbers and large jobbers are encouraged to distribute any additional catalogues and other printed matter furnished down through the trade purchasing from them, but smaller jobbers, according to the testimony of respondent's representatives, are more active on this score. According to the testimony also, an undisclosed percentage of the catalogues and price lists are used by the respondent in soliciting prospective jobbers to handle the Niehoff lines.

Exact distribution figures were not made available for the record for 1949 or any other year. It appears, however, that in 1951, respondent printed approximately 50,000 catalogues for its ignition line, and the run for the hydraulic catalogues was believed by a company witness to be 10,000. In 1949 respondent compiled three types of catalogues, one for its ignition line and testing equipment, another for its hydraulic brake line, and a third, and much smaller catalogue, which related to parts and testing equipment for Ford, Mercury and Lincoln automobiles. Distribu-
358 tion of respondent's catalogues among purchasers had to vary greatly inasmuch as some jobbing accounts have handled only respondent's line of ignition parts, others only the hydraulic brake line, others limited their purchases to special items for the Ford lines and still

others purchased all lines. The number of customers in each of these categories is not disclosed by the record, but the record suggests that the distributors with agreement customarily handled both the ignition and hydraulic lines and, accordingly, utilized those catalogues. Purchasers in this category received respondent's greatest discounts and rebates and it included customers who travel larger numbers of salesmen and maintain branches.

Other facts appear in the record showing that an allocation of catalogue costs equally among 866 direct jobbing accounts represents an inaccurate procedure. Data submitted by respondent is to the effect that, in 1949, it had 866 jobbing accounts, of which number 98 assertedly received the greatest discounts and purchased as distributors with agreement. Testimony was received, however, indicating that these figures did not include the individual members of Cotton States, Inc., a cooperative buyer group. All of its nine members and two of the branches of one of them submitted their purchase orders direct to respondent and were accorded its greatest discounts. Not all of respondent's merchandise, moreover, is sold through its domestic jobber accounts, among whom respondent would equally apportion its advertising expenses. In addition to approximately $2,000,000 per annum of net sales through those accounts, approximately $300,000 is distributed annually to export customers. The record, however, is silent as to whether these customers participate in respondent's advertising programs.

Furthermore, some of respondent's accounts receiving the larger discounts have done a subjobbing business, and they, except in instances where these accounts print house catalogues of their own, manifestly require larger supplies of printed matter to assist such jobbers in their resale of the Niehoff lines to garages and filling stations. Respondent's allocation takes no cognizance whatsoever of catalogues and advertising matter utilized in this manner. Noted in this connection is the fact that L. C. Bigelow, reported by respondent to be its only customer in the New York and New Jersey Metropolitan area, pur-
359 chased a substantial quantity of respondent's products in 1949; and, according to the record, it sold only to other automotive parts jobbers, no sales being made by it direct to garages and filling stations.

We, accordingly, reject the initial decision's view that the record supports conclusions that respondent's cata-

logues are evenly distributed or utilized by its accounts. The appeal of counsel supporting the complaint from the initial decision's ruling in reference to advertising expense is, therefore being granted.

We have considered the respondent's exceptions challenging the hearing examiner's rulings excluding certain evidence offered by it. Under one of such rulings, the hearing examiner declined to receive data relating to certain surveys conducted by National Standard Parts Association. These assertedly were offered in corroboration of other evidence directed to showing that larger jobbers incurred higher expenses in conducting their business operations which was one of the matters urged in support of respondent's contention that its larger discounts and rebates could not be deemed to be injurious to smaller volume jobbers from whom they were withheld. The questionnaire forms which were the basis for these tabulations were disseminated among the Association's entire membership numbering between 1,100 and 1,200 and returns ordinarily are received from approximately 10% of the membership. Included among the members submitting the returns were some Niehoff customers but their exact number and identity were not disclosed.

The reports prepared from the questionnaires represent industry averages relating to the financial operation of jobbers in small, medium and large categories. The information furnished in the questionnaires include merchandise costs and receipts in the aggregate, gross profit, expenses and net profit. In rejecting the tabulations, the hearing examiner held that opportunity for full cross-examination respecting the accuracy of the surveys and supporting data was not afforded. The data furnished concern all forms of automotive products and are unsegregated as to any product category; hence, the lack of materiality of these industry studies as a basis for evaluating what 360 may be the effects of the respondent's pricing practices between and among its competing customers is plainly apparent. In this situation, therefore, it does not appear that the challenged ruling of the hearing examiner was unduly restrictive or in any way prejudicial to the respondent's rights.

Somewhat similar considerations are applicable in appraising respondent's exceptions to the hearing examiner's exclusion of the Crowell-Collier Survey in reference to car owner repairs. This survey was offered to show that of

the automotive repairing in this country, 54% was done in the shops of franchised automobile dealers. That proffered evidence manifestly was irrelevant and immaterial to the issues presented here and its exclusion by the examiner was proper. Considered also are the matters urged by respondent in support of its exceptions to certain of the hearing examiner's findings of facts and his rejection of various of its proposed findings. We think, however, that those challenged findings and rulings are free from substantial or prejudicial error and respondent's exceptions thereto are denied accordingly.

Stating that an order requiring the respondent to terminate its unlawful discriminations will destroy the Niehoff business when its competitors are not likewise enjoined, appellant requests that this proceeding be held in abeyance until the Commission can place all industry members under identical restrictions. The pricing practices used by the respondent, however, have been found to be in violation of law. Since their continuance by the respondent is likewise unlawful the Commission's duty, under the applicable statute, is to require their termination forthwith. That respondent's business may be adversely affected by the requirement to cease its unlawful conduct does not counterbalance the precedent which would be set by the requested action which, if followed, would mean that Commission orders would be forever pending and unlawful practices rarely, if ever, corrected.[6]

361 Also considered are respondent's objections to the substance and form of the order contained in the initial decision. The provisions of the order are reasonably related to the unlawful general course of conduct found to have been engaged in by the respondent, and the order, therefore, cannot be regarded as unduly lacking in specificity. The fact that the order forbids respondent from discriminating "directly or indirectly" in the respects there designated does not mean, moreover, that the proscriptions of the order exceed the authority of the Commission under the Act. Inclusion of the word "indirectly" is designed to prevent evasion of its orders and similar

6. Relevant to our consideration here is the opinion of the Second Circuit Court in *Dictograph Products* v. *F.T.C.*, 217 F. 2d 821, 826. Judge Medina, for the Court, therein stated that: "Preliminarily, it should be noted that potential or even probable adverse effects upon petitioner's business alone is not a sufficient basis for withholding injunctive relief. Were we to hold otherwise, we would quite effectively draw the teeth of Section 3 and of the antitrust laws generally."

provisions have been included in other orders of the Commission, including the modified orders issued in the *Standard Oil*[7] and *Morton Salt*[8] cases. Nor is there any sound basis for respondent's contention that the record requires that a distinction be made in the order as between respondent's sales to its regular jobber accounts and sales made to or through its manufacturers' agents. We regard the various objections interposed by the respondent to the initial decision's order to be without merit.

In further reference to the order, we have, as previously noted, rejected the initial decision's holding that the respondent's price differentials are partially justified by savings or considerations related to catalogue expense. Our order, therefore, makes appropriate provision for modifying the initial decision's order in this respect. For reasons explained in our decision in the Edelmann matter, Docket No. 5770, we likewise are modifying the order below in the instant proceeding (1) by striking the phrase "for replacement purposes"[9] and (2) by inserting words to the end that the proscriptions of the order be additionally directed to the respondent's officers, representatives, agents and employees.

We have granted that part of the appeal of counsel supporting the complaint objecting to certain of the initial
362 decision's rulings with reference to catalogue expense, but an additional point is urged under the appeal. The initial decision in effect held that the status of the price of respondent's competitors as lawful or unlawful was not controlling to decision here, but additionally ruled that knowledge could not be imputed to the respondent that its competitors' prices were in fact illegal. Counsel's appeal primarily interposes objection to the latter and related conclusions and states that implicit in them is the erroneous holding that the respondent has successfully carried the burden of showing necessary proof relative to the lawfulness of competitors' prices. As previously observed, however, the hearing examiner ruled that the lower prices afforded its purchasers under respondent's continuous nationwide pricing program did not represent prices made to meet an equally low price or prices of competitors as con-

7. *Standard Oil Company* v. *F.T.C.*, *supra*.

8. *F.T.C.* v. *Morton Salt Company*, 334 U. S. 37.

9. The record reveals that respondent's discriminatory practices relate to its testing equipment and tools as well as its products designed for replacement purposes.

templated by the language of Section 2(b). The lawfulness or unlawfulness of its competitors' prices are therefore not in issue inasmuch as respondent's defense has been found legally insufficient on other grounds. We are therefore denying this phase of the appeal of counsel supporting the complaint and are denying the respondent's appeal, but are granting the appeal of counsel supporting the complaint to the extent previously described in this opinion. With the order to cease and desist modified in the manner previously discussed, the initial decision is affirmed.

May 17, 1955.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

C. E. Niehoff & Co., a corporation, *Petitioner,*
vs.
Federal Trade Commission, *Respondent.*
No. 11526.

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL TRADE COMMISSION.

To the Honorable Judges of the United States Court of Appeals for the Seventh Circuit:

Now Comes C. E. Niehoff & Co., an Illinois corporation (hereinafter referred to as the "Petitioner"), having its office and place of business at Chicago, Illinois, by its attorneys, and petitions this Court for a review of an Order of the Federal Trade Commission (hereinafter referred to as the "Respondent"), heretofore entered, respectfully representing to this Court as follows:

Statement of the Nature of the Proceedings as to Which Review Is Sought.

1. The proceedings as to which this review is sought were instituted against this Petitioner by a Complaint of the Respondent issued May 1, 1950. Said proceedings before the Federal Trade Commission were entitled "In the Matter of C. E. Niehoff & Co., a corporation, Docket No. 5768." The Complaint sought a cease and desist order

against the continuance of certain alleged practices of the Petitioner on the ground that such practices violated Subsection (a) of Section 2 of the Clayton Act (U. S. C. Title 15, Section 13) as amended by the Robinson-Patman Act approved June 19, 1936.

2. The alleged practices of Petitioner charged by the aforesaid Complaint to be violative of the Robinson-Patman Act are that Petitioner, in the course of its sale of automotive products and supplies to different purchasers throughout the United States, engages competitively with other companies selling comparable products to purchasers, many of which purchasers are competitively engaged each with the other; that Petitioner discriminates in price between such purchasers by selling its products at higher and less favorable prices to "small businessmen purchasers" than it sells such products to "large purchasers," some of whom are competitively engaged with some of the less favored purchasers and with some of the purchasers from Petitioner's competitors; that the effect thereof may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which Petitioner and such favored purchasers are engaged, or to injure, destroy or prevent competition with Petitioner, said favored purchasers or with customers of either of them.

3. Petitioner's Amended Answer filed June 18, 1952, admits that it is engaged at Chicago, Illinois, in the manufacture, sale and distribution of automotive products and supplies to different purchasers in Illinois and the other various states of the United States and the District of Columbia; admits that Petitioner maintains a course of trade in such products in interstate commerce, and that Petitioner is in active and substantial competition with other companies distributing automotive products and supplies in commerce to purchasers of the same.

Petitioner's Answer denies that it is now or has been directly or indirectly discriminating in price between different purchasers of its automotive products and supplies of like grade and quality by selling such products at higher and less favorable prices to numerous small businessmen purchasers than such products are sold to various larger purchasers; admits that it sells its products to different purchasers at different price differentials, but alleges that such differentials are openly available to all its purchasers and are not discriminatory, but denies that the effect there-

of may be substantially to lessen competition and create a monopoly in its line of commerce; and affirmatively alleges that such price differentials make only due allowance for differences in the cost of sale or delivery resulting from the differing methods or quantities in which such products and supplies are sold or delivered to its purchasers; and also affirmatively alleges that such price differentials as were granted by Petitioner were granted in good faith to meet an equally low price of a competitor, or were granted in good faith to meet the equally low prices of various of its competitors. Petitioner's Answer denies all of the other allegations of the Complaint.

4. Hearings were held before a Hearing Examiner appointed by the Federal Trade Commission during the period from September 13, 1950 to January 19, 1954, at which hearings testimony was taken and exhibits were introduced into evidence by both parties.

5. At the close of the hearings, counsel for both the Petitioner and Respondent filed with the Hearing Examiner proposed findings as to the facts and conclusions, with reasons in support thereof. On July 6, 1954, the Hearing Examiner filed his initial decision and thereafter Petitioner and Respondent each duly filed with the Federal Trade Commission their respective notices of intention to appeal from said initial decision to the Federal Trade Commission. Appeal briefs and opposing briefs were duly filed with the Respondent by counsel for each of the parties, and oral arguments were heard by the Respondent on January 19, 1955.

6. On May 17, 1955, Respondent issued its opinion and an order denying the Respondent's appeal, granting a portion of the appeal of counsel supporting the complaint and denying the appeal of counsel supporting the complaint to the extent set out in Respondent's opinion, and issued a final order pursuant to said opinion directing Petitioner to cease and desist from certain acts and practices and ordering Petitioner to file a report of compliance with the Respondent within sixty (60) days after service upon it of the Respondent's final order. Said final order was served upon Respondent on May 25, 1955, and no report of compliance has been filed by Petitioner with respect to said order pending the disposition of this petition for review.

Facts Upon Which Venue Is Based.

7. The Petitioner is an Illinois corporation maintaining its office and manufacturing plant at 4925 Lawrence Avenue, Chicago, Illinois, within the jurisdiction of the United States Court of Appeals for the Seventh Circuit.

Grounds on Which Relief Is Sought.

8. Petitioner seeks relief from the final order entered by Respondent on the following grounds:

(a) Said order directs Petitioner to cease and desist from discriminating in prices notwithstanding the fact that there is no showing in the record that Petitioner's price differentials have the effect of substantially lessening competition or tending to create a monopoly in the lines of commerce in which the Petitioner and its jobber purchasers buying said products at lower net prices are engaged, or to injure, destroy or prevent competition with Petitioner, with any of such purchasers, or with the customers of either of them;

(b) Said order directs Petitioner to cease and desist from discriminating in prices notwithstanding the fact that the evidence establishes that Petitioner's differentials in prices were and are made in good faith to meet the equally low prices of its competitors, which evidence constitutes a complete defense under Subsection (b) of Section 2 of the Clayton Act to all of the matters charged in Respondent's complaint; and notwithstanding the fact that the evidence also establishes that all of Petitioner's price differentials are fully cost justified, which evidence also constitutes a complete defense under Section 2 of the Clayton Act to all of the matters charged in Respondent's complaint;

(c) The issuance of said order as well as the issuance of the complaint upon which it is based is a misuse of the Respondent's discretion, for the evidence establishes that any requirement that Petitioner sell at uniform prices while its competitors are not under like compulsion will destroy Petitioner's business;

(d) Said order does not specify any particular act or thing which Petitioner is to do or refrain from doing and is, accordingly, too vague and uncertain.

(e) The prohibition contained in said order against "discriminating, directly or indirectly, in the price of said

automotive products" is broader than the regulatory power of Respondent;

(f) Said order does not exclude sales to or through Petitioner's manufacturer's agents or sales to Petitioner's special accounts, which types of sales and distributions were not challenged by Respondent in the proceedings before it;

(g) Said order does not exclude Petitioner's purely intrastate sales within the State of Illinois;

(h) Said order should be set aside because Respondent erred in refusing to admit into evidence certain exhibits and testimony offered by Petitioner and excluded by the Hearing Examiner, to all of which exclusions Petitioner took exception and assigned as prejudicial error in its appeal to the Respondent from the Hearing Examiner's initial decision;

(i) Said order is contrary to the evidence, is contrary to the law, and is contrary to the law and the evidence;

(j) Said order is based upon findings as to the facts which are not supported by substantial and sufficient evidence;

(k) Said order enjoins persons who are not named as respondents in the complaint and who were not parties to the proceedings;

(l) Said order is so broad and ambiguous as to make compliance therewith by Petitioner impossible, and therefore said order is arbitrary, capricious, unreasonable, illegal, oppressive, and an abuse of discretion.

Relief Prayed.

Wherefore, the Petitioner respectfully prays (a) that this honorable Court exercise its jurisdiction over the parties and subject matter of this petition for review; (b) that a copy of this Petition be served forthwith by the Clerk of this Court upon the Respondent Federal Trade Commission pursuant to Section 11 of the Clayton Act and the rules of this Court; (c) that Respondent be required to certify and file in this Court a transcript of the entire record in the aforementioned proceedings before it, including the complaint, answer, all testimony taken, all exhibits introduced in evidence, initial decision of the Hearing Examiner, opinion of the Respondent and final order of Respondent; (d) that this Court review the proceedings, the initial decision of the Hearing Examiner, including the findings as to the facts and conclusions, the opinion

of Respondent and the final order entered by Respondent; (e) that this Court enter a judgment and decree setting aside and vacating the findings of Respondent as to the facts and conclusions, and that this Court enter a judgment and decree vacating and setting aside the final order of the Respondent and directing the Respondent to dismiss its complaint against the Petitioner in Docket No. 5768; and (f) that enforcement of the Respondent's final order in this case be stayed pending the review thereof by this Court; and (g) that this Court grant such other and further relief as the Court may deem appropriate and equitable.

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Endorsed: In the United States Court of Appeals. * * (Caption) * * Petition for Review of an Order of the Federal Trade Commission. Filed Jul. 22, 1955. Kenneth J. Carrick, Clerk. Charles R. Sprowl, Whitney Campbell, James J. Magner, 134 South LaSalle Street, Chicago 3, Illinois, STate 2-6070.

IN THE UNITED STATES COURT OF APPEALS.

* * (Caption—11526) * *

STATEMENT PURSUANT TO RULE 10(b).

This suit was commenced on May 1, 1950 by the issuance on that date of a complaint by the Federal Trade Commission against C. E. Niehoff & Co., the respondent below and the petitioner here, C. E. Niehoff & Co. filed its answer to the complaint on July 27, 1950, and filed its amended answer on June 20, 1952.

The matter was thereafter assigned to Hearing Examiner Frank Hier and hearings were held before him from time to time between September 13, 1950 and January 19, 1954, in Washington, D. C., Chicago, Illinois, Memphis, Tennessee and New Orleans, Louisiana.

On July 6, 1954 the Hearing Examiner's initial decision was filed, together with a proposed order, which sustained in part the charges in the complaint and also sustained in part certain defenses raised thereto by C. E. Niehoff & Co. Both parties appealed to the Federal Trade Commission from such initial decision.

On May 17, 1955, the Federal Trade Commission issued its opinion, which granted in part and denied in part the appeal of the Commission's attorneys, and which denied the appeal of C. E. Niehoff & Co. On the same date the Federal Trade Commission entered its order which is the subject of the petition for review pending here.

On July 22, 1955, C. E. Niehoff & Co. filed with this court its petition for review of the Federal Trade Commission's order of May 17, 1955.

1035 In United States Court of Appeals for the Seventh Circuit

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No. 11526

SEPTEMBER TERM, 1956, SEPTEMBER SESSION, 1956.

C. E. NIEHOFF & CO., A CORPORATION, PETITIONER,

v.

FEDERAL TRADE COMMISSION, RESPONDENT.

PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION

Before MAJOR, FINNEGAN and SCHNACKENBERG, Circuit Judges.

Opinion—January 9, 1957

SCHNACKENBERG, Circuit Judge. Petitioner, sometimes referred to herein as Niehoff, asks us to review an order to cease and desist issued by the respondent, sometimes referred to herein as the commission, upon a complaint charging violation of section 2 (a) of the amended Clayton Act.[1]

1036 The complaint charges that Niehoff, in its nationwide sale of automotive ignition and hydraulic brake parts to automotive jobbers competitively engaged in the resale of such products, discriminates in price between its small quantity purchasers and its large quantity purchasers, and that the effect thereof may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which Niehoff and its favored purchasers are engaged, or to injure, destroy or

[1] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States * * *, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly received the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing contained in sections 12, 13, 14–21, and 22–27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *." 15 U. S. C. A. § 13.

prevent competition with Niehoff, said favored purchasers or with customers of either of them.

Niehoff's amended answer admits that it is engaged at Chicago, Illinois, in the manufacture, sale and distribution in interstate commerce of automotive products and supplies to different purchasers and that it is in active and substantial competition with other companies similarly engaged in manufacturing and selling automotive products and supplies; admits that Niehoff sells its products to different purchasers at different price differentials, but alleges that such differentials are openly available to all of its purchasers and are not discriminatory, and denies that the effect thereof may be substantially to lessen competition and create a monopoly in its line of commerce; alleges that such price differentials make only due allowance for differences in the cost of sale or delivery resulting from the differing methods of quantities in which such products and supplies are sold or delivered to its purchasers; and also alleges that such price differentials as were granted by Niehoff were granted in good faith to meet equally low prices of its competitors.

Following extensive hearings before an examiner, he entered findings of fact. He concluded "that petitioner sold its products of like grade and quality to customers at different prices, that the customers competed with one another in the resale of these products, and that the different prices were discriminatory and in violation of section 2 (a) * * *"; that "* * * the differentials in price were not justified by differences in cost under the cost proviso of section 2 (a)" (except in a minor particular which the commission on review set aside); and that

"* * * the discriminations were not justified under the
1037 'good faith' proviso of section 2 (b) of the Act." Accordingly the examiner entered a provisional order to cease and desist. Upon cross appeals to the commission by both parties, the commission, on May 17, 1955, affirmed the findings and order of the examiner with slight modification and entered the order now under review. Summarized, the basic facts, which are not in real dispute, are now stated.

Niehoff sells and distributes in commerce certain automotive products and supplies. There are many different items classified into three lines: an ignition line, a hydraulic line, and a testing equipment line.

Niehoff's total sales volume in the sample year 1949 was $2,068,499, and of this amount approximately 90% represented sales in the ignition line, 3 to 6% in the hydraulic line, 2% in the testing equipment line, and 2% in rebuilt items.

Its domestic sales were made to some 866 jobber accounts. The prices paid by these customers were based in the first instance on Niehoff's jobber price list which is the base price schedule. Niehoff grants discounts from this schedule which vary the net prices actually paid by its several jobber accounts. For discount purposes Niehoff classified its jobber customers at the beginning of each year on the basis of the purchases made during the preceding year. A 2% discount for prompt payment is accorded to all accounts regardless of classification. Niehoff grants uniform freight allowances to all jobber customers and treats all accounts uniformly in the handling of merchandise returned for credit. As found by the examiner, the various accounts are placed in one of four classifications: [1a]

1. Jobbers whose annual purchases are less than $1,200 are classified as "jobbers without agreement" [2] and who pay the regular jobber list price.

2. Jobbers whose annual purchases range from $1,200 to $3,600 receive Niehoff's "jobbers agreement" and as
1038 such receive the following discount and allowances from the base jobber price:

Annual volume of purchases	Discount allowance, percent
$1,200–$2,400	5
$2,400–$3,600	7
$3,600 and over	10

3. Jobbers whose annual purchases range from $3,600 to $6,000 are classified as "distributors without agreement" and receive a 10% discount off Niehoff's base jobber price on all purchases.

4. Jobbers whose annual purchases are in excess of $6,000 are classified as "distributors with agreement" and as such receive 10% discount off Niehoff's base prices on all purchases

[1a] The classifications referred to are somewhat confusing, there appearing to be overlapping of the classes. This circumstance is in our view of the case immaterial.

[2] In 1950 the designations used to describe the accounts in each classification were changed but the basis of classification and the buying prices remained the same for each class.

and the following additional discount allowances in the form of merchandise credits: [3]

Annual volume of purchases	Discount allowance, percent
$6,000–$8,400	5
$8,400–$12,000	6
$12,000 and over	7 [4]

The commission found, and it is not disputed, that this system of pricing provided different net purchase prices. It also found, and the record shows, that Niehoff sold to more than one account in a single city or trading area and that the net prices paid by accounts within given trading areas varied. It was further found that accounts within trading areas competed with one another in selling Niehoff's products.

The commission found that Niehoff's price differentials constituted discriminations in price. It was further
1039 found that the effect of these discriminations may be to substantially lessen, injure, destroy or prevent competition in the resale of Niehoff's products. This finding took into account the size of the differentials, amounting to as much as 16% in net purchase price; the fact that the record shows that the automotive parts business is highly competitive; that jobbers stock many lines ranging from 15 or 20 for the small operator to more than 100 for the large operator and these lines generally consist of thousands of items; that net profit depends on the accumulation of small margins on the numerous items handled; and that the record also shows that the margin of profit generally runs about 4% of sales.

The commission also found that Niehoff's discounts to favored distributors contribute a direct and powerful advantage to the recipient and concluded that there was a reasonable probability that Niehoff's pricing practices substantially lessened competition at the secondary level and that the effect of

[3] The additional discount allowances do not apply to purchases of service stocks, equipment and brake fluid.

[4] In 1949, 290 accounts were in class 1 and purchased at jobber list less cash discount. 228 were in class 2; 241 accounts were in class 3 and 98 accounts in class 4. There was a deviation from the stated price plan in that Niehoff sold to one buying group known as Cotton States, Inc., which in 1949 was composed of nine jobbers. Niehoff treats this group as a single purchaser, selling on its class 4 basis. The jobber member pays the invoice to group headquarters and it in turn remits monthly for all purchases by its members during that month. Except for one monthly billing instead of 9, the operation saves Niehoff nothing. In 1949 the annual purchases of only one member would individually have justified the discount given.

discriminations may be to injure, destroy or prevent competition between purchasers receiving the benefit of the discriminations and those to whom they were not accorded.

Niehoff introduced evidence for the purpose of justifying its price differentials by differences in costs of sale and delivery. This evidence pertained to sales expenses, advertising expense, and costs of processing orders. Upon consideration of all this evidence the commission rejected Niehoff's claim that its differentials were cost-justified within the meaning of the proviso of section 2 (a).

Niehoff also introduced evidence to prove that its price differentials were made in good faith to meet the equally low price of a competitor or competitors within the meaning of
1040 the good faith proviso of section 2 (b) of the Act.[5] The commission found that Niehoff did not establish any price or prices as a response to a particular competitor, and that, once the base price structure was established with reference to general competitive conditions, Niehoff did not deviate to meet the prices of particular competitors. It also found that the net prices accorded by Niehoff were a reflection of its nation-wide pricing system formulated to meet competition generally and not designed to meet any particular competitor's prices. On the basis of this finding the commission rejected the claim that Niehoff's price discriminations were justified under the good faith proviso of section 2 (b).

I. With the exception of certain phases of this case with which we shall hereinafter deal specially, our holding in this case is controlled by our decisions in *Whitaker Cable Corporation* v. *Federal Trade Commission*[6] and *E. Edelmann & Co.* v. *Federal Trade Commission*.[7] We adhere to the views expressed in those cases.

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[5] "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing contained in sections 12, 13, 14–21, and 22–27 of this title shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." 15 U. S. C. A. § 13 (b).

[6] No. 11494 (C. C. A. 7) decided 12–14–56.

[7] No. 11500 (C. C. A. 7) decided 12–14–56.

II. We have made a thorough search of the record and considered the evidence introduced by both parties on the issues involving cost justification and the alleged good faith of Niehoff in meeting equally low prices of its competitors. While there may be some conflict in the evidence upon these issues, we find that there is substantial evidence to support the findings of the commission.[8] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 229.

It is not the law that we may displace the commission's choice between two fairly conflicting views, even though we would justifiably have made a different choice had the matter been before us *de novo*. *Universal Camera Corp.* v. *N. L. R. B.*, *supra*, 488.

For the reasons herein set forth, the commission's order to cease and desist will be affirmed, subject to a modification to which we now refer.

1041 III. At this point we consider Niehoff's prediction that it "would be forced out of business if the traditional pricing practices which it now follows were denied to it while its competitors are free to continue such practices." There is uncontradicted evidence in the record to factually support this prediction.

The record shows that, as to the automotive ignition line which constitutes at least 90% of Niehoff's business,[9] it has 19 competitors, and included in this group are 3 competitors who presently have complaints or orders to cease and desist pending against them before the commission, the other 16 competitors being free to continue their present pricing practices unless and until cease and desist orders are entered against them in proceedings not yet commenced.

It thus appears that the order against Niehoff was entered at a time when the commission had acted against only a few of this firm's competitors. We are persuaded by Niehoff's argument that, in view of the lapse of time which is inevitably involved in proceedings before the commission, Niehoff's business will suffer economic extinction before the commission ad-

[8] 5 U. S. C. A. § 1009 (e) (5); *Universal Camera Corporation* v. *N. L. R. B.*, 340 U. S. 474, 488.

[9] Another 6% of Niehoff's business is in the hydraulic line where it has 10 principal competitors.

judicates upon trade practices of Niehoff's competitors, which in their purpose and effect are essentially similar to those condemned in the Niehoff order. This result will follow if Niehoff is required by elimination of its present selling methods to charge higher prices for its products than the prices charged by its competitors against whom the commission has not yet ruled.

The commission takes the position that it has no power to stay compliance with its order. It relies upon a part of section 11 of the amended Clayton Act,[10] contending that it has no discretion as to the enforcement of the law. It fails to cite that part of section 11 which provides that the commission "shall issue * * * an order requiring such person to cease and desist from such violations * * * *within the time fixed by said order.*" (Italics supplied for emphasis.) It is our opinion that this statutory language vests in the commission power to postpone the time at which an order is to take effect.

1042 In any event, the commission in this case has not exercised this permissive power under section 11, and it argues that this court has no power to delay or postpone compliance with the commission's order. If this be true we are impotent to postpone the effective date of the order and, furthermore, under section 11 of the act we can be required to enforce the order in the manner therein provided without delay. In other words, according to the commission, we may witness and participate in, but not interfere with, the economic death of Niehoff while the commission machinery continues to operate toward cease and desist orders against Niehoff's competitors.

However, we do not admit judicial impotency in this situation. Section 11 of the Clayton Act[11] gives this court power, *inter alia*, to modify an order of the commission. This includes the power to change that part of an order stating when it shall take effect. We have held[12] that the power of a court of appeals to enforce, set aside or modify the commission's order is an exercise of original jurisdiction, rather than appellate jurisdiction, and that the court may by its own or-

[10] 15 U. S. C. A. § 21.
[11] 15 U. S. C. A. § 21.
[12] *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 128 F. 2d 481, 484.

ders protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit. The order in this case was issued on May 17, 1955 and directed that Niehoff "forthwith" cease and desist. This order is in the nature of an injunction. We have a right to consider its effect upon Niehoff in the light of equitable principles, and to grant relief accordingly. We have no way of knowing in advance what further proceedings, if any, will be had by the commission against Niehoff's competitors to whom we have heretofore referred. The fixing of the time at which the order against Niehoff shall become effective is a matter over which we now reserve jurisdiction, the exercise of which will depend upon the future course of the commission's proceedings against Niehoff's competitors. For that reason the order against Niehoff is hereby modified by
1043 striking the word "forthwith" therefrom and by adding to said order the following: "This cease and desist order shall take effect at such time in the future as the United States Court of Appeals for the Seventh Circuit may direct, *sua sponte* or upon motion of the Federal Trade Commission." As thus modified, the order is affirmed.

Order, As Modified,
AFFIRMED.

FINNEGAN, Circuit Judge. Dissenting. Affirming this order of the Commission and then directing its indeterminate suspension, causes me to diverge from the majority view. Section 11 of the Clayton Act, as amended, mandates that: "The findings of the Commission * * * as to the facts, if supported by substantial evidence, shall be conclusive," 64 Stat. 1127, 15 U. S. C. § 21 (1952). If, as my brothers find, this order squares with the statutory yardstick then a violation of the Clayton Act has been established. But, on the other hand if the order, approved by the majority, requires modification for the reasons they state, then it would seem the Commission's order is defective since it is unsupported by evi-

dence concerning petitioner's competitors. After all the matter involves an economic problem within a defined industry. In its opinion (T. R. 1027–1028) the Commission stated, inter alia: "The initial decision in effect held that the status of the price of respondent's competitors as lawful or unlawful was no controlling to decision here. . . . The lawfulness or unlawfulness of its competitors' prices . . . are not in issue inasmuch as respondent's defense has been legally insufficient on other grounds."

We reach much too far into the administrative agency's province by reserving our jurisdiction contingent upon "the future course of the Commission's proceedings against Niehoff's competitors." Either such matters are now before us and we have failed to properly evaluate them in reviewing evidence of price discrimination, or, they are
1044 not, now, and in that state of affairs we have no business with them. Just when this Court will decide to infuse vitality into the Niehoff order, currently in suspended animation, escapes me entirely. It appears that the majority's modification compels the Commission to investigate, or complete examination of, Niehoff's competitors at the risk of forfeiting an otherwise approved order. Whether this entails all 19 competitors or a baker's dozen is unrevealed. My grave doubts that our statutory power to *modify* Federal Trade Commission orders can be converted into policing and supervising, though perhaps obliquely, the length, breadth and sequence of Commission investigations brings me to the position I now take. Certainly we would refuse to activate the Commission upon a bare petition for mandamus to investigate the automotive ignition industry. Responsibility of achieving enforcement of the statutes Congress assigned to the Commission lies elsewhere.

1045 In United States Court of Appeals for the Seventh Circuit

No. 11526

C. E. NIEHOFF & CO., A CORPORATION, PETITIONER,

vs.

FEDERAL TRADE COMMISSION, RESPONDENT.

PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION

Before HON. J. EARL MAJOR, Circuit Judge, HON. PHILIP J. FINNEGAN, Circuit Judge, HON. ELMER J. SCHNACKENBERG, Circuit Judge

Judgment—January 9, 1957

This cause came on to be heard on the Petition for Review of an order of the Federal Trade Commission and the transcript of the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the order of the Federal Trade Commission entered in this cause on May 17, 1955 be modified by striking the word "forthwith" therefrom and by adding the said order the following:

> "This cease and desist order shall take effect at such time in the future as the United States Court of Appeals for the Seventh Circuit may direct, sua sponte or upon motion of the Federal Trade Commission."

The order as thus modified is hereby AFFIRMED.

1046 In United States Court of Appeals for the Seventh Circuit

No. 11526

C. E. NIBHOFF & CO., PETITIONER,

vs.

FEDERAL TRADE COMMISSION, RESPONDENT.

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL TRADE COMMISSION

Before HON. F. RYAN DUFFY, Chief Judge, HON. PHILIP J. FINNEGAN, Circuit Judge, HON. WALTER C. LINDLEY, Circuit Judge, HON. H. NATHAN SWAIM, Circuit Judge, HON. ELMER J. SCHNACKENBERG, Circuit Judge

Order denying petition for rehearing—February 21, 1957

A majority of the entire Court, not including Judge Major, retired, has voted to deny the petition for rehearing en banc, and said petition for rehearing en banc is hereby DENIED.

(DUFFY, *Chief Judge*, and FINNEGAN, *Circuit Judge* voted to grant the petition for rehearing, en banc.)

A majority of the panel which heard this case and rendered an opinion has voted to deny said petition for rehearing, and said petition for rehearing is hereby DENIED.

(FINNEGAN, *Circuit Judge*, would affirm the Commissioner's order without the modification.)

1047 In the United States Court of Appeals for the Seventh Circuit

No. 11526

C. E. NIEHOFF & Co., PETITIONER,

v.

FEDERAL TRADE COMMISSION, RESPONDENT.

(File endorsement omitted.)

Final Decree—March 28, 1957

C. E. Niehoff & Co., petitioner herein, having filed in this Court on July 22, 1955, its petition to review and set aside an order to cease and desist issued on May 17, 1955, by the Federal Trade Commission, respondent herein, in a proceeding before said Commission entitled "In the Matter of C. E. Niehoff & Co., F. T. C. Docket No. 5768"; and the cause having been heard by the Court on briefs and oral argument; and this Court having rendered its decision on January 9, 1957, modifying said order to cease and desist and affirming said order as modified; and this Court having thereafter on February 21, 1957, denied respondent's petition for rehearing and petition for rehearing en banc:

Now, therefore, it is hereby ordered, adjudged and decreed, That said order to cease and desist is modified to read as follows:

> *It is ordered*, That respondent C. E Niehoff & Co., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in, or in connection with, the sale of automotive products in commerce, as "commerce" is defined in the Clayton Act, as amended, do cease and desist from discriminating, directly or indirectly, in the price of said automotive products of like grade and quality, by selling to any purchaser at net prices higher than the net prices charged any other purchaser, which purchasers compete, in fact, in the resale of said products.

It is further ordered, That this cease and desist order shall take effect at such time in the future as the
1048 United States Court of Appeals for the Seventh Circuit may direct, *sua sponte* or upon motion of the Federal Trade Commission.

It is further ordered, adjudged and decreed, That the order of the respondent Federal Trade Commission, as hereby modified, is affirmed.

By the Court.

[s] J. EARL MAJOR
[s] ELMER J. SCHNACKENBERG
United States Circuit Judges.

Dated: March 28, 1957.

1049 United States Court of Appeals

Clerk's Certificate to foregoing transcript omitted in printing.

1050 Supreme Court of the United States

No. 935, October Term, 1956

(Title omitted.)

Order allowing certiorari. Filed June 3, 1957.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted. The case is transferred to the summary calendar and assigned for argument immediately following No. 750.

And it is further ordered, That the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such suit.

Mr. Justice WHITTAKER took no part in the consideration or decision of this application.

U. S. GOVERNMENT PRINTING OFFICE: 1957

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 77

MOOG INDUSTRIES, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 8TH CIRCUIT

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STATUTES:

Section 2(a) of the Clayton Act 38 Stat. 730 as amended by Section 1 of the Robinson-Patman Act 49 Stat. 1526, 15 U. S. C. Section 13 (a) ....
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

MOOG INDUSTRIES, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 8TH CIRCUIT

Your petitioner Moog Industries Inc. prays that a writ of certiorari be issued to review the judgment of the Court of Appeals for the 8th Circuit entered in the above entitled case on November 29, 1956.

OPINIONS BELOW

The initial opinion and decision of the Hearing Examiner for the Federal Trade Commission appears in the printed record page 59. The opinion of the

Federal Trade Commission on Appeal from the Examiner's decision appears in the printed record at page 79. The opinion of the Court of Appeals is attached to the certified copy of the record and is reported at 238 F.2d. 43. Petitioner's motion to hold judgment and order in abeyance or for the Court to exercise its equitable jurisdiction is attached to the record and was denied by the Court of Appeals on November 29, 1956.

JURISDICTION

The judgment of the Court of Appeals was entered on November 29, 1956 (attached to certified copy of record). Petitioner's Motion for Rehearing was denied November 29, 1956 (attached to certified copy of record). On Petitioner's Motion, issuance and transmittal of decree to Federal Trade Commission was ordered withheld by the Court of Appeals on December 17, 1956, for 30 days to permit petitioner to apply to Supreme Court for writ of certiorari and on Petitioner's Motion, the Court of Appeals entered its order on January 14, 1957, extending the time to apply for certiorari for 20 days from January 16, 1957 (attached to certified copy of record).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. In this price discrimination proceeding in which petitioner was charged with violation of Subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, Title 15, Section 13, U. S. C. (see appendix), counsel for Federal Trade Commission introduced testimony and documentary evidence of the giving by petitioner of annual volume discounts

to competing customers according to a published table of discounts applicable to the annual volume purchased. No other testimony was introduced by the Federal Trade Commission, nor did counsel for the Federal Trade Commission produce any customer who testified that he had been injured by such practice. The petitioner introduced testimony from various large and small customers that they had not been competitively injured by the aforesaid volume discount practice. The counsel for Federal Trade Commission introduced no rebuttal evidence.

One of the questions presented is whether the mathematical price differences standing alone in the face of unimpeached and uncontradicted testimony by numerous customers of petitioner that no competitive injury had occurred to them, is sufficient under the statute to support a finding that petitioner was guilty of price discrimination, and that there was a reasonable probability of competitive injury to petitioner's customers.

2. Another question presented, is whether the petitioner was denied due process of law under the Fifth Amendment to the United States Constitution by the denial by the Federal Trade Commission of petitioner's Motion for a Bill of Particulars, when the complaint, itself, merely charged a violation of the statute in question in the general words used in statute and nothing more.

3. Another question presented is whether petitioner was denied due process of law under the Fifth Amendment to the United States Constitution by the Federal Trade Commission's denial of petitioner's Motion to elect typical transactions upon which the

Federal Trade Commission would rely from the great mass of statistical evidence covering several years' transactions over most of the United States.

4. Another question presented is that of the denial by the Court of Appeals of petitioner's Motion to Hold Its Judgment and Order in Abeyance or to exercise its equitable powers and original jurisdiction until its various numerous competitors who are using similar forms of volume discounts, which are standard in the industry, can be subjected to similar judgments and orders, since only two of its many competitors have been proceeded against similarly by the Federal Trade Commission; whether such denial by the Court of Appeals is inequitable, unjust and unfair when petitioner is subjected to the judgment and decree of the Court while its numerous competitors may still continue to offer volume discounts inevitably causing petitioner to suffer loss of business and consequent financial loss; and whether under such circumstances the Court should exercise its original equitable jurisdiction to protect the rights of petitioner.

STATUTES INVOLVED

Section 2 (a) of the Clayton Act, 38 Stat. 730 as amended by Section 1 of the Robinson Patman Act, 49 Stat. 1526, 15 USC Section 13 (a).

Administrative Procedure Act, Title 5 USC Section 1004.

STATEMENT

Federal Trade Commission issued a complaint against petitioner charging in the general terms of the statute that petitioner had discriminated in prices

between different purchasers and that such acts may be substantially to lessen competition, tend to create a monopoly, or injure, destroy, or prevent competition in violation of Subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act Title 15, USC Section 13, 49 Stat. 1526 (approved June 19, 1936) (R. 1) (Stat. as set forth in appendix). Thereafter, petitioner filed its motion for a bill of particulars (R. 5) which was denied (R. 6 and R. 16). Thereafter petitioner's amended answer was filed by leave specifically denying any violation of law as charged (R. 7). During the course of the hearing, petitioner's counsel moved the Hearing Examiner to require counsel for Commission to make typical elections from the great mass of statistical evidence covering transactions throughout the United States over a period of several years upon which they would rely (R. 415-420). This motion was denied (R. 25). Thereafter the Hearing Examiner filed his initial decision against petitioner (R. 59) and filed order against petitioner ordering it to cease and desist from price discrimination. The order appears at (R. 76). Thereafter on appeal the full Commission rendered its opinion affirming the decision of the Hearing Examiner (R. 79) and entered its final order against petitioner (R. 78). Commissioner Mason filed a dissenting opinion (R. 91). Thereafter petitioner filed its petition to review the order of the Federal Trade Commission with the United States Court of Appeals for the 8th Circuit (R. 100). Thereafter the Court of Appeals rendered its decision, affirming the order of the Federal Trade Commission, reported at 238 F. 2d 243, copy of which is attached to certified copy of record. Thereafter motion for re-

hearing was filed together with motion to hold order in abeyance (attached to certified copy of record) both of which motions were denied on November 29, 1956 (attached to certified copy of record).

In support of the complaint counsel for respondent introduced testimony of three officers of petitioner (R. 114, 126, 134, 154), four automotive replacement parts jobbers located at New Orleans, Louisiana (R. 182, 184, 186, 189), four automotive replacement parts jobbers located at Memphis, Tennessee (R. 191, 197, 200, 202), and one automotive replacement parts jobber located at Greenwood, Mississippi (R. 204), the president of a group of automotive parts jobbers (R. 192) and two Federal Trade Commission accountants (R. 207-221) together with numerous statistical exhibits showing total purchases of certain customers in various areas in a given year and the discounts received as well as lists of names of group buyers and the group to which they belonged and copies of various distributor contracts between petitioner and its customers. None of the automotive replacement parts jobbers called to testify by respondent, was asked by respondent's counsel as to whether he had been competitively injured by the pricing practices of petitioner. None of the commission's witnesses testified that he had lost money, or lost trade, or lost customers. There was no evidence of any price cutting by any purchasers, nor was there any testimony that one customer had lost business to another customer. Nor was there any testimony that any customer had been forced out of business. Practically all of the customer-witnesses testified that naturally they would like to buy at lower prices and

make more profit. The Commission placed no expert witnesses on the stand to show the effect, if any, on the market. There was no testimony adduced as to what type of parts were more marketable in one area than in another area or what makes of cars were used in one area more than in another. In short there was no testimony whatsoever on the market situation in any areas. The sum total of the Commission's witnesses' testimony was almost unanimously to the effect that the automobile manufacturers and automobile dealers were the jobbers' greatest and keenest competition and in certain areas that several of Moog's customers were in competition with each other.

Thereafter petitioner in its behalf introduced the testimony of three officers of petitioner (R. 247, 420, 499), the Secretary-Treasurer of an incorporated group of automotive replacements parts jobbers (R. 370), five automotive parts jobbers from Denver, Colorado (R. 272, 281, 294, 303, 310), four automotive parts jobbers from Dallas, Texas (R. 315, 321, 324, 326), three automotive parts jobbers from New Orleans, Louisiana (who had previously testified as Commission witnesses) (R. 329, 336, 340), two automotive parts jobbers from Memphis, Tennessee (one of whom had previously testified for respondent) (R. 348, 357), one automotive parts jobber from West Orange, New Jersey (R. 381), one from Brooklyn, New York (R. 387), one from New Brunswick, New Jersey (R. 400), and one from Newark, New Jersey (R. 381), together with certain exhibits showing various volume discounts offered by various other automotive replacement parts manufacturers. All of these jobber witnesses testified that

they had not been competitively injured by the pricing practices of petitioner. In addition counsel for the Commission conceded to and entered into a stipulation with counsel for petitioner that if additional jobbers were called upon to testify "their testimony would be the same as that of the witnesses previously called," to the effect that they had not been competitively injured or damaged by Moog's pricing system (R. 414).

Mr. Foster of Foster Auto Supply of Denver, Colorado, testified that he had lost no business to his larger competitors. Mr. Livonious of Western Spring Service Co. of Denver, whose company had received no volume discount, stated that he had not been injured competitively. He further stated that he wasn't always interested in buying at the cheapest prices; that he could buy a lot of items cheaper than he actually did buy them, but did not do so for his own reasons. He further testified that the larger jobbers in his own area did not cut into his business and that he even sells some of them (R. 283-285). Russell E. Faries of Empire Spring and Shock Absorber Service, Denver, who testified he had not been competitively injured, stated that he could buy similar products from others cheaper than he could from petitioner, but that he preferred petitioner because of the fine trade name that they have in the industry (R. 301). Mr. Henderson of Henderson Auto Parts, Dallas, Texas, testified that he had not been competitively injured, and that he preferred to carry a small inventory and have a less investment. Mr. Bardin of Auto Shock Absorber Sales Co., New Orleans, a small dealer who testified that he had not been competitively injured said that he preferred the

Moog line because they made good merchandise and that the name Moog was an asset to his business and when asked on cross-examination if he wasn't interested in buying an article at a cheaper net price, he said, "not necessarily so;" that he could buy from another jobber and let that jobber carry the cats and dogs and the large inventory and the large overhead (R. 333). Mr. Greiner of Greiner Auto Parts Co., New Orleans, who had previously testified as a witness for the Commission under subpoena and who testified he had not been competitively injured, stated that he turned his inventory five times; that he knew that he could buy quantities of Moog parts cheaper, but that it paid him to pay a little more to other jobbers (R. 339) and when cross-examined by counsel for the Commission as to a functional service performed by the jobbers as he had outlined, Commission counsel asked him this question —"You understand we are out to eliminate that?" and he answered, "You can't eliminate it, it is what the industry is built on." (R. 340). Mr. Williams of Truckstell Sales Co., Memphis, who testified he had not been competitively injured, stated that not a single one of his salesmen had reported a single instance of any complications caused by prices; that all of the stock that they had bought from Moog was sold and that they had no dead stock on hand (R. 363). Mr. Sapiro of Sapiro Auto Parts Co., New Brunswick, N. J., testified that he wasn't competitively injured; that there was plenty of business for everybody; and that he got his share of it and was not interested in what another firm paid for their merchandise (R. 400). Mr. Feaster of Wheels, Inc., Newark, New Jersey, testified that he had not been competitively injured and had suffered no reduction in his sales (R. 405).

Every one of these witnesses were jobbers, some with very large businesses and some with very small businesses. The Commission in its opinion cited Dallas, Texas, where six customers were sold who were in competition with each other (R. 83). At page 316, Mr. Bardin, General Manager, Automotive Appliances Co. of Dallas, stated he had not been injured by the pricing practices of petitioner. At page 325, Mr. Cook, President of Motor Supply Co. of Dallas, stated that he had not been injured by the pricing practices of petitioner. Mr. Henderson of Henderson Auto Parts of Dallas, a very small buisness, testified he had not been injured by the pricing practices of petitioner.

Petitioner, Moog Industries, Inc., has its principal office and manufacturing place in St. Louis, Missouri. It is in the business of manufacturing, selling and distributing automotive replacement parts to purchasers located in all States of the United States and the District of Columbia (R. 127-128). Some of the parts that it sells are purchased by petitioner for resale, the balance being manufactured in its own plant at St. Louis, Missouri (R. 129-442). It is now and for many years prior to and since the effective date of the Robinson-Patman Act (June 19, 1936), has been continuously engaged in this business and has been and is now engaged in competition with numerous other corporations, firms and individuals who are also manufacturing, selling and distributing similar automotive replacement parts in interstate commerce.

For volume discount purposes, Moog separates its various automotive replacement parts into three classifications or lines as follows:

(a) Coil Action Parts

(b) Leaf Springs, Coil Springs and Chassis Parts

(c) Piston Rings

The (a) Coil Action Parts line are all front end suspension parts and include threaded steel bushings, pins, seals, grease fittings, lock washers, bronze bushings, pivot shafts, stop nuts, rubber bushings, cotter pins, steering knuckle supports, threaded steel studs, welded upper control arm assemblies, shock links, coil spring spacers, Allen wrenches, rubberized coil spring silencers, A frame saddles, and repair kits of various front end parts for various yearly models. All of the above are for the various makes and yearly models of various types of passenger cars by yearly model starting with the 1937 year models. There are approximately 500 items included in this line and 260 types of repair kits (Comm. Ex. 15—Moog catalog) (R. 136).

The (b) Leaf Springs, Coil Springs, and Chassis Parts line include the following:

Approximately 3,300 types of complete leaf springs for passenger cars of various years, models and makes starting with the 1931 year models; approximately 7,000 types of complete leaf springs for trucks and buses from ½ ton up for the various years, makes and models. This gives a total of approximately 10,300 types of complete leaf springs, but does not include the individual leaves and component parts of springs. Individual leaves vary from 1 to 11 for each spring and these leaves are also sold by petitioner. This classification also includes approximately 100 types of U bolts, center bolts, approximately 120 types

of overload sets and buildup sets for various makes and models of cars starting with the year 1937, approximately 200 types of spring shackles, approximately 36 types of coil springs for various makes and models starting with the year 1935, approximately 1,350 chassis parts which consist of king bolts, kits and parts, tie rod ends, drag rings, and intermediate rods for various makes and yearly models of passenger cars, trucks, buses and axles starting with the 1928 yearly models (Comm. Ex. 15 — Moog Catalog) (R. 136, 267).

The (c) Piston Rings are composed of three different grades of piston ring sets which average five rings per set, the catalog listing approximately 1,950 sets for each grade or a total of 5,850 types of piston ring sets. These piston rings are for passenger car engines, truck engines, farm tractor engines, air-cooled engines, and industrial engines (Comm. Ex. 15 —Moog Catalog) (R. 136).

The above types of automotive replacement parts represent thousands of different items of varying design and function used in the repair and maintenance of many various makes and yearly models of automobiles and trucks.

Petitioner maintains a plan of retroactive volume discounts which it offers to every one of its customers which provides for annual volume discounts based upon the amount of annual purchases in any one of the above named three lines or classifications (R. 130, 157).

These discounts are as follows:

Coil Action Parts:

New Purchases During Each Fiscal Year	Retroactive Rebate	Net Purchases During Each Fiscal Year	Retroactive Rebate
Under $1,000	None	$15,000 to $17,499	14%
$ 1,000 to $ 4,999	5%	17,500 to 19,999	15%
5,000 to 7,499	7½%	20,000 to 22,499	16%
7,500 to 9,999	9%	22,500 to 24,999	17%
10,000 to 12,499	10%	25,000 to 27,499	18%
12,500 to 14,999	12%	27,500 and over	19%

Piston Ring Line:

New Purchases During Each Fiscal Year	Retroactive Rebate	Net Purchases During Each Fiscal Year	Retroactive Rebate
Under $2,000	None	$ 9,000 to $ 9,999	13%
$ 2,000 to $ 2,999	2%	10,000 to 11,999	14%
3,000 to 3,999	5%	12,000 to 14,999	15%
4,000 to 4,999	7%	15,000 to 17,999	16%
5,000 to 5,999	9%	18,000 to 20,999	17%
6,000 to 6,999	10%	21,000 to 24,999	18%
7,000 to 7,999	11%	25,000 to 29,999	19%
8,000 to 8,999	12%	30,000 and over	20%

Leaf Spring Line, Including Coil Springs and Chassis Parts:

Net Purchases During Each Fiscal Year	Retroactive Rebate	Net Purchases During Each Fiscal Year	Retroactive Rebate
Under $1,000	None	$11,000 to $14,999	11%
$ 1,000 to $ 2,999	5%	15,000 to 19,999	12%
3,000 to 4,999	7%	20,000 to 27,499	13%
5,000 to 7,999	9%	27,500 to 34,999	14%
8,000 to 10,999	10%	35,000 and over	15%

(Comm. Ex. 1.) (R. 62, 63.)

These are offered by petitioner to all of its customers without exception through a distribution contract of which Commission Exhibit 1 is a typical example. In addition to the above volume discounts, petitioner allows to its distributors who stock its lines and resell to other jobbers a 10% warehousing and redistributing commission, provided the combined earnings of the

warehousing and redistributing commission plus the volume discount on any line in a given year do not exceed the earnings figured at the maximum rebate for that particular line (Comm. Ex. 2, R. 175). Every purchaser is granted and receives rebates according to the bracket applicable to his annual purchases. In addition petitioner allows to all its customers a uniform discount of 2% for cash payment by the 10th of the month following month of purchase (Comm. Ex. 1) (R. 421). Similar types of volume discounts or discounts in one form or another prevail throughout the entire automotive parts replacement industry (R. 426, 429, 436, 197, Resp. Ex. 10B-C, 16, 18-C, 25-A (typical examples)). When petitioner entered the piston ring field, it was general practice in the industry to grant cumulative rebates (R. 444, 130, 131, 458). Petitioner was compelled to use the volume rebates to meet competition in order to start in business in the replacement parts field (R. 445). This was evidenced by similar discounts offered by competitors as shown in respondent's exhibits showing these discounts (Resp. Ex. 6A, 12B). The large competitors who use similar pricing plans are Ramsey Corporation, Hastings Mfg. Co., Sealed Power Corp., McQuay-Norris and Perfect Circle Co. (R. 462, 500, 501).

The fiercest competition that petitioner's distributor meets in all phases is the car manufacturer through their car dealers (R. 464, 465).

All of petitioner's prices are published and are available to all their customers on the same equal terms (R. 430). It has only one type of customer which is a jobber and at times is referred to as a distributor (R. 129). Very few of their customers

carry petitioner's complete line. Some customers are piston ring specialists, buying only piston rings. Some are leaf spring specialists, buying only that line. Some are wheel alignment specialists (R. 441-443-444). A very few accounts are equipment manufacturers (R. 147-148) and pay the same price as other distributors (R. 157-158). A typical group account is Mid-South Distributors, who have 17 members (R. 193) who are jobbers (R. 194). It is a cooperative and its contract provides for a volume discount (R. 194). The members order on the Mid-South order blank in triplicate, one going to the manufacturer and one to Mid-South's office. Shipment is made direct to the member and petitioner invoices the order to Mid-South who is responsible for the payment (R. 194). When the discount rebate is received from petitioner by Mid-South, the expense of the group operation is deducted and then is distributed to the members in proportion to their purchases (R. 373, 374, 206).

Petitioner has no control of what the jobber does with his merchandise. He may resell it for whatsoever price he chooses (R. 442). All jobbers buy on what is called the blue price sheet (R. 471, Respondent's Exhibit 14). Various different colored price sheets showing suggested resale prices are given to jobbers who may, if they choose, in turn give certain ones to their customers for their use (R. 118-149-150-169). During 1947 to 1949, petitioner had approximately 1,200 Coil Action line accounts, about 800 Spring line accounts, and about 400 Piston Ring accounts. These figures include the group members counted individually (R. 167).

A Commission accountant testifying for the Commission stated that Commission exhibits 70A through 79G were made up from an examination of petitioner's ledgers and from compiled data made by petitioner (R. 221). He admitted he did not know how many items were in the Moog catalog after spending one month at petitioner's plant preparing the exhibits (R. 213-232). He admitted that he had examined only a few invoices, less than 289 in number (R. 232). He admitted that in making up these exhibits that he did not take into consideration that various makes of models and models of trucks, buses and passenger cars all use different replacement parts—that all he took into consideration was the total amount of the purchase and the rebate (R. 237).

The Court of Appeals held in effect that the mathematical differences were sufficient to sustain the order of the Federal Trade Commission to cease and desist in the face of unimpeached and uncontradicted testimony in rebuttal that no competitive injury had occurred, the Court holding that witnesses giving such testimony of non-injury were merely stating conclusions which could not prevail against mathematics.

The Court of Appeals further held that petitioner was not denied due process of law by the denial by the Federal Trade Commission of Petitioner's Motion for a Bill of Particulars.

The Court of Appeals further held that petitioner was not denied due process of law by the Federal Trade Commission's denial of Petitioner's Motion to elect typical transactions upon which the Federal Trade Commission would rely from the great mass of

statistical evidence covering several years transactions over most of the United States.

The Court of Appeals further denied Petitioner's Motion to hold its judgment and order in abeyance or to exercise its equitable powers and original jurisdiction until various numerous competitors who are using similar forms of volume discounts which are standard in the industry might be subjected to similar judgments and orders, as only two of its many competitors have been proceeded against similarly by the Federal Trade Commission.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals in effect held that the mathematical price differences standing alone in the face of unimpeached and uncontradicted testimony by petitioner's customers that they had not suffered competitive injury by reason of the volume discounts was sufficient to support the finding of the Commission. Such ruling is in square conflict with the opinion of the Supreme Court in *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U. S. 61, 78 (1953), in which the Court held that the ordinary rules of evidence applied in Robinson-Patman Act proceedings.

The ruling of the Court of Appeals is in direct conflict with *Appalachian Coals* v. *United States,* 288 U. S. 344 (1933), in which elaborate statistics were introduced by the government and the defendant introduced numerous competing witnesses who testified the proposed action would not hurt their business; the government offered no opposing testimony as to

the effect of the proposed operation and the Court held that the government had failed to support its case by substantial evidence.

The ruling of the Court of Appeals is in direct conflict with *International Shoe Co.* v. *Federal Trade Commission,* 280 U. S. 291; 299 (1930), where experienced business witnesses were put on by International Shoe Co. who denied the competitive effect alleged by the government and no rebuttal witnesses were put on by the government. The Court held that thereby the Federal Trade Commission had failed to support its decision and order by *substantial evidence.*

The ruling of the Court of Appeals is contrary to *Pennsylvania Railroad* v. *Chamberlain,* 288 U. S. 333, 340, 341, wherein the Supreme Court held that the existence of a fact which must be inferred from other facts cannot exist when testimony appears contrary to the inferred fact.

In the instant case, numerous jobber witnesses, both large and small, all of them being hardheaded practical businessmen with years of experience, testified that they had not been injured by the volume discount practice of the petitioner. In addition, counsel for Federal Trade Commission entered into a stipulation with petitioner that future jobber witnesses, if called, would testify that they had not suffered competitive injury because of such practice (R. 414). The Court below stated that such testimony by all of the aforesaid witnesses was a mere conclusion on their part and that witnesses could not by conclusion deny a mathematical fact. The Court in effect says it has better knowledge of the business

than the jobbers themselves. Such a statement by the Court is contrary to the aforesaid decisions of this Court because all of the opposing witnesses to the government in the cited cases were the same type of hardheaded practical experienced business men who testified from their own intimate knowledge and experience as in the instant case; the testimony of those witnesses in the above cited cases was not a conclusion and the Court so ruled; in the instant case, the Court of Appeals by ruling otherwise with identical experienced witnesses has ruled contrary to the aforesaid decisions. In addition such statement by the Court ignores the very language of the statute which requires evidence of the competitive effects of the difference in prices. It takes more than a difference in price to constitute a violation under the Act. There must be in addition the consequent competitive effects mentioned in the statute, but the Court below, as we have mentioned above, has ignored this requirement of the statute. One of the most recent cases illustrating this very point is that of *United States* v. *E. I. Dupont De Nemours & Co.*, 118 F. Supp. 41, 232 (1953), affirmed 351 U. S. 377, where the District Court said:

> "To reach inferences which the plaintiff seeks this Court to draw from its selected use of documentary materials, would necessitate a determination by this Court that the testimony of these witnesses was false."

In that case the District Court dismissed the anti-trust action refusing to infer competitive injury under the Robinson-Patman Act from the bare evidence of price differentials.

In addition the Court below in the instant case surprisingly held that the Commission's findings were not based upon non-permissible inference, but upon proven facts and inferences to be properly drawn therefrom. It must be noted that the Court fails to state what these proven facts are. In any event whatever proven facts the Court referred to, from the record it is evident they were either isolated, trivial or sporadic, which Courts have held not to be substantial evidence. The facts proven by the Federal Trade Commission were the volume discounts which petitioner admitted, that many of the customers were in competition with each other, and some of them testified they would like to make more profit. Such proof and the inferences therefrom are not substantial evidence upon which to base reasonable probability of competitive injury. Selling at quantity discounts to competing purchasers is not enough—otherwise Congress would not have used the words in the statute "where the effect of such discrimination may be substantially to * * * lessen * * * or to injure * * * competition." *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, 745 (1947). The facts proven in a price discrimination case must be such that there is a reasonable probability of injury to competition and such facts are not in the instant case. In fact on this very point in *Minneapolis Honeywell Regulator Co.* v. *Federal Trade Commission*, 191 F. 2d 786, 689, 790 (7th Cir.), Cert. dismissed, 348 U. S. 806 (1954), the Court refused to affirm the price discrimination order. The ruling in the instant case is in conflict with the 7th Circuit on this point. We respectfully submit that there is no substantial evidence whatsoever in the record on

the part of the government to support the order made. The important question to be determined is whether or not the giving of volume discounts alone is sufficient to warrant a decree of price discrimination by the Federal Trade Commission. So far as counsel can find, this is the first time that this Court has been asked to rule upon this question. In all other price discrimination cases initiated by the Federal Trade Commission that have reached this Court, the Federal Trade Commission in each and every instance showed actual competitive injury by competent testimony. This is a point which this Court should clarify inasmuch as the Court of Appeals has thereby departed from the accepted and usual course and rulings on substantial evidence that have heretofore prevailed in judicial proceedings.

II.

The complaint filed by the Federal Trade Commission (R. 1 and 2) merely charged the petitioner with a violation of the statute in question in the general words used in the statute and alleged nothing more. A Motion for a bill of particulars was filed by petitioner (R. 5) and denied (R. 6 and 16). Under such circumstances, such ruling is a denial of due process and in direct conflict with the ruling of the Supreme Court in *Morgan* v. *United States,* 304 U. S. 1, 18-20 (1938). The holding in that case with particular respect to quasi judicial proceedings uses this language:

> "Those brought into contest with the government in a quasi judicial proceedings aimed at the control of their activities are entitled to be fairly advised of what the government proposes and be

heard upon its proposals before it issues its final command."

The Federal Trade Commission and the Court of Appeals both have disregarded this fundamental requirement of fairness which is the essence of due process. The denial of the motion for a bill of particulars and its affirmance by the Court of Appeals in its opinion is in direct conflict with the holding of this Court in *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U. S. 61, 81. In that case the Federal Trade Commission was criticized for its use of general terms in respect to what the Supreme Court had to review. The Court through Mr. Justice Frankfurter saying:

> "* * * since we are charged with the duty of reviewing the correctness of the standards which the commission applies and the essential fairness of the mode by which it reaches its conclusions, that the Commission do not shelter behind uncritical generalities or looseness of expression as to make it essentially impossible for us to determine what really lay behind the conclusions which we are to review."

If the Supreme Court was thus kept in the dark by the Commission's use of generalities, it is certainly necessary in the spirit of judicial fairness that the defendant in a case brought against him by the Federal Trade Commission should be advised in some particularity as to what he has to meet.

In the 2nd Circuit in *Federal Trade Commission* v. *Biddle Purchasing Co.,* 113 F. 2nd 29 (1941), the Court on this very point stated that a bill of particulars should be granted to the extent of at least

requiring the Commission to particularize at least one typical transaction, sufficiently to inform the respondent of the nature of the acts claimed to violate the order. Therefore the holding of the Court below, as well as of the Federal Trade Commission is contrary to the holding of the 2nd Circuit. The Court below circumvented this argument by stating that it was apparent on the first day of the hearing that the Commission was relying upon the price discriminatory effect of petitioner's cumulative annual rebate plan as the sole source of the price discriminations found. Unfortunately, the Court below has overlooked the fact that the statute requires more than just proof of price discrimination alone. In such a case, there must be some evidence of some particular act as to time and place that has the required effect set out by the statute. Thereby your petitioner has been deprived of due process of law; in addition there has been a direct violation of the Administrative Procedure Act (Title 5 U.S.C. Sec. 1004(a)) which was passed to provide such due process of law; and we differ from the opinion of the Court below that a reading of the first day's proceedings "made it apparent" upon what the Commission would solely rely.

III.

During the course of the hearing petitioner's counsel moved the Hearing Examiner to require counsel for Commission to make typical elections from the great mass of statistical evidence throughout the United States over a period of several years upon which they would rely (R. 415-420). This motion was denied (R. 420). There was thereby

placed upon petitioner an insurmountable burden of analyzing and breaking down this great mass of evidence which would require thousands of man-hours by high-priced accountants and would involve exorbitant and needless expenses far beyond petitioner's financial ability to meet or to pay. The denial of this motion constituted a denial of due process of law under the 5th Amendment to our Constitution and is directly contrary to the pronouncement of the Supreme Court in *A. E. Staley* v. *Federal Trade Commission,* 324 U. S. 746, 753 (1945), wherein the Court stated that the statute placed emphasis upon individual competitive situations rather than upon a general system of competition. The action of the Commission and of the Court below in denying a motion to elect is directly contrary to the opinion of the Court in the 6th Circuit in *E. B. Mueller & Co.* v. *Federal Trade Commission,* 142 F. 2d 511, 519 (1944), the 6th Circuit saying that since the statute imposed upon petitioner the burden of rebutting a prima facie case, the Commission's counsel should in fairness have specified the individual or group transactions which it claimed constituted unlawful discrimination. It is interesting to note that in the *Automatic Canteen Co.* v. *Federal Trade Commission,* supra, the Federal Trade Commission introduced seventy-five particular situations, and counsel for the Commission was criticized by the Commission for introducing so many typical situations and so burdening the record, saying that not more than five such situations would have been ample. In the Commission's brief in the Supreme Court in that case, Mr. Dawkins, Assistant General Counsel of the Commission, represented to the court that

> "Petitioner refers to the numerous discriminations and sellers involved; as to this it could have moved the Commission to elect a limited number of instances upon which it would rely (see page 18 of the Commission's brief in that case.)"

Again in that same brief to the Supreme Court, Commission counsel states

> "* * * could have moved the Commission to elect a limited number of instances upon which it would relay and thus greatly reduce the scope of the defense necessary."

It is interesting to note that counsel for petitioner in the instant case did exactly what Commission's counsel in its brief in the *Automatic Canteen* case argued should have been done. Thereby the Commission's counsel itself has admitted by its brief in that case that petitioner's motion to elect is proper under similar circumstances. In order to be consistent, the Commission must agree with petitioner's contention herein. Fundamental requirements of fairness, which is the essence of due process were violated and thereby the ruling of the Court below is contrary to *Morgan* v. *United States*, 304 U. S. 1, 18-20 (1938).

IV.

After the Court of Appeals had rendered its opinion affirming the order of the Commission, your petitioner filed a motion to hold the judgment and order in abeyance or to exercise its equitable powers therein for the protection of petitioner.

The record shows that numerous of the competitors of petitioner used similar volume discount practices

and that it is standard practice in the industry (R. 426, R. 444). The record further shows the names of a few of these competitors from the large ones down to the smaller ones approximating the size of petitioner. Some of these appear at pages 451, 462, 471, 472, 475, 477, 500 and 501 of the record, such as Maremount Automotive Products Tuthill Spring Co., Ramsey Corporation, Hastings Manufacturing Co., Sealed Power Corporation, McQuay Norris Co., Perfect Circle Corporation, Chevrolet, Mopar Chrysler, Regal Tool & Mfg. Co., Hershey Metal Products, Thompson Products. Typical contracts of some of the above companies showing volume discounts are Regal Tool & Mfg. Co., Thompson Products and McQuay-Norris Co., Respondents Exhibit 10-B & C, p. 1538B, Respondents Exhibit 16, p. 1582-1583, Respondents Exhibit 25A, p. 1867. Your petitioner sells less than one per cent (1%) of the total sales in the automotive replacement parts industry (R. 430), the 1952 volume of the industry being two and one-half billion dollars (R. 431). So far as counsel is advised, the Federal Trade Commission has proceeded against only two of petitioners competitors in this industry. To subject your petitioner to the order of Federal Trade Commission and leave the great bulk of the industry free to continue volume discounts is inequitable and unfair and can only inevitably result in loss of business to petitioner and consequent financial loss. This identical situation under practically identical facts arose in the case of *C. E. Nichoff & Co.* v. *Federal Trade Commission*, #11526, in the 7th Circuit which was decided on January 9, 1957, not yet officially reported. In that case the court affirmed the Commission's order to cease and desist from price dis-

crimination, and then when a similar situation such as we have outlined above was stated by the Court, it further held:

> "It thus appears that the order against Niehoff was entered at a time when the Commission had acted against only a few of this firm's competitors. ' We are persuaded * * * in view of the lapse of time which is inevitably involved in proceedings before the Commission, Niehoff's business will suffer economic extinction before the commission adjudicates upon trade practices of Niehoff's competition which in their purpose and effect are essentially similar to those condemned in the Niehoff order. This result will follow, if Niehoff is required by elimination of its present selling methods to charge higher prices for its products than the price charged by its competitors against whom the Commission has not yet ruled."

The Court then held that it had the power to modify an order of the Commission and had original jurisdiction to protect the rights of the parties in any manner in which a trial court of equity of general jurisdiction might do in an injunction suit. The Court then modified the Commission's order to cease and desist by adding these words to the order:

> "This cease and desist order shall take effect at such time in the future as the United States Court of Appeals for the 7th Circuit may direct, sua sponte, or upon motion of the Federal Trade Commission."

As thus modified, the 7th Circuit then affirmed the order of the Commission.

The Court of Appeals for the 8th Circuit in the instant case refused to hold the order in abeyance

or to exercise its equitable jurisdiction as prayed; thereby its holding is contrary to the 7th Circuit in the above case.

In addition the ruling of the Court below on this point is contrary to the ruling of the Court in the 7th Circuit in *Natural Gas Pipeline Co.* v. *Federal Power Commission,* 128 F. 2d 481, 484, which cites in support several Federal Trade Commission cases.

The ruling of the Court of Appeals below in this respect is contrary to the ruling of the Court in the 2nd Circuit in *Indiana Quartered Oak Co.* v. *Federal Trade Commission,* 58 F. 2d 183, 184, wherein the Court held that it had original jurisdiction to modify orders of the Commission where equity demands such an action, since otherwise—

> "* * * it places it in a position where it would be unable to fairly compete with its competitors. Under these circumstances this court should act and will do so. An order will therefore be entered by this Court modifying the order of affirmance directing petitioner to cease and desist, so that petitioner will be permitted to use the term 'Philippine Mahogany' * * *"

In the 2nd Circuit in *Butterick Co.* v. *Federal Trade Commission,* 4 F. 2d 910, 913, the Court expressed itself in a similiar way. Since the Court of Appeals for the 8th Circuit in the instant case has ruled contrary to and in conflict with the Courts of Appeals of other Circuits in identical situations, it is submitted that this Court should grant certiorari and rule upon this highly important question of vital interest not alone to petitioner, but to the general public and the automotive replacement parts industry in general.

In addition, the Court in the *Niehoff* case, supra, stated that they did not agree with the Commission's contention that the Court of Appeals was judicially impotent in such a situation, and then went on to state its position and ruling as noted above. The actual effect of such denial by the 8th Circuit Court of Appeals to hold the order in abeyance, or to modify it, places petitioner in a decidedly unfavorable position competitively and in effect denies it equal protection of the laws. Under such conditions, the very purpose of the Robinson-Patman Act to protect small competitors such as petitioner would be defeated.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

No. 15,370

MOOG INDUSTRIES, INC., *Petitioner*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

Petition to Review Order of Federal Trade Commission.

[November 5, 1956.]

Malcolm I. Frank (Bernard Mellitz, James W. Cassedy and Mellitz & Frank were with him on the brief), for Petitioner.

James E. Corkey, Attorney, Federal Trade Commission (Earl W. Kintner, General Counsel, and Robert B. Dawkins, Assistant General Counsel, and Janet D. Saxon, Attorney, for Federal Trade Commission, were with him on the brief), for Respondent.

Before SANBORN, JOHNSEN and WHITTAKER, Circuit Judges.

WHITTAKER, Circuit Judge.

The Federal Trade Commission, after hearings, found that petitioner, which manufactures and sells automobile

repair or replacement parts in interstate commerce, has granted to its customers, at the end of each annual period, a retroactive volume rebate consisting of a flat, graded, percentage of the aggregate dollar volume of their respective purchases in the preceding year, and that this practice has discriminated in price between different purchasers of like grades and qualities of its products, and that the effect "may be to substantially lessen, injure, destroy or prevent competition between customers receiving the benefit of said discriminations and the customers who do not receive the benefit of such discriminations", and it concluded that such discriminations violated Section 2(a) of the Clayton Act, 38 Stat. 730, as amended by Section 1 of the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C., Section 13, which, in pertinent part, provides:

> "(a) It shall be unlawful for any person engaged in commerce * * *, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * *, where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing contained in Sections 12, 13, 14-21, and 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *."

The Commission accordingly issued an order prohibiting petitioner from discriminating in price:

> "By selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who, in fact, competes with the purchaser paying a higher price in the resale and distribution of (respondent's) petitioner's products."

Aggrieved by that order, petitioner has brought the matter here upon its petition for review, and seeks reversal upon the grounds (1) that the Commission's findings and conclusions are erroneous, and are not supported by any substantial evidence, (2) that the Commission's order is broader than its powers to make, and (3) of claimed procedural errors of the Commission.

It is conceded by the parties that (a) petitioner sold and distributed its products in interstate commerce, (b) they were sold for resale within the United States, (c) petitioner's *base price* for its products has been the same to all its customers, (d) petitioner promulgated, years ago, and has since universally used, the questioned annual retroactive volume rebate plan, and (e) the plan allows a volume discount, or rebate, to petitioner's customers, computed, at the end of each annual period of purchases, upon a flat, graded, percentage of the aggregate dollar volume of their respective purchases made in the preceding year. Petitioner practically concedes, at least does not seriously dispute, as, indeed, it could not, that its rebate plan has resulted in higher prices to some than to others of its customers—the extent of the differentials depending upon the aggregate dollar volume of their respective purchases in the preceding year.

The essential facts found by the Commission are that petitioner manufactures at St. Louis, and sells to jobbers, whom it calls distributors, and to "group buying" associations throughout the country, thousands of different types and sizes of replacement parts—all of the same high or first grade and quality—for many makes, models and ages of automobiles and trucks. These jobbers and "group" buyers are not granted exclusive territories by petitioner, and two or more of them do business in each trade area, and, in turn, sell these products to the same types of customers—repair shops, garages, service stations, fleet accounts, car dealers, other jobbers, and over-the-counter—as competitors. For pricing and volume re-

bate purposes, petitioner has classified its products into three lines, namely (1) leaf spring line, including coil springs and chassis parts, (2) coil action line, and (3) piston ring line. It enters into contracts, which it calls franchise agreements, with its jobber and "group buying" purchasers. Those contracts contain an annual cumulative rebate schedule, for each of the three lines of products, as set forth in the margin.[1] It will be seen from those

[1] These rebate schedules were applicable to the sample year 1949.

Coil Action Line

Net Purchases During Each Fiscal Year	Retroactive Rebate (Percent)	Net Purchases During Each Fiscal Year	Retroactive Rebate (Percent)
Under $1,000	None	$15,000 to $17,499	14
$ 1,000 to $ 4,999	5	$17,500 to $19,999	15
$ 5,000 to $ 7,499	7½	$20,000 to $22,499	16
$ 7,500 to $ 9,999	9	$22,500 to $24,999	17
$10,000 to $12,499	10	$25,000 to $27,499	18
$12,500 to $14,999	12	$27,500 and over	19

Piston Ring Line

Net Purchases During Each Fiscal Year	Retroactive Rebate (Percent)	Net Purchases During Each Fiscal Year	Retroactive Rebate (Percent)
Under $2,000	None	$ 9,000 to $ 9,999	13
$2,000 to $2,999	2	$10,000 to $11,999	14
$3,000 to $3,999	5	$12,000 to $14,999	15
$4,000 to $4,999	7	$15,000 to $17,999	16
$5,000 to $5,999	9	$18,000 to $20,999	17
$6,000 to $6,999	10	$21,000 to $24,999	18
$7,000 to $7,999	11	$25,000 to $29,999	19
$8,000 to $8,999	12	$30,000 and over	20

Beginning July 1, 1949, petitioner introduced the following schedule applicable to its leaf spring line.

Net Purchases During Each Fiscal Year	Retroactive Rebate (Percent)	Net Purchases During Each Fiscal Year	Retroactive Rebate (Percent)
Under $2,000	None	$ 8,000 to $ 9,999	8
$2,000 to $2,999	3	$10,000 to $14,999	9
$3,000 to $3,999	4	$15,000 to $19,999	10
$4,000 to $4,999	5	$20,000 to $27,499	11
$5,000 to $5,999	6	$27,500 to $34,999	12
$6,000 to $7,999	7	$35,000 and over	13

schedules that a different volume rebate is applicable to each line; that the coil action line rebate ranged from 5% on annual net purchases of $1,000, to 19% on annual net purchases of $27,500 or more; that the piston ring line rebate ranged from 2% on annual net purchases of $2,000, to 20% on annual net purchases of $30,000 or more, and the leaf spring line rebate ranged from 3% on annual net purchases of $2,000, to 13% on annual net purchases of $35,000 or more.

In addition to those rebates, petitioner allowed a 10% warehousing commission to those of its customers who resold its products to other jobbers whom it had approved, provided the combined earnings from the volume rebate and the redistributing commission could not exceed the maximum volume rebate for that line. Petitioner also allowed its customers a cash discount of 2% if payment be made by the 10th day of the month following order.

In the sample year 1949, petitioner had franchise agreements with 15 group buying organizations or associations having numerous members, many of whom operated in the same trading area. The group buying was done substantially as follows: A member of a group would forward his orders directly to petitioner, with a copy to the group's office, or through the group's office. Petitioner would then ship the goods directly to the member, but would bill the group's office which would pay the bills and the member would later reimburse the group's office. At the end of each year, petitioner totaled the combined purchases by all members of the group and paid a rebate, in the scheduled percentage applicable to the total of those combined purchases, to the group's office, which, in turn, distributed the rebate to its members on the basis of the amount of their respective purchases.

The Commission found that these group buying associations were "in reality bookkeeping devices for the collection of rebates, discounts and allowances received from

sellers on purchases made by its jobber members", and that such jobber members "in fact, purchased their requirements of petitioner's products directly from petitioner, and at the same time received a more favorable price or higher rebate based upon the combined purchases of all the members." This finding is not here challenged by petitioner.

Though the fact that petitioner's rebate plan has resulted in price differentials between its customers is not here, and, we think, could not be, in serious dispute, two simple illustrations—typical of many shown by the evidence—will demonstrate how, and to what extent, it has done so, and may aid general understanding of points to follow.

First, the Commission found that in 1949 petitioner had approximately 1,200 purchasers of its coil action line, but 793, or nearly two thirds of them, received no rebate and only 407, or about one third of them, received a rebate, and 352 of those 407 received a rebate of only 5%, while others, in smaller numbers, received rebates ranging from 7½% to 19%, as illustrated by the tabulation in the margin.[2]

[2]

Net Purchases	Rebate	Number of Customers	Average Annual Purchases
Under $1,000	None	793	
$ 1,000 to 4,999	5%	352	$ 1,911
5,000 to 7,499	7½%	27	5,499
7,500 to 9,999	9%	1	8,372
10,000 to 12,499	10%	6	10,660
12,500 to 14,999	12%	4	13,667
15,000 to 17,499	14%	5	9,277
17,500 to 19,999	15%	2	18,735
20,000 to 22,499	16%	0	....
22,500 to 24,999	17%	1	23,441
25,000 to 27,499	18%	1	26,887
27,500 and over	19%	5	33,471

Second, the evidence shows, and the Commission found that petitioner sold its leaf spring line to six customers in Dallas, all of whom were in competition with each other in the resale of those products, four of whom purchased through group buying organizations and received rebates from petitioner ranging from 12% to 15%, but the fifth, who was not a member of a "group", received no rebate, because his aggregate annual purchases were not sufficient, and the sixth, who was the largest purchaser of the six, but not a member of a group, received a rebate of 7.29%, of the dollar amount of its purchases in the preceding year.

That these rebates were substantial is shown by the Commission's finding that they amounted, on the coil action line, to $163,392.66 in 1947, to $263,478.53 in 1948, and to $196,255.91 in 1949, and, on the piston ring line, they amounted to $57,561.89 in 1947, to $21,011.19 in 1948, and to $22,380.88 in 1949, and on the leaf spring line, they amounted to in excess of $81,000 in 1950.

These illustrations demonstrate that petitioner's cumulative annual rebate plan has resulted in general, widespread and substantial price differentials between its customers.

We have no issue here respecting justification of these price differentials, as petitioner does not contend on this review that it has justified the different prices by any showing of "differences in the cost of manufacture, sale or delivery", as indeed it could not, because their source is its rebate system, based, not on the quantities or other factors involved in any particular sale, but, rather, upon the combined dollar amount of all sales to a purchaser, or to a "group" of which he is a member, made in the preceding year (without any prior commitment to purchase any particular amount), and that system results "inevitably in systematic price discriminations, since the prices . . . bear relation to factors other than actual costs

of production or delivery." *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726, 732. Cf. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37.

Petitioner says that its rebates are equally available to all. "Theoretically these discounts are equally available to all, but functionally they are not", because they embrace the "evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability." *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 42.

It has been many times held by the Supreme Court that price differentials, not justified by a showing of differences in the cost of manufacture, sale or delivery, become price discriminations and are prohibited by the Robinson-Patman Act if they may substantially lessen, injure, destroy or prevent competition. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 44, *Federal Trade Commission* v. *Staley Co.*, 324 U.S. 746, 751, *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726.

Petitioner's contentions on the subject of injury to competition, got down to this: That the Commission failed to adduce any evidence that the price discriminations injured its competing purchasers, because it did not show that competing purchasers bought exactly the same, or interchangeable, items at different net prices; and that the Commission merely inferred competitive injury, and that there was no room for such an inference because such would be contrary to the positive testimony of a number of its purchasers, categorically denying that they were injured, and also to the stipulation that all others would so testify if called.

It is true that the evidence did not identify, item by item, the exact parts in any line sold by petitioner to particular purchasers, but only dealt with them by the same lines as they were sold by petitioner. Thus, for example,

the evidence does not specifically show whether leaf springs, coil action parts or piston rings sold to a particular purchaser were designed for the same make, model and age automobile as the like products sold to his competitor. On this basis, petitioner argues there is no evidence that it sold the same items to competing purchasers at different net prices. And it argues that although its products "may all be of one grade and quality" the Commission must prove that it sold "interchangeable" items to competing purchasers at different net prices, otherwise they will not "compete", and could not properly be regarded as of "like grade and quality" within the meaning of the act.

Nothing in the statute suggests this, in a case like the present, and petitioner points to no reason or authority that supports it. The cited case of *Package Closure Corp.* v. *Seal Right Co.*, 2 Cir., 141 F. 2d 972, does not involve the point, and the other cited case, from this circuit, of *Boss Manufacturing Co.* v. *Pagne Glove Co.*, 71 F. 2d 768, compared second grade cloth gloves of inferior materials and workmanship with first grade ones of superior materials and workmanship, and, naturally, held them to be of different grade and quality.

We agree with the statement set out at page 157 of the "Report of the Attorney General's National Committee to Study the Anti-Trust Laws", issued March 31, 1955, that "The 'like grade and quality' concept . . . was designed to serve as one of the necessary rough guides for separating out those commercial transactions insufficiently comparable for price regulation by the statute", and while leaf springs, coil springs or piston rings may not be interchangeable and usable in all makes, models and ages of automobiles, we believe that when such items are sold to competitors in lines, as petitioner has sold them, and when, as here, a discriminatory rebate is paid upon all items in a line, the Commission may properly find that

such items are "sufficiently comparable for price regulation by the statute."

The real and substantive answer is that, while leaf springs, coil action parts or piston rings for a Ford sedan of 1947 may be sufficiently different from those for a Chevrolet coach of 1950 that the former could lawfully be sold for *uniform* higher or lower prices than the latter, the question here is not related to uniform different prices for different items, nor, hence, to the like grade and quality concept, because the price discriminations here did not arise from uniform different prices for particular items, but, rather, they arose solely from the cumulative annual rebate plan, which applied to the aggregate dollar volume of all sales in a particular line to a particular purchaser in the preceding year, and, therefore, necessarily discriminated in price as to all items in the line, whether exactly alike and interchangeable or not.

While all purchasers did not handle all three of petitioner's complete lines, some of them did, and numerous ones handled two of the lines; and it was shown and found that two or more of petitioner's purchasers did business in each trade area and were, consequently, competitors therein. Through operation of the applicable cumulative annual rebate schedule, some were charged higher prices than others. This constitutes an adequate evidentiary basis to support the Commission's finding that the price discriminations may substantially injure competition.

Petitioner sought to offer detailed evidence, on an item by item basis, to show that the leaf springs, coil action parts and piston rings bought by particular purchasers, doing business in the same trade area, were not uniformly for the same make, model and age of automobile, and not exactly alike and interchangeable. Objection was made and sustained on the ground of immateriality, since the parts, though in part for different makes, models and ages of automobiles, were catalogued, priced and sold, and

were subject to rebate, as lines. Petitioner complains that this was prejudicial error. We believe that it was not, for all the reasons above stated.

Petitioner put on a number of its customers as witnesses, and asked them whether they had been competitively injured by its cumulative annual rebate plan, and each said that he had not been injured, and it was later stipulated by the parties that all of petitioner's other customers would so testify, if called.

Petitioner argues, in connection with its contention that the Commission's findings were based only on nonpermissible inferences, that this uncontradicted testimony by "hardheaded practical businessmen" shows the complete absence of competitive injury to petitioner's customers by its discriminatory prices.

The answers are, first, that the Commission's findings were not based upon nonpermissible inferences, but upon proven facts, and inferences properly to be drawn therefrom, and, second, a number of these witnesses were large buyers or members of groups, and thus received high rebates and were benefitted by the plan, and, third, their answers were conclusions contrary to simple mathematics, which may be illustrated by the example of two competing purchasers in a given trade area, buying petitioner's coil action line. Through one or more orders in a given year, one buys $4,999 worth of those products, and the other buys $27,500 worth (or even $4,999 worth, if through a "group" whose combined purchases in the year aggregate $27,500 or more). At the end of the year, petitioner will pay the former a rebate of 5% of the aggregate dollar amount of his purchases of $4,999, but will pay the latter a rebate of 19% of the aggregate dollar amount of his (or of his "group's") purchases of $27,500 (which, in either case, of course, includes the first $4,999 of his purchases) and, thus, on the first $4,999 of the purchases, the former gets a rebate of $249.81, while the latter gets a re-

bate of $949.81. A witness cannot be allowed by conclusion to deny a mathematical fact, and all the testimony of these jobbers, on this score, amounts to—if they understood the facts—is that they are not objecting.

The Commission was not required to show that petitioner's rebate system has, in fact, adversely affected competition. The language—in the "effect" clause of the statute—is "*may be* substantially to lessen competition * * *." (Italics supplied). The Supreme Court has repeatedly held that Section 2(a) of the Act does not require a finding that the discriminations in price *have in fact* had an adverse effect on competition. *Corn Products Refining Co. v. Federal Trade Commission*, 324 U.S. 726, 738, 742; *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 46; *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 356, 357. It has also held that "The statute is designed to reach such discriminations 'in their incipience' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect." *Corn Products* case, 324 U.S. at 738.

"The proper test of injury to competition has been phrased in various ways. In the *Corn Products* case, at page 738, the Court stated, following the *Standard Fashion* case, "The use of the word 'may' was not to prohibit discriminations having 'the mere possibility' of those consequences, but to reach those which would probably have the defined effect on competition." Later, in the *Corn Products* case, at page 742, the Court declared, "As we have said, the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable *possibility* that they 'may' have such an effect." (Italics supplied.) The latter passage was repeated in the *Morton Salt* case, at page 46, although with the qualification that it "is to be read also in the light of" the statement on page 738 of the *Corn Products* case (334 U.S. at 46n.).

Many of petitioner's customers testified that their business is keenly competitive and consists of the sale of thousands of items at small margins of profit, and that it is necessary to acquire goods at the lowest available price to be competitive, and those who received these rebates testified that these rebates were very important to them, and some testified that the rebates were more important than the 2% cash discount allowed by petitioner, of which all of petitioner's customers consistently took advantage. One, who ranked third or fourth in size in the city of Dallas, testified that his over all net profit ran less than 1%.

With competition so keen, margins so small and over-all net profits so low, it was clearly open to the Commission to find that rebates denied to some purchasers (well more than half in all lines) but granted to others, ranging up to 19%, may probably result in substantial injury to competition.

While many of petitioner's customers handled numerous lines, and were not dependent for financial success upon profits from petitioner's lines alone, yet the Commission, in determining the reasonable probability of injury to competition, was entitled to take account of the effect of rebates from petitioner's products upon their businesses, for the Supreme Court points out in the *Morton Salt* case, at page 49:

> "There are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. Congress intended to protect the merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods constituted a major or a minor portion of his stock. Since a grocery stock consists of many comparatively small articles, there is no possible way to effectively protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store."

For all of the foregoing reasons, we hold that the Commission's finding that petitioner has discriminated in price between different purchasers of like grades and qualities of products and that the effect may be substantially to lessen, injure, destroy or prevent competition, was supported by substantial evidence.

Petitioner's next contention is that the Commission's order was too broad, in that it prohibits all price differences and, hence, prohibits conduct which is not unlawful, and, in consequence, denies petitioner the right to participate in lawful competition; and in that it is not, but should be, limited to the secondary level of competition, and in that it should not have included the phrase "piston rings and other related items."

This order is substantially the same as the one approved by the Supreme Court in *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470. It was argued in that case that the failure to include in the order provisos excepting from its prohibitions those differentials which merely make allowances for differences in cost of manufacture, sale and delivery, or which are made in good faith to meet an equally low price of a competitor, amounted, in effect, to a prohibition against lawful competitive conduct. But the Supreme Court rejected this contention, saying:

> "* * * we think the provisos are necessarily implicit in every order under the authority of the Act, just as if the order set them out *in extenso*. Although previous Commission orders have included these provisos, they gained no force by that inclusion. Their absence cannot preclude the seller from differentiating in price in a new competitive situation involving different circumstances where it can justify the discriminations in accordance with the statutory provisos."

Thus, the provisos which petitioner would insert are implicitly contained in the order as it stands.

"The contention that the order should be limited to the secondary level of competition, overlooks the fact that the order is so limited. By its terms, the order covers only sales to those who, in fact, compete "in the resale and distribution of respondent's products." This language limits the order to the secondary line of competition.

"As to petitioner's contention that the order should not have contained the phrase "piston rings and other related items", there was evidence that piston rings were sold to the same type of accounts as petitioner's other lines, and that cumulative annual rebates were paid to their purchasers in accordance with the schedule applicable to those products, and that, under the applicable schedule, rebates were paid to some, but not to other, purchasers of those products, but it is true that the Commission did not segregate piston ring sales and develop the evidence respecting them with the same completeness as in the coil action and leaf spring lines. But the Commission's power is not limited to prohibiting the identical practices which have resulted in illegal price discriminations. It has the authority to prohibit acts of the same type or class as those committed in the past. This was made clear in the *Ruberoid* case by the statement, at page 473, reading:

> "In carrying out this function the Commission is not limited to prohibiting the illegal practic in the precise form in which it is found to have existed in the past. If the Commission is to attain the objective Congress envisioned, it cannot be required to confine its roadblock to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity."

We cannot say that inclusion of the questioned phrase was beyond the Commission's power in these circumstances.

Petitioner's final contentions are that the Commission erred in overruling its motion for a bill of particulars, filed in the pleading stage and renewed at the close of the

Commission's evidence, and that the Commission erred in overruling petitioner's motion, made at the conclusion of the Commission's case, for an order requiring the Commission to elect, from the mass of evidence adduced, typical transactions, and areas involved, upon which it would rely, and that the action of the Commission in overruling these motions constitutes a denial of due process, within the meaning of the Fifth Amendment.

The answer is that, while the complaint was in the general terms of the statute, it was made apparent on the first day of the hearing that the Commission was relying upon the price discriminatory effect of petitioner's cumulative annual rebate plan as the sole source of the price discriminations found, and petitioner admitted, and still admits, the existence of that rebate plan, and, therefore, and in these circumstances, the denial of petitioner's motions for a bill of particulars was not prejudicial and cannot be said to have constituted a denial of due process. The foregoing is equally applicable to, and conclusive upon, petitioner's contention respecting the overruling of its motion to elect.

There being no prejudicial error, the order of the Commission must be, and it is hereby, affirmed.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Judgment

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1956

Thursday, November 29, 1956

No. 15370

MOOG INDUSTRIES, INC., *Petitioner*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

FINAL DECREE AFFIRMING ORDER TO CEASE AND DESIST

Moog Industries, Inc., a corporation, petitioner herein, having filed in the Court on June 27, 1955, its petition to review and set aside an order to cease and desist issued on April 29, 1955, by the Federal Trade Commission, respondent herein, in a proceeding before said Commission entitled "In the Matter of Moog Industries, Inc., F. T. C. Docket No. 5723"; and the cause having been heard by the Court on briefs and oral argument; and the Court having rendered its decision on November 5, 1956, and having denied said petition to review:

Now, therefore, It is Hereby Ordered, Adjudged and Decreed that the aforesaid petition to review be, and the same is hereby dismissed, and that the said order to cease and desist be, and it hereby is, affirmed.

And It is Hereby Further Ordered, Adjudged and Decreed that within sixty days from date of issuance of certified copy of this decree to the Federal Trade Commission the petitioner file with the Federal Trade Commission a report in writing, setting forth in detail the manner and form in which it has complied with said order to cease and desist.

November 29, 1956.

(Order Denying Motions of Petitioner for Rehearing and to Hold in Abeyance Entry of Judgment.)

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

September Term, 1956

Thursday, November 29, 1956

No. 15370

MOOG INDUSTRIES, INC., *Petitioner*,

v.

FEDERAL TRADE COMMISSION,

ON PETITION TO REVIEW ORDER OF FEDERAL TRADE COMMISSION

Motion of petitioner for a rehearing of this cause has been considered by this Court, and, It is now here Ordered that said motion be, and hereby is, denied.

Motion of petitioner, filed concurrently with motion for a rehearing, to hold in abeyance entry of judgment in this cause has also been considered by the Court, and, It is now here Ordered that the said motion be, and hereby is, denied.

November 29, 1956.

Robinson-Patman Amendment, Clayton Act, U. S. C., 49 Stat. 1526, Title 15—

SECTION 13. DISCRIMINATION IN PRICE, SERVICES, OR FACILITIES—PRICE; SELECTION OF CUSTOMERS

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: PROVIDED, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: PROVIDED HOWEVER, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established AND PROVIDED FURTHER, That nothing contained in sections 12, 13, 14-

21, and 22-27 of this title shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And Provided Further, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Burden of Rebutting Prima Facie Case of Discrimination

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, However, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) * * *

(d) * * *

(e) * * *

(f) * * *

Administrative Procedure Act, Title 5, U. S. C., Section 1004 (a)

* * * * * *

NOTICE OF HEARING AND ISSUES

(a) Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) * * *

(c) * * *

(d) * * *

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

MOOG INDUSTRIES, INC.,
Petitioner,

vs.

FEDERAL TRADE COMMISSION.

On Writ of Certiorari to the United States Court of Appeals for the 8th Circuit.

BRIEF FOR PETITIONER.

BERNARD MELLITZ,
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No. 77.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

MOOG INDUSTRIES, INC.,
Petitioner,

vs.

FEDERAL TRADE COMMISSION.

On Writ of Certiorari to the United States Court of Appeals for the 8th Circuit.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The initial decision of the Hearing Examiner for the Federal Trade Commission appears at R. 59-77. The opinion on appeal to the Federal Trade Commission appears at R. 79-90. The dissenting opinion of Commissioner Mason appears at R. 91-95. The final order of the Federal Trade Commission appears at R. 78. The opinion of the Court of Appeals (R. 507 et seq.) is reported at 238 F. 2d 43.

JURISDICTION.

The judgment and order of the Court of Appeals was entered on November 29, 1956 (R. 523). Petitioner's motion to hold judgment and order in abeyance or for the Court to exercise its equitable jurisdiction was denied by the Court of Appeals November 29, 1956 (R. 522).

On Petitioner's motion issuance and transmittal of decree to the Federal Trade Commission was ordered withheld by the Court of Appeals on December 17, 1956, for thirty (30) days to permit application to Supreme Court for writ of certiorari (R. 524), and on petitioner's motion, the Court of Appeals entered its order on January 14, 1957, further extending the time to apply for certiorari for twenty (20) days from January 16, 1957 (R. 525). A petition for a writ of certiorari was filed on February 4, 1957, and was granted on March 25, 1957, limited to question four presented by the petition for the writ (R. 525).

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1), and 15 U. S. C., Section 21.

QUESTION PRESENTED.

The Federal Trade Commission on December 20, 1949, filed its complaint against petitioner alleging price discrimination between its customers in violation of Subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, Title 15, Sec. 13 (a), U. S. C. (49 Stat. 1526) (R. 1). The petitioner was giving annual volume discounts to all its customers according to published table of discounts applicable to the annual volume purchased (R. 62-63). This practice in one form or another is traditional and standard throughout the automotive replacement parts industry. The Court of Appeals affirmed the order of the Federal Trade Commission ordering petitioner to cease and desist from price discrimination and

ordered petitioner to file with the Federal Trade Commission its certificate of compliance sixty (60) days from the date of issuance of certified copy of the decree to the Federal Trade Commission (R. 523). Petitioner filed its motion with the Court of Appeals to hold its judgment and order in abeyance and to exercise its equitable jurisdiction and to suspend the same until its numerous competitors, who are continuing to give volume discounts to their customers can be subject to a similar order (R. 521). The Court of Appeals denied this motion (R. 522) and entered the judgment and order requiring compliance in sixty (60) days as noted above (R. 523).

The question presented is whether petitioner is entitled to have the Court of Appeals order of compliance held in abeyance or suspended until its numerous competitors, who are using similar forms of volume discounts, are subjected to similar orders—and whether the Court should exercise its statutory power and original equity jurisdiction to protect petitioner from an inevitable loss of customers and business to its competitors who are free to continue to offer volume discounts; and whether the action of the Court of Appeals in denying petitioner's motion to hold its order in abeyance is inequitable, unjust and unfair.

CONSTITUTION, STATUTES AND RULES INVOLVED.

Constitution of the United States, Article III, Section 2. (See appendix.)

Subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13 (a). (See appendix.)

Clayton Act, Sec. 11, 38 Stat. 734, as amended by Robinson-Patman Act, 15 U. S. C., Section 21. (See appendix.)

Rules of Practice and Procedure of Federal Trade Commission (May, 1955), Subpart c, Sections 2.21-2.232, inclusive, page 17 et seq. (See appendix.)

STATEMENT.

The petitioner, with its principal office and manufacturing plant in St. Louis, Missouri, is in the business of manufacturing, selling and distributing automotive replacement parts to purchasers located in various parts of the United States and the District of Columbia (R. 127-128); most of the parts so sold are manufactured in its own plant, but some of the parts so sold are purchased for resale (R. 129-442). It is now and has for many years prior to the effective date of the Robinson-Patman Act (June 19, 1936), been continuously engaged in this business. Petitioner is in competition with other corporations, firms and persons who are manufacturing, selling and distributing similar automotive replacement parts in Interstate Commerce throughout the United States.

The Federal Trade Commission filed its complaint against petitioner December 20, 1949, charging in substance that the petitioner was discriminating in prices between different purchasers and that such act substantially tended to lessen, injure and prevent competition in violation of Subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C., Section 13A (R. 1).

After hearings were had before the Hearing Commissioner, initial decision (R. 59) and order rendered, and appeal taken to the full Commission, the Commission issued its cease and desist order, requiring petitioner to file its certificate of compliance within sixty (60) days thereafter (R. 76-78). On review before the Court of Appeals, the decision of the Federal Trade Commission was affirmed (R. 507-520). Petitioner filed its motion to hold the judgment and order in abeyance until its competitors were subjected to similar orders as such volume or quantity

discount pricing system was standard and part and parcel of the automotive replacement parts industry, otherwise, petitioner would face loss of customers and business and resultant financial loss and would itself be subject to price discrimination and unfair competition, which is the very result which the Robinson-Patman Act was enacted to prevent (R. 521). This motion was denied by the Court of Appeals and its decree and order was entered affirming the order of the Federal Trade Commission, and further ordering petitioner to file its certificate of compliance with the Federal Trade Commission within sixty (60) days from the date of the issuance of certified copy of decree to the Federal Trade Commission (R. 523). Thereafter, petitioner in due time and within the period provided by law applied to the Supreme Court for certiorari, presenting four questions therein, the fourth question covering the denial by the Court of Appeals of its motion to hold its order in abeyance and for equitable treatment, and showing that such ruling under identical circumstances was contrary to the rulings of the Court of Appeals in other circuits as follows:

C. E. Niehoff & Co. v. Federal Trade Commission, 241 F. 2d 37 (7th Cir.);

Indiana Quartered Oak Co. v. Federal Trade Commission, 58 F. 2d 183-184 (2nd Cir.);

Butterick v. Federal Trade Commission, 4 F. 2d 910, 913 (2nd Cir.);

Natural Gas Pipelines Co. v. Federal Power Commission, 128 F. 2d 481-484 (7th Cir.).

The Supreme Court granted certiorari limiting it to the fourth question therein, relating to the denial by the Court of Appeals of petitioner's motion to hold the judgment in abeyance until its competitors could be subjected to similar orders (R. 525).

The petitioner gives annual volume discounts to all of its customers according to a published table of discounts or rebates applicable to the annual volume purchased (R. 62-63). This practice of giving volume discounts or rebates in one form or another is traditional and standard in the automotive replacement parts industry as practically all of Moog's competitors offer volume discounts or rebates in one form or another (R. 426, 429, 436, 444, 445, 446, 447, 448, 449, 462, 475, 476, 500, 501, 502, 503, 504). Some of the larger of Moog's competitors are:

Maremount Automotive Products
Tuthill Spring Co.
Burton Auto Springs
Eaton Products Co.
Ramsey Corporation
Hastings Manufacturing Co.
Sealed Power Corp.
McQuay-Norris Co.
Perfect Circle Corp.
Mopar (Chrysler Corporation)
Regal Manufacturing Co.
Geary Hershey Co.
Shefford Master Corp.
Thompson Products
General Motors, Chevrolet Division
Burton Auto Spring Corporation
Eaton Products of Cleveland

These are some of the larger companies who are Moog's competitors as mentioned in the testimony appearing in the Record at pages 446, 447, 448, 451, 452, 462, 472, 473, 474, 475, 501.

Typical of such discounts or rebates given by Moog's competitors is that shown by Respondent's Exhibits 10-B and 10-C, Regal Tool and Mfg. Co., Inc. (R. 526, 527, 528,

309); Respondent's Exhibit 16, Thompson Products, Inc. (R. 529-531, 473); and Respondent's Exhibits 18-A and 18-B, Thompson Products, Inc. (R. 532-535, 473); and Respondent's Exhibit 25-A, McQuay-Norris Manufacturing Co. (R. 477, 537).

Moog Industries, Inc., is one of the smaller manufacturers in the automotive replacement parts industry, its gross business being a little less than five million dollars in 1952 which is less than one per cent (1%) of the total sales volume in the industry (R. 474). The total volume of automotive replacement parts sold by the entire industry in 1952 was two and one-half billion dollars (R. 431). In order to be competitive Moog must meet its competitors' prices (R. 426, 427, 429, 445, 450) or be put out of business (R. 502). Moog, being in a secondary position because of its size, must follow the pricing practices of the industry or they would be out of business (R. 502). Moog's pricing schedule is arrived at from a competitive standpoint, costs considered (R. 427, 445, 450, 497, 498).

During the progress of the case and while it was on appeal before the full Federal Trade Commission, the petitioner, on April 16, 1954, with other manufacturers as one group and wholesalers in the industry as another group, in accordance with Subpart (c), Trade Practice Conference rules, Section 2.21 et seq., page 17, filed with the Commission their separate applications for a Trade Practice Conference requesting the Commission to grant a Trade Practice Conference to the automotive replacement parts industry in order to formulate trade practice rules and to deal among other things with unfair methods of competition and other alleged illegal practices. The Federal Trade Commission, up to the date of the writing of this brief, has failed to take any action on this application.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred by denying petitioner's motion to hold in abeyance its judgment and order of compliance until its competitors who were using the same volume discounts, could be subjected to similar orders; and further erred in failing to exercise its statutory and original equitable jurisdiction to protect the business life of petitioner.

SUMMARY OF ARGUMENT.

This proceeding involves the rights of petitioner to have an order of the Court of Appeals held in abeyance until petitioner's competitors are subjected to similar orders. The order in question required petitioner to cease and desist from price discrimination and to file its report of compliance therewith within sixty (60) days. The price discrimination consisted of the giving of volume discounts which are traditional and standard in the automotive replacement parts industry. Petitioner's competitors are free to continue such volume discounts while petitioner is subject to the order to refrain therefrom, thereby causing petitioner to be at a severe competitive disadvantage with consequent loss of business and customers. The Court of Appeals has both statutory and equitable jurisdiction to grant such relief. The action of the Court of Appeals is in direct conflict with the decision of the Courts of Appeals of other Circuits, particularly:

C. E. Niehoff & Co. v. Federal Trade Commission, 241 F. 2d 37 (7th cir., now on certiorari before this Court);

Natural Gas Pipelines v. Federal Power Commission, 128 F. 2d 481, 484 (7th cir.);

Indiana Quartered Oak Co. v. Federal Trade Commission, 58 F. 2d 183 (2nd Cir.);

Butterick v. Federal Trade Commission, 4 F. 2d 910 (2nd cir.);

L. B. Silver Co. v. Federal Trade Commission, 292 F. 752, 756 (6th cir.);

Century Metalcraft Corp. v. Federal Trade Commission, 112 F. 2d 443 (7th cir.).

To deny the petitioner the relief requested is not only inequitable, unfair and unjust, but would be a defeat of

the very purpose of the Robinson-Patman Act to protect a small business from its larger competitors. The United States and the Federal Trade Commission have heretofore in similar instances suspended orders of compliance until other competitors of the one proceeded against could be subjected to similar orders. The principles of equity should be applied here in order to protect the business life of petitioner.

ARGUMENT.

On the Facts in the Record, the Petitioner is Entitled to Equitable Relief Such as Was Given by Decisions in Other Courts of Appeals.

The Court of Appeals should have granted petitioner's Motion to Hold Its Judgment and Order in Abeyance. The Court of Appeals had ordered in its final decree that within sixty days from the date of issuance of certified copy of the decree to the Federal Trade Commission that the petitioner file with the Federal Trade Commission a report in writing setting forth the manner and form in which it complied with said order to cease and desist (R. 523). The record shows the extreme competitive disadvantage in which this would place petitioner while its competitors were still continuing to offer volume discounts thereby unquestionably causing it to lose customers and a consequent loss of money.

The Court of Appeals is given power by the Statute, 38 Stat. 734, 15 U. S. C., Section 21, to modify the orders of the Federal Trade Commission. The title of this section reads "Enforcement Provisions: Proceedings." After making provisions by which the Commission may enter its order to cease and desist and provision for review by the Court of Appeals, the section reads in part:

> "Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such persons, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission or Board."

Later on the same section reads in part as follows:

> "Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or

modify the order of the Commission or Board as in the case of an application by the Commission or Board for the enforcement of its order."

The next to last paragraph of said section 21 reads in part:

"The jurisdiction of the United States Court of appeals to enforce, set aside, or modify orders of the Commission or Board shall be exclusive."

The very words of the statute, thrice repeated, confers upon the Court of Appeals the power to modify the Commission's order. It appears obvious, therefore, that the Court of Appeals has the power to modify by postponing the date when the order will take effect. Both the title of the section and the quoted words of the Statute clearly and unequivocally so state.

The Court of Appeals also has original equity jurisdiction to modify the Commission's order by temporarily suspending it upon facts which appear in the record. The Constitution of the United States vests original equity jurisdiction in United States Courts. Article III, Section 2, of our Constitution provides:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States . . ."

In **McConihay v. Wright**, 121 U. S. 201, 7 S. C. 940, 942, 30 L. Ed. 392, this Court said in referring to the equitable jurisdiction of the United States Courts:

"That jurisdiction as has often been decided is vested as a part of the judicial power of the United States in its Courts by the Constitution and acts of Congress in execution thereof."

Chief Justice Marshall in **Osborn v. United States Bank**, 9 Wheat. 738, page 819, 6 L. Ed. 204, construed Article III of the Constitution as follows:

"This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it, by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws and treaties of the United States."

In **Old Colony Trust Co. v. Commissioner of Internal Revenue**, 279 U. S. 716, 49 S. C. 499, there was a certification by the Court of Appeals to this Court involving a review of a decision of the Board of Tax Appeals as to the jurisdiction of the Court and involving Article III of our Constitution. This Court held at page 722 of the U. S. Report that the proceedings on review before the Court of Appeals were judicial. The Court further held on the same page that the case was analogous to suits lodged in the Circuit Courts of Appeal upon petition or finding of an executive or administrative tribunal and it was not important whether such a proceeding was originally begun by an administrative or executive determination, if when it came to the Court, it called for only the exercise of the judicial power of the Court upon which jurisdiction was conferred by law.

On page 723 of the cited case the Court further held that the jurisdiction in that cause was like that of Circuit Courts of Appeal in review of orders of the Federal Trade Commission, citing in support:

Federal Trade Commission v. Eastman Kodak Co., 274 U. S. 623, 47 S. C. 688, 71 L. Ed. 1238;

Silver Co. v. Federal Trade Commission (C. C. A.), 292 F. 52.

The Court then quoted at page 724 of the cited case the opinion of Chief Justice Marshall in the Osborn Case which we have quoted above.

The most recent case where a Court of Appeals exercised both its statutory power and its original equity jurisdiction is **C. E. Niehoff & Co. v. Federal Trade Commission,** 241 F. 2d 37, 42 (7th Cir.), now pending on certiorari before this Court. The Court said at page 42 of the Reporter:

> "Niehoff's business will suffer economic extinction before the Commission adjudicates upon trade practices of Niehoff's competitors, which in their purpose and effect are essentially similar to those condemned in the Niehoff order."

The Court also stated on page 42 of the Reporter:

> "We have held that power of a court of appeals to enforce, set aside, or modify the Commission's order is an exercise of original jurisdiction, rather than appellate jurisdiction, and that the court may by its own orders protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit."

In support of that Court's decision, it cited:

Natural Gas Pipe Lines Co. v. Federal Power Commission, 128 F. 2d 481, 484 (7th Cir.).

This latter case cites in support of its decision:

Butterick v. Federal Trade Commission, 4 F. 2d 910, 913 (2nd Cir.);

L. B. Silver Co. v. Federal Trade Commission, 292 F. 752, 756 (6th Cir.);

Chamber of Commerce v. Federal Trade Commission, 13 F. 2d 673, 683 (8th Cir.);

Federal Trade Commission v. Baum, 23 F. 2d 615, 618 (2nd Cir.), cert. denied 277, U. S. 598;
Indiana Quartered Oak Co. v. Federal Trade Commission, 58 F. 2d 182, 184 (2nd Cir.).

In the Indiana Quartered Oak case, supra, the Court said, as to its original jurisdiction where equity demands such action, at page 184 of the Reporter:

> "* * * It places it in a position where it would be unable to fairly compete with its competitors. Under these circumstances this Court should act and will do so. An order will therefore be entered by this court modifying the order of affirmance directing petitioner to cease and desist so that petitioner will be permitted to use the term 'Philippine Mahogany * * *.'"

In **Century Metalcraft Corp. v. Federal Trade Commission**, 112 F. 2d 443 (7th Cir.), the Court held that Congress had made a grant of original jurisdiction to the Court to enforce, set aside, or modify the Commission's order and that such power carried with it authority to vacate or modify its own judgment whenever good cause is shown citing in support **United States v. Swift & Co.**, 286 U. S. 106, 110, 52 S. C. 460, 76 L. Ed. 999. In the Chamber of Commerce Case, 13 Fed. 2d 373, 683 (8th Cir.), the Court said:

> "When cease and desist orders come before a court of appeals the proceedings in such court are of an equitable nature."

In **L. B. Silver Co.** case, 292 F. 752, 753 (6th Cir.), the Court held that it had original equity jurisdiction in reviewing orders of the Federal Trade Commission. This case was cited in this Court's opinion in the Old Colony Trust Co. v. United States, supra.

It would appear, therefore, that under the facts existing in this case in line with previous decisions of this

Court and Courts of Appeals as noted above, that it becomes the duty of the Court to so exercise its equitable power to protect the rights of those that are before it.

A. The Testimony in the Record Plainly Shows the Necessity of Equitable Relief.

In overruling petitioner's motion the Court of Appeals undoubtedly overlooked the evidence in the record to the effect that almost all of petitioner's competitors use some form of volume rebate similar to that of petitioner and that it was a general practice in the automotive replacement parts industry, and that unless petitioner followed the rest of the industry they were "out of business" (R. 502).

Hubert C. Moog, Executive Vice President of Moog Industries, Inc., who had been with the Company since 1935 in all departments of the business (R. 420-421) testified:

> "We have to keep competitive at all times (R. 424). Our competitors' pricing structures are similar to our own * * * I believe it is necessary for us to exercise our present pricing practices to meet our competitors' price structures and their method of doing business" (R. 426).

His testimony is to the same effect at R. 429. Mr. Moog further testified:

> "Since we entered the piston ring field in 1935 there has been a general practice in the marketing of pistons to grant a cumulative retroactive rebate similar to the one that is now used and that practice was in effect in the industry at the time we entered * * *" (R. 444).

He further testified:

> "What we are now doing to meet competitive pricing practices in the sale of automotive products is to change our schedule wherever it is necessary to meet a situation that arises. All moves * * * that we make

> * * * are made in order to either prevent the loss of a certain group of our customers to our competition or in some way to protect ourselves in this competitive enterprise system" (R. 445).

Herbert M. Ramel, a vice president of petitioner and in that line of business since 1922, formerly a vice president of Ramsey Corporation (R. 499) testified that as to the piston ring field

> "Most all of the six large companies that I have named that do 85% to 90% of the business at the present time have either a retroactive or non-retroactive discount schedule * * *" (R. 501).

He further testified:

> "In order to meet the competition of these larger piston ring manufacturers and what in my opinion is necessary * * * to meet that competition, we just have to follow the leaders. We are helpless in the matter * * * as to what in my opinion it is necessary for us to do in the present state of market competition, the only thing you can do is * * * to follow all the practices that are now in vogue in the industry at the present time * * * we must follow the rest of the industry or we are out of business. The jobber would not handle them, and therefore, we would have no outlets for our merchandise. I have made a study of the things that jobbers do in seeking sources of supply" (R. 502).

The petitioner's gross business in 1952 was less than five million dollars (R. 474). In 1952, the gross business in the automotive replacement parts industry in the United States was two and one-half billion dollars (R. 431). Therefore, petitioner's business is less than one per cent of the gross business in the industry. Petitioner's larger competitors are numerous. Among those named in the testimony are:

Maremount Automotive Products
Tuthill Spring Co.
Burton Auto Springs
Eaton Products Co.
Ramsey Corporation
Hastings Manufacturing Co.
Sealed Power Corp.
McQuay-Norris Co.
Perfect Circle Corp.
Mopar Chrysler Co.
Regal Manufacturing Co.
Geary Hershey Co.
Shefford Master Corp.
Thompson Products
General Motors, Chevrolet Division

and are referred to in the record at pages 446, 451, 542, 462, 472, 473, 474, 475, 501 and 502. Some of Moog's smaller competitors are mentioned at page 501 of the record:

Wausau Motor Parts Co.
Superior Piston Ring Co.
Pacific Piston Ring Co.
Grant and Grant
White Machine Works

Typical contracts of some of petitioner's competitors showing volume discounts are:

Respondent's Exhibits 10B, 10C, Regal Tool and Manufacturing Co. (R. 526-528) (R. 309);

Respondent's Exhibit 16, Thompson Products, Inc. (R. 529-531) (R. 473);

Respondent's Exhibits 18A and B, Thompson Products, Inc. (R. 532-535) (R. 473);

Respondent's Exhibits 25-A, McQuay-Norris Manufacturing Co. (R. 537) (R. 477);

Respondent's Exhibit 15, Wausau Motor Parts Co.—referred to and introduced in evidence at R. 473.

It, therefore, seems obvious that if petitioner is restrained by the order of the Federal Trade Commission from following the volume discount practice of the industry they would just not be able to follow the industry and be competitive and as Mr. Ramel put it: "We are out of business."

Testimony, such as we have quoted above by the officers of petitioner, skilled in their business, as to the pricing practices and competition in the industry, should be accepted by this Court as there appears to be no reason to doubt its accuracy, and no testimony to the contrary appearing. This Court in **International Shoe Co. v. Federal Trade Commission**, 280 U. S. 291, 299, 50 S. C. 89, 91, in a similar situation to the instant one, except that the skilled witnesses testified that there was no real competition to the particular product, said:

> "* * * and where these officers skilled in the business which they have carried on, assert that there was no real competition in respect to the particular product, their testimony is to be weighed like that in respect to the other matters of fact, and since there is no testimony to the contrary, and no reason appears for doubting the accuracy of their observation or the credibility of the witnesses, their statements should be accepted."

The instant case is even stronger because we have documentary evidence to corroborate the witnesses' testimony as noted above. In an industry where price competition is so keen as appears in the instant case, the importance of meeting a competitor's price is of paramount consideration. The importance of meeting a competitor's price is dealt with in the strongest terms in Report of Attorney General's National Committee to Study the Anti-Trust Laws, March, 1955. At page 331 of that report under the paragraph headed "Meeting or Matching the Prices of Rivals," it states:

"Meeting a rival's discounts, is the means whereby competition diffuses the gains of productive efficiency. To forbid a seller to meet his rival's prices would involve *reductio ad absurdum* so long as the market structure itself is untouched."

The Constitution of our Nation requires fair play which is only equity. This Court has many times held that equity will not suffer a wrong without a remedy, regards as done that which ought to be done, and that equality is equity. **Independent Wireless Telegraph Company v. Radio Corporation of America**, 269 U. S. 459, 472, 473, 46 S. C. 166; **U. S. Rubber Co. v. American Oak Leather Co.**, 181 U. S. 441, 21 S. C. 670, 677. Your petitioner prays for this equitable treatment by this Court in order to protect practical survival of its business. Petitioner seeks equitable treatment, by this Court ordering the suspension of the order against it until similar orders can be applied to its competitors. Otherwise the very purpose of the Robinson-Patman Amendment to the Clayton Act, 49 Stat. 1526, 15 U. S. C. 13 (a), would be defeated, that purpose being the protection of small business from unfair competition by its larger competitors. If this Court should deny this relief, petitioner's larger competitors would be protected from their smaller competitor, your petitioner, and the purpose of the statute be defeated contrary to Congressional enactment.

B. **Both the United States and the Federal Trade Commission, Have Heretofore Recognized and Exercised the Protection of One Competitor Until Its Competitors Can Be Subjected to Similar Orders.**

This protection of one competitor, under an order, from its competitors until the latter can be subjected to similar orders, has been recognized and has been exercised both by the United States and the Federal Trade Commission,

by postponing effective dates of orders as to the one competitor. An order to cease and desist was entered by the Federal Trade Commission against Elizabeth Arden, Inc., in October, 1944, 39 F. T. C. Dec. 288. It was appealed to the Court of Appeals, 2nd Cir., and affirmed and the order enforced 156 Fed. 2d 132 (1946), cert. denied April 14, 1947, 331 U. S. 806. Similar complaints had also previously been filed by the Federal Trade Commission against six of its competitors. While the Elizabeth Arden case was pending, counsel for the Federal Trade Commission entered into an agreement that he would recommend to the Federal Trade Commission that it should defer compliance with the cease and desist order by any of seven respondents against whom cease and desist orders had been entered, until final action by the Court of Appeals in the the Elizabeth Arden case if Elizabeth Arden appealed, and until final action by the Commission in the last of the seven cases. In August, 1947, after this Court had denied certiorari in the Elizabeth Arden case, the Federal Trade Commission entered its order deferring the time within which Elizabeth Arden, Inc., should file its certificate of compliance until sixty days after the date that the last of the seven cases were disposed of by the Federal Trade Commission. Such action by the Federal Trade Commission recognized to the fullest extent that one competitor should not be under the restraint of a cease and desist order until its competitors, who were also violating the same law, were likewise restrained. The United States entered into somewhat similar agreements through consent decrees entered in conspiracy to restrain trade cases, and these are referred to in **Chrysler Corp. v. United States**, 316 U. S. 556, 558, 62 S. C. 1146, 1148, and **Ford Motor Co. v. United States**, 335 U. S. 303, 308-311, 69 S. C. 93, 95, 97. These consent decrees provided that if similar proceedings against General Motors should not result in conviction that the provisions of the consent decrees should be sus-

pended until such time as substantially an identical decree should be obtained against General Motors, and that if a similar decree against General Motors was not obtained by a certain date that the restraint would expire. In the Ford Motor Case, at page 307 of the U. S. Report, this Court stated:

> "Protection against competitive advantage, the appropriateness of which the government recognized, required a time certain at the end of which the restraint against Ford would expire if General Motors were still free of them."

The Federal Trade Commission and the United States recognized the extreme competitive disadvantage if one competitor were under a restraint while others were free therefrom and that is all that your petitioner asks this Court to do—to place petitioner in a position so that it can effectively compete with its competitors until they can be placed under similar orders.

The rules of the Federal Trade Commission provide for Trade Practice Conferences on application of persons or groups to eliminate on a voluntary and industry-wide basis trade practices and methods of competition in an industry which constitute violation of laws administered by the Commission. (Federal Trade Commission Rules of Practice and Procedure Subpart [c] 2.21 et seq.) While the instant case was on appeal before the Federal Trade Commission from the initial decision of the Hearing Examiner, the petitioner together with other manufacturers as one group in this industry, and a much larger group of wholesalers in this industry, filed their separate applications in April, 1954, with the Federal Trade Commission for a Trade Practice Conference for the Automotive Replacement Parts Industry, in order to formulate trade practice rules dealing with unfair methods of competition and other alleged illegal practices such as annual volume discounts.

Up to the date of the writing of this brief, forty-one (41) months have passed and the Federal Trade Commission has failed and neglected to take any action whatsoever on these applications. Petitioner, therefore, has attempted to bring about equal rules for all the industry to no avail. It appears that the Federal Trade Commission should be reminded of its rules and proceed to the achievement of one of the purposes for which it has assumed jurisdiction.

Your petitioner strongly feels that an industry that did a volume of two and one-half billion dollars in 1952 and undoubtedly is much larger today should receive more co-operation as requested above and less prosecution at the hands of the Federal Trade Commission and thereby bring trade practice harmony in many respects to an industry that would seem to sorely need its assistance. A notable example in which the Federal Trade Commission has acted in such respect was in the huge cosmetics industry. There were seven similar cases instituted in the Commission and there were some eighteen hundred concerns in the industry who were violating the same statute. The Commission ordered a Trade Practice Conference which resulted in adoption of trade practice rules as well as a settlement of all pending proceedings, and promulgated such rules in 1951, and issued amended trade practice rules in September, 1954.

As a result of cigarette advertising that made various claims as to their product, the Federal Trade Commission again in September, 1955, after investigation and consultation, promulgated a Cigarette Advertising Guide for use for its staff in cigarette advertising. Acting Chairman Robert C. Secrest of the Federal Trade Commission stated to the Legal and Monetary Subcommittee of the House Committee on Government Operations on July 26, 1957, that the adoption and administration of this guide has made marked improvement in cigarette advertising, in-

cluding filter cigarettes. As a natural result of such actions by the Federal Trade Commission, formal complaints which ordinarily require a trial are often settled by a consent order to cease and desist from the practice, as the balance of the industry are following the trade practice rules.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Court should suspend the order of compliance entered against petitioner by the Court of Appeals until such time as petitioner's competitors can be subjected to similar orders, such time to be fixed to a date certain. This date certain should be sufficiently far ahead to give the Federal Trade Commission sufficient time to secure similar orders against petitioner's competitors; and we suggest that the Court reserve jurisdiction so that in the event the Federal Trade Commission has not secured similar orders against all of the petitioner's competitors by the named date the Court may on application extend said date to another date certain.

Respectfully submitted,

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APPENDIX.

CONSTITUTION OF THE UNITED STATES.

Article III.

The Judicial Department.

Section 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, * * *.

Subsection (a) of Section 2 of the Clayton Act, as Amended, by the Robinson Patman Act, 49 Stat. 1526, 15 U. S. C. 13 (a):

Section 13. Discrimination in price, services, or facilities—Price; selection of customers.

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the juris-

diction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established; And provided further, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Section 11 of the Clayton Act, as Amended, by the Robinson Patman Act, 15 U. S. C. 21:

Section 21. Enforcement provisions; procedure.

Authority to enforce compliance with sections 13, 14, 18 and 19 of this title by the persons respectively subject thereto is hereby vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or Board requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by

counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a United States court of appeals, as hereinafter provided, the Commission or Board may at any time, upon such notice, and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person fails or neglects to obey such order of the Commission or Board while the same is in effect, the Commission or Board may apply to the United States court of appeals, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission or Board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside

the order of the Commission or Board. The findings of the Commission or Board as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission or Board, the court may order such additional evidence to be taken before the Commission or Board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission or Board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendations, if any, for the modification or setti g aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section 1254 of Title 28.

Any party required by such order of the Commission or Board to cease and desist from a violation charged may obtain a review of such order in said United States court of appeals by filing in this court a written petition praying that the order of the Commission or Board be set aside. A copy of such petition shall be forthwith served upon the Commission or Board, and thereupon the Commission or Board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission or Board as in the case of an application by the Commission or Board for the enforcement of its order, and

the findings of the Commission or Board as to the facts, if supported by substantial evidence, shall in like manner be conclusive.

The jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission or Board shall be exclusive.

Such proceedings in the United States court of appeals shall be given precedence over cases pending therein, and shall be in every way expedited. No order of the Commission or Board or the judgment of the court to enforce the same shall in anywise relieve or absolve any person from any liability under the anti-trust Acts.

Complaints, orders, and other processes of the Commission or Board under this section may be served by anyone duly authorized by the Commission or Board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process, registered and mailed as aforesaid shall be proof of the service of the same. Oct. 15, 1914, c. 323, Sec. 11, 38 Stat. 734; Feb. 13, 1925, c. 229, Sec. 2, 43 Stat. 939; June 19, 1934, c. 652, Sec. 602 (d), 48 Stat. 1102; Aug. 23, 1935, c. 614, Sec. 203 (a), 49 Stat. 704; June 23, 1938, c. 601, Sec. 1107 (g), 52 Stat. 1028; 1940 Reorg. plan No. IV, Sec. 7, eff. June 30, 1940, 5 F. R. 2421, 54 Stat. 123; Dec. 29, 1950, c. 1184, 64 Stat. ...

Federal Trade Commission, Rules of Practice and Procedure, May, 1955, Subpart C—Trade Practice Conference Rules, page 17 et seq.:

SUBPART C—TRADE PRACTICE CONFERENCE RULES.

Section 2.21. **Purpose.** Trade practice rules are in the nature of advisory opinions for the guidance of businessmen. Trade practice conference rules are designed to eliminate and prevent, on a voluntary and industry-wide basis, trade practices and methods of competition and business behavior in an industry which constitute violations of laws administered by the Commission.

Section 2.22. **Content.** Rules promulgated for industries are of two classifications, namely, Group I and Group II. No rules will be promulgated for an industry which consists solely of those within the Group II classification. The Group I rules are those which define practices which are considered by the Commission to be violative of laws administered by it. They afford guidance to the industry members as to legal requirements. The Group II rules are those which reflect the industry's views and recommendations as to desirable or undesirable practices. No Group II rule will be accepted and promulgated by the Commission for an industry when containing provisions which purport to sanction any practice which is contrary to law, or which, in the opinion of the Commission, may not be in accordance with the public interest.

Section 2.23. **Application.** Application for a trade practice conference may be filed with the Commission by any interested person, party or group. Such application shall be in writing and shall be signed by the applicant or the duly authorized representative of the applicant or group desiring such conference. The following information, to the extent known to the applicant, shall be furnished with

such application or in a supplement thereto: (a) a brief description of the industry, trade, or subject to be treated; (b) the kind and character of the products involved; (c) the size or extent and the divisions of the industry or trade groups concerned; (d) the estimated total annual volume of production or sales of the commodities involved; (e) list of membership of the industry or trade groups concerned in the matter; and (f) a brief statement of the acts, practices, methods of competition or other trade practices desired to be considered, or drafts of suggested trade practice rules.

Section 2.24 **When authorized.** Trade practice conference proceedings are authorized by the Commission whenever such proceedings appear to the Commission to have possibilities (a) of constructively advancing the best interests of industry on sound competitive principles in consonance with public policy, or (b) of bringing about more adequate or equitable observance of laws under which the Commission has jurisdiction, or (c) of otherwise protecting or advancing the public interest.

Section 2.25 **Informal discussions with members of the Commission's staff.** Any interested person or group may, upon request, be granted opportunity to confer in respect to any proposed trade practice conference office, either prior or subsequent to the filing of any such application. They may also submit any pertinent data or information which they desire to have considered. Such submission shall be made during such period of time as the Commission or its duly authorized official may designate.

Section 2.26 **Industry conferences.** Due notice of the time and place of any such authorized conference shall be issued by the Commission and published in the Federal Register. A member of the Commission or of its staff shall conduct the conference pursuant to direction of the Commission and in such manner as will facilitate the proceed-

ing and afford appropriate consideration of matters properly coming before the conference. A transcript of the conference proceedings shall be made, which, together with all rules, resolutions, modifications, amendments or other matters offered, shall be submitted to the Commission for its consideration.

Section 2.27 **Public hearing on proposed rules.** After the conference, and after due consideration has been given to information developed at the conference or otherwise available, a draft of proposed rules in appropriate form shall be prepared and released by the Commission and a public hearing thereon shall be scheduled. Notice of the time and place of such public hearing thereon shall be published in the Federal Register and copies of the released proposed rules and notice shall be mailed to all members of the industry of which the Commission may have knowledge. At the hearing industry members and all other interested parties, including consumers, may appear and express their views as to the rules and may suggest such amendments, revisions, and supplementation thereto as they may consider to be desirable and appropriate. Suggestions and views of industry members and interested parties as to the proposed rules may also be submitted in writing at any time prior to the scheduled public hearing.

Section 2.28 **Publication of rules.** When final trade practice rules have been approved by the Commission, they shall be published in the Federal Register. Said rules shall become operative thirty (30) days after the date of publication or at such other time as may be specified by the Commission. Copies of the final rules shall be made available at the office of the Commission. Under the procedure of the Commission a copy of the trade practice rules is sent to each member of the industry whose name and address is available.

Section 2.29 **Voluntary compliance.** The entire procedure is aimed at voluntary observance. To encourage this, the Commission circulates to industry members with the rules an acceptance form providing opportunity to each member to signify his intention to observe the rules in the conduct of his business.

Section 2.30 **Violations.** Complaints as to the use, by any person, corporation or other organization, of any act, practice or method inhibited by the rules may be made to the Commission by any person having information thereof. Such complaints will receive the attention of the Commission and appropriate action will be taken to effect such correction as is warranted. In addition, the Commission may on its own motion take such steps to stop violations of the rules as may be proper under the circumstances. Formal complaint proceedings involving practices which are violative of trade practice rules charge violation of the statutory provision on which the rules are premised, and do not charge violation of the trade practice rule.

Section 2.31 **Amendment or repeal of rules.** Any interested person, party or group may petition for the amendment or repeal of a rule. The application shall be in writing, signed by the applicant or his duly authorized representative, and shall set forth the reasons for the requested action. When an amendment of trade practice rules for an industry is requested, the Commission may, at its discretion, direct that only a conference or hearing be held in lieu of the industry conference and hearing on proposed rules provided for in the initial establishment of trade practice rules for industries. The Commission may initiate proceedings for amendment or repeal of trade practice rules for industries on its own motion.

Section 2.32 **Effect on pending proceedings—(a) Prior to complaint.** Upon the promulgation of trade practice conference rules for an industry an examination will be

made of all charges of law violations by members of that industry then pending before the Commission which have not reached the formal stage through the issuance of complaint. In those instances in which the pending charges are adequately covered by the trade practice conference rules, and which are not excluded by the policy set forth in Section 1.51 of this chapter, the Commission will consider the advisability of closing the matters. In such instances consideration will be given to whether or not a proposed respondent has subscribed to the trade practice conference rules for his industry, to whether or not there is adequate reason to believe that he is in fact complying with such rules and will continue to do so, and to whether or not the public interest requires any further proceedings.

(b) **After complaint.** Upon the promulgation of trade practice conference rules for an industry, formal complaints which have not then been adjudicated and in which the charges are adequately covered by such rules, and which are not excluded by the policy set forth in Section 1.51 of this chapter, may be made the subject of a motion to suspend submitted pursuant to the provisions of Section 3.8 of this chapter. In ruling upon such motions, consideration will be given to factors similar to those outlined in paragraph (a) of this section with respect to informal matters.

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No. 77.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

MOOG INDUSTRIES, INC.,
Petitioner,

vs.

FEDERAL TRADE COMMISSION.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

STATEMENT.

The brief of the Commission contains no denial of the fact that petitioner will suffer financial injury and loss by not being able to compete with its competitors who continue to offer volume discounts, if the Order of the Federal Trade Commission to Cease and Desist such practice is not stayed and the petitioner given equitable relief therefrom. Inasmuch as the Commission has seen fit to file its brief in this case and include by reference the arguments which it made in its brief in **Federal Trade Commission v. C. E. Niehoff & Co.** (No. 110 this Term), your petitioner has been compelled to refer to two briefs to frame this reply and in order to do so will attempt to follow Sections numbered 1, 2, 3 and 4 as set out in the Commission's brief filed in the instant proceedings.

ARGUMENT.

I.

Reviewing Power and Original Jurisdiction of Appellate Courts.

The petitioner emphatically denies that one of the questions in this case is "whether postponement of enforcement (either by modifying the agency's order or by withholding entry of decree of affirmance) constitutes unwarranted substitution of the Court's judgment for that of the Commission," which statement appears at the top of page 11 of the Commission's brief. The motion of petitioner filed in the Court of Appeals below was for equitable relief to prevent irreparable injury and the prayer for relief was for the Court to exercise its equitable jurisdiction and modify the Commission's order as to the date of its effectiveness, and the alleged question of substitution of the Court's judgment for that of the Commission is an obvious attempt on the part of the Commission to avoid the actual issues in this case.

The foregoing statement of the Commission of a so-called question in the case is an evident attempt to avoid the rulings of this Court cited on pages 12 and 13 of our main brief as to the original equitable jurisdiction of the Court. **McConihay v. Wright**, 121 U. S. 201; **Osborn v. United States Bank**, 9 Wheat. 738, 819; **Old Colony Trust Co. v. Commissioner of Internal Revenue**, 279 U. S. 716, 722. We again state that under our Constitution and the rulings of this Court that the Court of Appeals and this Court has original equitable jurisdiction notwithstanding the devious arguments to the contrary presented in various technical forms by the Commission in their brief in language inferring that the Court of Appeals and this Court has no such jurisdiction.

The Commission made no finding of facts on this point in controversy here for the simple reason that the Federal Trade Commission has no equitable jurisdiction (**Federal Trade Commission v. Eastman Kodak Co.**, 274 U. S. 619, 623). The Federal Trade Commission is not a judicial body and hence has no jurisdiction to decide equitable issues. Therefore, there is no basis for the statement noted as to substitution of its judgment for that of the Commission. The motion for equitable relief filed by petitioner in the Court below is so to speak ancillary to the original proceedings and is in complete accord with the opinion of this Court in **Scripps-Howard Radio v. Federal Trade Commission**, 316 U. S. 4, 17, that the Court of Appeals was not deprived of its power to stay—"a power as old as the judicial system of the Nation."[1]

For the same reason, the argument of the Commission on pages 12 and 13 of their brief, that fact finding is the exclusive province of the Commission has no basis or application here, nor are the cases they have cited applicable here. And even if the cases cited in support of their argument on page 13, **Federal Trade Commission v. Pacific State Paper Trade Ass'n**, 273 U. S. 52; **Federal Trade Commission v. Algoma Lumber Co.**, 291 U. S. 67, to the effect that the reviewing Court should not pick and choose for itself among uncertain and conflicting inferences, were applicable in this case, there are no uncertain or conflicting inferences. There is undisputed testimony that volume discounts or rebates in one form or another are part and parcel of the entire automobile replacement parts industry (R. 426, 429, 444, 445, 501, 502, 446, 451, 462, 473, 474, 475). This testimony is corroborated by documentary evidence which seems to be

[1] See also Federal Trade Commission Act of 1914, 38 Stat. 719, as amended 52 Stat. 111, 113, 15 U. S. C. 45 (c), authorizing the Court to issue such writs "as are necessary in its judgment to prevent injury to the public or to competitors pendente lite."

ignored by the Commission, being the then Respondent's exhibits showing various contracts giving volume discounts:

Respondent's Exhibits 10B, 100, Regal Tool and Manufacturing Co. (R. 526-528) (R. 309);

Respondent's Exhibit 16, Thompson Products, Inc. (R. 529-531) (R. 473);

Respondent's Exhibits 18A and B, Thompson Products, Inc. (R. 532-535) (R. 473);

Respondent's Exhibit 25-A, McQuay-Norris Manufacturing Co. (R. 537) (R. 477);

Respondent's Exhibit 15, Wausau Motor Parts Co. —referred to and introduced in evidence at R. 473.

All of these are undisputed facts in the record and not inferences. Significantly, the Commission does not deny that such volume discounts or rebates are part and parcel of the entire automotive replacement parts industry and it prudently refrains from comment on the foregoing typical exhibits showing volume discounts or rebates by petitioner's competitors. In its brief on this point, page 13, the Commission states that the testimony we have set forth which is favorable, falls "far short" of a convincing showing of facts on which to base our motion. There is nothing in the record to the contrary—all the testimony and the documentary evidence are undisputed—and in such cases this Court has held in a similar situation that the testimony of officers skilled in their business should be accepted, no statements appearing to the contrary, **International Shoe Co. v. Federal Trade Commission**, 280 U. S. 291; 299. On page 19 of the Commission's brief in the Niehoff case, the Commission states that it has filed 14 complaints against various firms in the automotive replacement parts industry; as every one of these are Section 2 (a) complaints and are based on volume discounts or rebates, this appears as corroboration that it is standard practice in the industry.

Commission cites the fact in note 5 on page 13 of its brief that Sealed Power Corporation, a piston ring manufacturer, has agreed to be bound by a cease and desist order similar to the one entered against petitioner. That decision is Sealed Power Corporation's, not ours. That company is many times larger than your petitioner—it also sells original equipment to the automobile manufacturers—and in all likelihood, will not be harmed financially by the amount of business it will lose in the replacement field by not being able to give volume discounts as do its competitors. Petitioner sells no car manufacturers and should not be rated in the same class, your petitioner being a small manufacturer as compared to many of its competitors. Petitioner is here now battling for its business survival.

II.

The Alleged Huge Task of Subjecting Competitors to Similar Orders Does Not Actually Exist and Could Be Entirely Eliminated if a Trade Practice Conference Were Granted.

On page 14 of the Commission's brief, it states that petitioner erroneously assumes that every member of the so-called "industry" is its competitor, and makes much of an alleged huge administrative task on the part of the Commission which it would have to assume to subject petitioner's competitors to similar orders. Such argument is foreign to and should have no effect on the equity of the situation presented. It seems that the Commission is implying, if not so stating, that such a job is too big for it to undertake, and therefore, they are unable to perform the duties delegated to them by Congress. If this be the fact, is the small concern like your petitioner to suffer loss of business and financial loss or its future existence endangered, because the Commission cannot perform its functions—or should equity come to the small concern's

rescue? We do not believe such a deficiency exists in the Commission. By its own rules it has established a procedure for handling such "huge" tasks. Your petitioner joined in an application under that procedure,—i. e.—a trade practice conference.

If the Federal Trade Commission had granted the petitioner's and other manufacturers' request for a trade practice conference as referred to in our original brief, this alleged huge task of filing complaints against numerous other competitors could not be before the Federal Trade Commission or the Courts for that matter. It would not have been necessary to file all of the fourteen suits which they allege they have filed. The Trade Practice Conference, if it had been called, would probably have eliminated all of the difficulty. We repeat, that the Commission seems to ignore the basic fundamental purpose of the Robinson-Patman Amendment which was to protect small dealers and manufacturers from the large ones, yet ironically the Commission appears here arguing just the opposite. Out of the fifteen named competitors in the testimony in this case (see pages 6 and 18 of our original brief), the Commission has only proceeded against Thompson Products, Sealed Power Corporation and Airtex (Shefford-Master Corp.); and the only conclusion to be arrived at from the state of facts as we have noted, is that petitioner and a few others are being made guinea pigs for the entire industry.

On page 19 of the Commission's brief, it attempts to side-step this obvious fact by stating that it has filed 14 Section 2 (a) complaints against 14 members of the automotive replacement parts industry, but it is highly significant that only 3 out of these 14, as shown above, are competitors of petitioner. The other eleven are not competitors; and significantly may we remind this Court and the Commission that not one single complaint has been filed

by the Commission against any of petitioner's competitors who manufacture leaf springs and allied parts which is a large part of petitioner's business. Out of the three competitors proceeded against, only one of these manufactures coil action and chassis parts, and the petitioner is the smallest firm of the three proceeded against. Outside of Thompson Products and Sealed Power, which are huge concerns, no large manufacturer in the industry has been complained against. The leaf spring line and the coil action and chassis parts line comprise the greater portion of petitioner's business, and if petitioner must submit to the order entered while its competitors continue to offer volume discounts in this highly competitive field, it will suffer certain irreparable injury and certain financial loss. The finding of facts by the Commission states that the field of automotive replace parts is highly competitive (R. 60). On page 15 of its brief, the Commission then goes on to say that if the decree herein is modified and petitioner is granted equitable relief that the Commission would then have to determine:

(1) Who are petitioner's competitors? We answer, they are named in the record here.

(2) They would have to investigate the pricing practices of each. We answer, a typical group of competitor's contracts showing volume discounts, are in the record here, and within a month's time, the Commission could easily secure all of the balance of such contracts not shown in this record.

(3) The effect of each company's price differentials on competition? We answer, if the petitioner's volume discounts injure competition as the opinion of the Commission and Court of Appeals has held, why should there be any different conclusion on the part of the Commission but that similar discount schedules of petitioner's larger as well as smaller competitors involve actual competitive injury. The Morton Salt

case seems to have settled this question (**Federal Trade Commission v. Morton Salt Co.**, 334 U. S. 37).

Such arguments on this point are given by the Commissioner under the facts as shown here seem specious. We repeat, despite the fact that all the complaints it has filed are Section 2 (a) cases, based on volume discounts or rebates, the Commission chooses to ignore the fact that volume discounts are part and parcel of the automotive replacements parts industry and instead of calling a trade practice conference as requested, or filing simultaneous complaints, they instituted the 14 proceedings over a period of some 9 years, all but 2 of which are against small companies. There can be no doubt that the Commission has been derelict in its duties in this respect and this dereliction should not cause irreparable injury to your petitioner.

III.

The Commission Cannot Blind Its Eyes to Obvious Facts in the Record and Is Arguing Against the Very Purpose for Which the Robinson-Patman Act Was Enacted.

The Commission on pages 16 and 17 of its brief makes the astonishing statement that there is no automotive replacement parts industry significant to the present proceedings and that comparison of the petitioners' sales volume with that of the entire industry is empty of meaning because petitioner sells only three so-called lines. This is obviously so stated in an attempt to convince this Court that your petitioner is not a small manufacturer in the industry, and therefore, is not in need of the equitable protection of this Court. Such an argument indicates that the Commission has turned its back on obvious facts. According to the **1957 Global Automotive Market Survey** and **World Motor Census**, there were in use in the United States in the year 1957, 64,600,721 cars, trucks and buses. Every one of these cars, trucks and buses, at some time or

another, need replacement parts and each year as more cars are manufactured and sold, more replacements parts are needed. Your petitioner manufactures and distributes the indicated replacement parts and it is as much an essential part of its industry as the original automobile parts manufacturer. The thousands of different replacement parts manufactured and sold by petitioner are just as essential as the original parts, otherwise, no car could ever have worn parts replaced; as petitioner's total sales volume in 1952 was less than $5,000,000 in a $2,500,000,000 total sales volume for the year, we respectfully submit that the argument advanced by the Commission falls of its own weight. The automotive replacement parts industry understandably is not broken up into small segments of this and that for statistical purposes and the comparison advanced in our brief is proper. Even if the total sales volume of the entire industry were cut in half, our sales volume would still be insignificant in comparison. Your petitioner is in active competition with many of these replacement parts manufacturers as named in the record, including the car manufacturers who manufacture and sell replacement parts through car dealers, and petitioner respectfully submits that the comparison that we have set out in our main brief of the small volume of petitioner as compared to the entire replacement parts industry still holds good. The Commission argues against the very purpose of the Robinson-Patman Act—that is, to protect small business from its large competitors.

IV.

Previously Hereto in Other Large Industries the Commission Has Either Filed Simultaneous Complaints or Held Trade Practice Conferences.

On page 17 of the Commission's brief, it attempts to excuse itself from its action in the cosmetics industry in deferring effective dates of compliance with its order until

all of the others proceeded against were brought under similar orders. The Commission says that it merely exercised its "discretion." We remind this Court and the Commission that the Commission also exercised its "discretion" in the lumber industry when it filed fifty simultaneous complaints against fifty lumber manufacturers. It exercised its "discretion" by recognizing that it would be unfair to proceed against one, two, three or half a dozen and not proceed against the others who were all charged with the same offense. So it exercised its "discretion" so as not to be unfair, by filing against all of them simultaneously. (See reference to the 50 simultaneous filings in **Federal Trade Commission v. Algoma Lumber Co.**, 291 U. S. 67.) In the cement industry, the Commission in **Federal Trade Commission v. Cement Institute et al.**, 333 U. S. 683, filed twelve simultaneous cases with some eighty or eighty-five competitors as defendants in the case.

In the cigarette industry, instead of filing complaints, a trade practice conference was called, and as a result, no complaints had to be filed. (See page 23 of our main brief.)

Such inaction on the part of the Commission indicates not the use of "discretion", but rather lack of a fixed policy. The Commission could just as easily have called the trade practice conference or filed simultaneous complaints against the majority of large and small automotive parts manufacturers in the replacement parts industry. The Commission with but two exceptions in the 14 cases it has filed, has singled out small companies as guinea pigs. Its failure to call a trade practice conference at the request of many manufacturers as one group and many wholesalers as one group, as indicated in our main brief, indicates a failure on the part of the Commission in the performance of the function assigned to it by Congress. Under such circumstances, we believe it to be the duty of this Court in the exercise of its equitable jurisdiction to modify the decree

as requested and to instruct the Commission to take some action on the request for a trade practice conference that has lain in its files gathering dust since April, 1954. The nine years of litigation, initiating complaints against only 14 members out of a large industry, and ignoring requests for a trade practice conference, exposes a grave deficiency in the administrative processes of that agency. Through such actions, as outlined above, and such inaction, your petitioner and other small concerns, who have only been doing what is standard in the industry, giving volume discounts, will suffer untold irreparable loss unless the decree is modified and the effective date of compliance is postponed so that your petitioner can compete with its many and more fortunate competitors in this highly competitive industry.

V.

Cases Cited by Commission in Its Brief Are Not Applicable to the Factual Situation Here.

With reference to the cases cited by the Commission in its brief in the Niehoff case and in its brief in the instant case, none of them deals with a factual situation comparable to the one presented here. In **Federal Trade Commission v. Eastman Kodak Co.**, 274 U. S. 619, which is cited at page 11 of the Commission's Niehoff brief, Eastman was ordered to cease and desist certain unfair practices and also further directed to dispose of certain laboratories. The Court of Appeals affirmed the Cease and Desist portion of the Commission's Order but held that the Commission was without authority to direct the disposal of the laboratories. This Court affirmed the decision of the Court of Appeals and held that the Commission, not being a judicial body, had no equitable jurisdiction This Court also pointed out that the Court of Appeals in reviewing an order of the Commission has the power to enter any order that the Commission could have entered as well as to set

aside or modify any order of the Commission and it was in connection with this discussion that this Court made the comments quoted in Footnote 1 appearing at page 11 in the Commission's Niehoff brief.

In the same footnote on page 11 of the Commission's Niehoff brief, it cites **American Chain and Cable Co. v. Federal Trade Commission,** 142 F. (2) 909. In that case a cease and desist order was entered by the Commission under Section 5 of the Federal Trade Commissions Act and the action was affirmed by the Court of Appeals. Thereafter, American Chain presented a motion to the Commission requesting enforcement of the order be stayed on account of the war emergency. The Commission refused to entertain the motion on the ground that it had no such authority. The Court of Appeals, on American Chain's petition, held that the Commission did have the authority to pass upon the motion in view of the war emergency and entered its order directing the Commission to do so.

On page 11 of the Commission's Niehoff brief, it cites **Federal Communications Commission v. Pottsville Broadcasting Co.,** 309 U. S. 134. This case does not involve the Clayton Act, but arose under the Federal Communications Act. Pottsville had filed a request for a license to construct a radio station which was denied by the Federal Communications Commission. The Court of Appeals reversed this order on appeal and remanded the case to the Commission. In the interim, two other applications had been filed with the Commission for stations in the same general area, and the Commission thereupon set all three applications for its joint consideration at the same time. Pottsville again went to the Court of Appeals which issued a writ of mandamus directing the Commission to consider Pottsville's application alone. This Court on appeal reversed that decision and held that in dealing with matters involving public convenience and necessity the Communications Commission was not limited to the original record,

but could and should consider all of the circumstances as disclosed by the two latter applications and it was in connection with such facts that this Court made the statement quoted in the Niehoff brief.

On page 12 of the Niehoff brief the Commission cites **Scripps-Howard Radio v. Federal Trade Commission**, 316 U. S. 4. That case involved the sole question whether the Court of Appeals had the power to stay an order of the Communications Commission pending review. This Court held that the Court of Appeals did have such power, particularly where it was necessary to prevent irreparable injury.

On pages 13 and 14 of the Commission's Niehoff brief, it cites **United States v. Wabash Railroad Co.**, 321 U. S. 403. In that case, the Interstate Commerce Commission had issued an order prohibiting carriers serving A. E. Staley Mfg. Co. from granting it a spotting allowance in violation of a certain section of the Interstate Commerce Act which prohibits carriers from granting shippers anything not specified in the filed tariffs. Staley asked that the order be set aside since enforcement would place it at a disadvantage unless similar orders were issued against the railroads serving its competitors. On appeal this Court held that the order should not be set aside and pointed out that under the Interstate Commerce Act, Staley had the right to initiate its own proceedings with the Interstate Commerce Commission to compel other railroads, serving its competitors, to stop similar practices and that in view of this fact that the Commission's order should not be set aside. In effect, this Court held that Staley had a complete and adequate remedy in the Interstate Commerce Act.

In the instant case, no such statutory remedy exists whereby petitioner can force or induce the Federal Trade Commission to exercise its discretion or to perform its

duty as against petitioner's competitors. The Commission states in its footnote on page 14 of the Niehoff brief, anticipating the distinction we have noted above, that the petitioner could bring triple damage actions or injunctive proceedings against its competitors. Petitioner's counsel and this Court are familiar with the tremendous cost, the length of time consumed in pursuing such remedies, as well as their difficulty, all of which shows the total inadequacy of the remedy as well as the uncertainty in result; **nor does this remedy serve to keep petitioner in business and enable it to retain its customers as against competitors. No amount of damages could compensate for such loss.** Therefore, the cited case is certainly not analogous or comparable to the present situation. None of the other cases cited by the Commission either in the Niehoff brief or in the Moog brief deals with the power of a Court upon a showing of irreparable injury in the record, to modify a decree of the Commission pending institution of similar proceedings against its competitors.

CONCLUSION.

For the reasons assigned, it is respectfully submitted that this Court should grant the prayer of petitioner as set forth in our original brief.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 750

MOOG INDUSTRIES, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION

OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit (Pet. 1a) is reported in 238 F. 2d 43.

JURISDICTION

The final decree affirming and enforcing the order of the Federal Trade Commission was entered on November 29, 1956. The petition for a writ of certiorari was filed on February 4, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether there is substantial evidence to support the Federal Trade Commission's finding that the effect of petitioner's price discrimination betw en different

purchasers may be substantially to lessen competition or to injure or destroy competition with persons receiving the benefit of such discrimination.

2. Whether the Commission's denial of petitioner's motions for a bill of particulars and to require the Commission to elect particular transactions on which it would rely violated due process of law.

3. Whether the Court of Appeals improperly denied petitioner's motion to hold its judgment in abeyance until petitioner's competitors, using similar forms of volume discounts, should be subjected to similar judgments or orders.

STATUTE INVOLVED

Section 2 (a) of the Clayton Act, as amended by Section 1 of the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13 (a), provides in part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * * .

STATEMENT

The Commission in December 1949 filed a complaint charging that petitioner, which makes and sells automotive replacement parts, had been discriminating

in price between different purchasers of products of like grade and quality in violation of Section 2 (a) of the Clayton Act (R. 1–3). Following the taking of evidence, the Commission's Hearing Examiner filed an "Initial Decision" (R. 59–77), and on appeal the Commission by a written opinion affirmed the Examiner's findings of fact, conclusion, and order (R. 79–90).

Petitioner's business is substantial and it sells its products in every state. Its customers are jobbers, who resell to garages, service stations, fleet owners, and other jobbers. It has adopted three classifications for its products, coil action line, leaf spring line, and piston ring line. At the end of each year it granted a retroactive rebate (usually referred to by petitioner as a "discount") based on the total volume of the year's purchases in each line. The rebates for the coil action line ranged from 5%, for those jobbers whose annual purchases were between $1,000 and $4,999, to 19% for those jobbers whose annual purchases were $27,500 and over. The range on the piston ring line was from 2% to 20%, and on the leaf spring line from 5% to 15%. (R. 60–63.)

Some of petitioner's sales have been to members of group-buying organizations. In such sales the jobber either ordered directly from petitioner or through the group office; petitioner shipped to the jobber but billed the group office, with which the jobber made settlement; and at the year's end petitioner paid the group office the rebate payable on the dollar volume of the total purchases made by its members, which rebate the group office divided among the mem-

bers in the proportion of their individual purchases. The Commission found that this method of buying was a mere bookkeeping device to obtain for its members a higher rate of rebate (and consequent lower price) than given nonmembers. (R. 64–65.)

The jobber witnesses all testified that they took advantage of the 2% discount which petitioner gave for cash payment, and that they regarded the resulting reduction in cost as essential to the conduct of the business in which they were engaged (R. 71).[1] Indeed, the over-all net profit of a jobber of petitioner who ranked third or fourth in the Dallas, Texas, trade area ran less than 4% (*ibid.*). And of six customers in that area to whom petitioner sold its leaf spring line in 1950 and who competed in resales, the four who purchased through group-buying organizations received rebates ranging from 12% to 15%, whereas the customer making the largest purchases received only a 7.29% rebate (R. 83).

Petitioner has not contended that there were any cost savings incident to its retroactive rebate plan equal to the rebates granted thereunder, or that the rebates and resulting lower prices were made in good faith to meet the equally low price of a competitor. Its contention has been that, since various jobber witnesses testified that they had not been competitively injured by petitioner's annual rebate plan, the Commission's finding of probable injury to competition cannot stand, and that the effect-on-competition

[1] The Commission found that the business was highly competitive (R. 60, 84).

clause of Section 2 (a) of the Clayton Act, an essential element of violation of that section, had therefore not been established.

The Court of Appeals rejected, after full consideration, petitioner's attack upon the probable-injury-to-competition finding (Pet. 11a–13a), and unanimously affirmed the Commission's order.

DISCUSSION

I

In order to establish a violation of Section 2 (a) of the Clayton Act it is not necessary to show that a price discrimination has in fact injured competition, but merely that there is a reasonable probability or "reasonable possibility" of this effect. *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, 738, 742; *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 46, 47. The statute was designed to reach price discriminations "'in their incipiency,' before the harm to competition is effected" (324 U. S. at 738) and "Congress was especially concerned with protecting small businesses which were unable to buy in quantities" (334 U. S. at 49).

In the instant case the Court of Appeals held that the Commission's findings of injury to competition were based upon "proven facts and inferences properly to be drawn therefrom," and that testimony of petitioner's jobber customers [2] that they had not been

[2] Many of these witnesses were large buyers or members of buying groups who received high rebates and thus were benefited by petitioner's rebate plan (Pet. 11a; R. 315–6, 332–3, 325, 349–50, 359).

injured competitively by its rebate plan did not and could not negate the adverse effect on competition inherent in sales at widely differing prices to customers competing with each other in their resales (Pet. 11a). The court said that all that the testimony of the jobbers "amounts to—if they understood the facts—is that they are not objecting [to the rebate plan]" (Pet. 12a).

In *Morton Salt* the Commission had found that grant of a 5% discount to purchasers in carload quantities adversely affected competition. See 334 U. S. at 41, 46. This Court, in holding that there was evidence to support the requisite statutory finding as to the effect of this discount on competition, said that it believed it to be "self-evident" that "competition may be adversely affected by a practice under which" a manufacturer sells his goods to some customers at substantially lower prices than it sells like goods to the competitors of these customers. *Id.* at 50. *A fortiori*, probable or possible injury to competition is self-evident in the present case, since it was petitioner's practice to sell to some customers at the published price and to sell like goods to others at that price reduced by rebates which, depending upon the "line", might be as high as 15%, 19%, or 20% (R. 82). Thus in 1949 there were about 1,200 purchasers of petitioner's coil action line; approximately two-thirds of these purchasers received no rebate while fourteen received rebates ranging from 14% to 19% (R. 70–71, 84).

Furthermore, the jobber testimony as to absence of competitive injury was equivocal and inconclusive.

Typically, petitioner's counsel asked the witness if he knew whether his company had been injured competitively by the spread in petitioner's rebates or by the larger rebate received by a specific competitor, and the witness replied that he was not aware of any such injury. *E. g.* R. 315–6, 322, 324–5. On cross-examination, some witnesses admitted they would prefer the larger rebate (R. 324, 342, 314), or would like to buy products as cheaply as possible (R. 354–5, 392–3), or that larger rebates would help profits (R. 347, 355, 367–8, 401) and would therefore be competitively helpful (R. 355–6, 368, 393), or that they did not know whether competitors had undercut their prices (R. 327–8, 338, 353, 363, 368–9).

The Court of Appeals correctly found that there was substantial evidence to support the Commission's findings. The correct legal standards were applied. This point raises no issue requiring consideration by this Court.

II

Petitioner's first "due process" contention is based on the denial of its motion for a bill of particulars (Pet. 21–23). The Commission, in ruling that petitioner was not thereby prejudiced, said (R. 80):

> * * * During the presentation of the case in support of the complaint respondent became fully informed as to the scope and details of the charges against it. Continuances are freely granted in Commission proceedings and respondent had full opportunity to study the record before proceeding. There was no possi-

bility of "surprise" to the respondent or inopportunity properly to prepare its case.

Since the hearings were in progress intermittently for 20 months, petitioner had ample opportunity to prepare its defense. Here, as in *Northwestern Bell Tel. Co.* v. *Nebraska State Ry. Comm.*, 297 U. S. 471, 476, all "[p]ossibility of doubt as to the purpose of the hearing was removed in its course before the Commission." The Court of Appeals observed that it was made apparent on the first day of the hearings that the charge of price discrimination was based solely on petitioner's cumulative annual rebate plan, and that petitioner was therefore not prejudiced by denial of its motion for a bill of particulars (Pet. 16a).[3]

Petitioner also contends that, in violation of due process, the Commission refused to require its counsel to elect particular transactions upon which it would rely, and thereby placed upon petitioner "an insurmountable burden of analyzing and breaking down" a "great mass of statistical evidence" (Pet. 23–24). But, as the Commission stated in its opinion, petitioner had advanced no defense requiring analysis or break down of the Commission's statistical tabulations, and the motion to elect was made more than a year after the Commission had rested its case (R. 81).

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[3] In *Federal Trade Commission* v. *Biddle Purchasing Co.*, 117 F. 2d 29 (C. A. 2), which petitioner cites as a conflicting authority, the Commission had cited the respondent for contempt of a cease and desist order, and the bill of particulars which the court granted merely required the Commission to specify the type of act on which it based the alleged violation.

Not only has petitioner failed to show prejudicial error in the procedural rulings upheld by the court below (Pet. 16a) but they plainly present no question meriting review by this Court.

III

Petitioner contends that the court below erred in denying petitioner's motion to hold the court's judgment in abeyance, or otherwise to exercise its equitable powers, until petitioner's competitors, referred to as using similar forms of volume discounts, are subjected to similar judgments or orders.

The Commission believes that the court below correctly denied this motion and that its decision is not in conflict with *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 128 F. 2d 481 (C. A. 7), or *Indiana Quartered Oak Co.* v. *Federal Trade Commission*, 58 F. 2d 182 (C. A. 2), cited by petitioner as contrary rulings (Pet. 28). The Commission believes, however, that on the point under consideration the decision below is in conflict with the decision of the Court of Appeals for the Seventh Circuit in *Nichoff & Co.* v. *Federal Trade Commission*, decided January 9, 1957 (Appendix, *infra*, p. 11), rehearing *en banc* denied on February 21, 1957 by a three to two vote.

In *Nichoff* the court upheld the validity of an order of the Commission directed against a company which sold automotive ignition and hydraulic brake parts to jobbers and granted quantity discounts (in the form of merchandise credits) based on annual purchases, but the court decided that the Commission's order

should not become effective in advance of proceedings against its competitors and modified the order so as to provide that it shall take effect "at such time in the future as" the court "may direct."

In view of the conflict between the decision of the Seventh Circuit and the decision of the Eighth Circuit in the instant case the Government does not oppose grant of a writ of certiorari with respect to Question 4 of the questions presented by the petition.

CONCLUSION

It is respectfully submitted that if the petition for a writ of certiorari is granted, review should be limited to Question 4 stated in the petition.

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MARCH 1957.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11526 September Term, 1956, September Session, 1956.

C. E. NIEHOFF & Co., a corporation, *Petitioner*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

Petition to Review an Order of the Federal Trade Commission.

January 9, 1957

Before MAJOR, FINNEGAN and SCHNACKENBERG, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. Petitioner, sometimes referred to herein as Niehoff, asks us to review an order to cease and desist issued by the respondent, sometimes referred to herein as the commission, upon a complaint charging violation of section 2 (a) of the amended Clayton Act.[1]

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[1] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases

The complaint charges that Niehoff, in its nation-wide sale of automotive ignition and hydraulic brake parts to automotive jobbers competitively engaged in the resale of such products, discriminates in price between its small quantity purchasers and its large quantity purchasers, and that the effect thereof may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which Niehoff and its favored purchasers are engaged, or to injure, destroy or prevent competition with Niehoff, said favored purchasers or with customers of either of them.

Niehoff's amended answer admits that it is engaged at Chicago, Illinois, in the manufacture, sale and distribution in interstate commerce of automotive products and supplies to different purchasers and that it is in active and substantial competition with other companies similarly engaged in manufacturing and selling automotive products and supplies; admits that Niehoff sells its products to different purchasers at different price differentials, but alleges that such differentials are openly available to all of its purchasers and are not discriminatory, and denies that the effect thereof may be substantially to lessen competition and create a monopoly in its line of commerce; alleges that such

---

involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States * * *, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing contained in sections 12, 13, 14, 21, and 22–27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *." 15 U. S. C. A. § 13.

price differentials make only due allowance for differences in the cost of sale or delivery resulting from the differing methods of quantities in which such products and supplies are sold or delivered to its purchasers; and also alleges that such price differentials as were granted by Niehoff were granted in good faith to meet equally low prices of its competitors.

Following extensive hearings before an examiner, he entered findings of fact. He concluded "that petitioner sold its products of like grade and quality to customers at different prices, that the customers competed with one another in the resale of these products, and that the different prices were discriminatory and in violation of section 2 (a) * * *"; that "* * * the differentials in price were not justified by differences in cost under the cost proviso of section 2 (a)" (except in a minor particular which the commission on review set aside); and that "* * * the discriminations were not justified under the 'good faith' proviso of section 2 (b) of the Act." Accordingly the examiner entered a provisional order to cease and desist. Upon cross appeals to the commission by both parties, the commission, on May 17, 1955, affirmed the findings and order of the examiner with slight modification and entered the order now under review. Summarized, the basic facts, which are not in real dispute, are now stated.

Niehoff sells and distributes in commerce certain automotive products and supplies. There are many different items classified into three lines: an ignition line, a hydraulic line, and a testing equipment line.

Niehoff's total sales volume in the sample year 1949 was $2,068,499, and of this amount approximately 90% represented sales in the ignition line, 3 to 6% in the hydraulic line, 2% in the testing equipment line, and 2% in rebuilt items.

Its domestic sales were made to some 866 jobber accounts. The prices paid by these customers were based in the first instance on Niehoff's jobber price list which is the base price schedule. Niehoff grants discounts from this schedule which vary the net prices actually paid by its several jobber accounts. For discount purposes Niehoff classified its jobber customers at the beginning of each year on the basis of the purchases made during the preceding year. A 2% discount for prompt payment is accorded to all accounts regardless of classification. Niehoff grants uniform freight allowances to all jobber customers and treats all accounts uniformly in the handling of merchandise returned for credit. As found by the examiner, the various accounts are placed in one of four classifications:[1a]

1. Jobbers whose annual purchases are less than $1,200 are classified as "jobbers without agreement"[2] and who pay the regular jobber list price.

2. Jobbers whose annual purchases range from $1,200 to $3,600 receive Niehoff's "jobbers agreement" and as such receive the following discount and allowances from the base jobber price:

Annual volume of purchases	Discount allowance, percent
$1,200–$2,400	5
$2,400–$3,600	7
$3,600 and over	10

[1a] The classifications referred to are somewhat confusing, there appearing to be overlapping of the classes. This circumstance is in our view of the case immaterial.

[2] In 1950 the designations used to describe the accounts in each classification were changed but the basis of classification and the buying prices remained the same for each class.

3. Jobbers whose annual purchases range from $3,600 to $6,000 are classified as "distributors without agreement" and receive a 10% discount off Niehoff's base jobber price on all purchases.

4. Jobbers whose annual purchases are in excess of $6,000 are classified as "distributors with agreement" and as such receive 10% discount off Niehoff's base prices on all purchases and the following additional discount allowances in the form of merchandise credits:[3]

Annual volume of purchases	Discount allowance, percent
$6,000–$8,400	5
$8,400–$12,000	6
$12,000 and over	[4] 7

The commission found, and it is not disputed, that this system of pricing provided different net purchase prices. It also found, and the record shows, that Niehoff sold to more than one account in a single city or trading area and that the net prices paid by accounts within given trading areas varied. It was further found that accounts within trading areas com-

[3] The additional discount allowances do not apply to purchases of service stocks, equipment and brake fluid.

[4] In 1949, 299 accounts were in class 1 and purchased at jobber list less cash discount. 228 were in class 2; 241 accounts were in class 3 and 98 accounts in class 4. There was a deviation from the stated price plan in that Niehoff sold to one buying group known as Cotton States, Inc., which in 1949 was composed of nine jobbers. Niehoff treats this group as as single purchaser, selling on its class 4 basis. The jobber member pays the invoice to group headquarters and it in turn remits monthly for all purchases by its members during that month. Except for one monthly billing instead of 9, the operation saves Niehoff nothing. In 1949 the annual purchases of only one member would individually have justified the discount given.

peted with one another in selling Niehoff's products.

The commission found that Niehoff's price differentials constituted discriminations in price. It was further found that the effect of these discriminations may be to substantially lessen, injure, destroy, or prevent competition in the resale of Niehoff's products. This finding took into account the size of the differentials, amounting to as much as 16% in net purchase price; the fact that the record shows that the automotive parts business is highly competitive; that jobbers stock many lines ranging from 15 r 20 for the small operator to more than 100 for the large operator and these lines generally consist of thousands of items; that net profit depends on the accumulation of small margins on the numerous items handled; and that the record also shows that the margin of profit generally runs about 4% of sales.

The commission also found that Niehoff's discounts to favored distributors contribute a direct and powerful advantage to the recipient and concluded that there was a reasonable probability that Niehoff's pricing practices substantially lessened competition at the secondary level and that the effect of discriminations may be to injure, destroy or prevent competition between purchasers receiving the benefit of the discriminations and those to whom they were not accorded.

Niehoff introduced evidence for the purpose of justifying its price differentials by differences in costs of sale and delivery. This evidence pertained to sales expenses, advertising expense, and costs of processing orders. Upon consideration of all this evidence the commission rejected Niehoff's claim that its differentials were cost-justified within the meaning of the proviso of section 2 (a).

Niehoff also introduced evidence to prove that its price differentials were made in good faith to meet

the equally low price of a competitor or competitors within the meaning of the good faith proviso of section 2 (b) of the Act.[5] The commission found that Niehoff did not establish any price or prices as a response to a particular competitor, and that, once the base price structure was established with reference to general competitive conditions, Niehoff did not deviate to meet the prices of particular competitors. It also found that the net prices accorded by Niehoff were a reflection of its nation-wide pricing system formulated to meet competition generally and not designed to meet any particular competitor's prices. On the basis of this finding the commission rejected the claim that Niehoff's price discriminations were justified under the good faith proviso of section 2 (b).

1. With the exception of certain phases of this case with which we shall hereinafter deal specially, our holding in this case is controlled by our decisions in *Whitaker Cable Corporation* v. *Federal Trade Commission*[6] and *E. Edelmann & Co.* v. *Federal Trade Commission*.[7] We adhere to the views expressed in those cases.

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[5] "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing contained in sections 12, 13, 14–21, and 22–27 of this title shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." 15 U. S. C. A. § 13 (b).

[6] No. 11494 (C. C. A. 7) decided 12–14–56.

[7] No. 11500 (C. C. A. 7) decided 12–14–56.

II. We have made a thorough search of the record and considered the evidence introduced by both parties on the issues involving cost justification and the alleged good faith of Niehoff in meeting equally low prices of its competitors. While there may be some conflict in the evidence upon these issues, we find that there is substantial evidence to support the findings of the commission.[8] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 229.

It is not the law that we may displace the commission's choice between two fairly conflicting views, even though we would justifiably have made a different choice had the matter been before us *de novo*. *Universal Camera Corp.* v. *N. L. R. B.*, *supra*, 488.

For the reasons herein set forth, the commission's order to cease and desist will be affirmed, subject to a modification to which we now refer.

III. At this point we consider Niehoff's prediction that it "would be forced out of business if the traditional pricing practices which it now follows were denied to it while its competitors are free to continue such practices." There is uncontradicted evidence in the record to factually support this prediction.

The record shows that, as to the automotive ignition line which constitutes at least 90% of Niehoff's business,[9] it has 19 competitors, and included in this group are 3 competitors who presently have complaints or orders to cease and desist pending against them before the commission, the other 16 competitors being free to continue their present pricing practices unless

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[8] 5 U. S. C. A. § 1009 (e) (5); *Universal Camera Corporation* v. *N. L. R. B.*, 340 U. S. 474, 488.

[9] Another 6% of Niehoff's business is in the hydraulic line where it has 10 principal competitors.

and until cease and desist orders are entered against them in proceedings not yet commenced.

It thus appears that the order against Niehoff was entered at a time when the commission had acted against only a few of this firm's competitors. We are persuaded by Niehoff's argument that, in view of the lapse of time which is inevitably involved in proceedings before the commission, Niehoff's business will suffer economic extinction before the commission adjudicates upon trade practices of Niehoff's competitors, which in their purpose and effect are essentially similar to those condemned in the Niehoff order. This result will follow if Niehoff is required by elimination of its present selling methods to charge higher prices for its products than the prices charged by its competitors against whom the commission has not yet ruled.

The commission takes the position that it has no power to stay compliance with its order. It relies upon a part of section 11 of the amended Clayton Act,[10] contending that it has no discretion as to the enforcement of the law. It fails to cite that part of section 11 which provides that the commission "shall issue * * * an order requiring such person to cease and desist from such violations * * * *within the time fixed by said order.*" (Italics supplied for emphasis.) It is our opinion that this statutory language vests in the commission power to postpone the time at which an order is to take effect.

In any event, the commission in this case has not exercised this permissive power under section 11, and it argues that this court has no power to delay or postpone compliance with the commission's order. If this be true we are impotent to postpone the effec-

[10] 15 U. S. C. A. § 21.

tive date of the order and, furthermore, under section 11 of the act we can be required to enforce the order in the manner therein provided without delay. In other words, according to the commission, we may witness and participate in, but not interfere with, the economic death of Niehoff while the commission machinery continues to operate toward cease and desist orders against Niehoff's competitors.

However, we do not admit judicial inpotency in this situation. Section 11 of the Clayton Act [11] gives this court power, *inter alia,* to modify an order of the commission. This includes the power to change that part of an order stating when it shall take effect. We have held [12] that the power of a court of appeals to enforce, set aside or modify the commission's order is an exercise of original jurisdiction, rather than appellate jurisdiction, and that the court may by its own orders protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit. The order in this case was issued on May 17, 1955 and directed that Niehoff "forthwith" cease and desist. This order is in the nature of an injunction. We have a right to consider its effect upon Niehoff in the light of equitable principles, and to grant relief accordingly. We have no way of knowing in advance what further proceedings, if any, will be had by the commission against Niehoff's competitors to whom we have heretofore referred. The fixing of the time at which the order against Niehoff shall become effective is a matter over which we now reserve jurisdiction, the exercise of which will depend upon the future course of the commission's proceedings against Niehoff's com-

[11] 15 U. S. C. A. § 21.

[12] *Natural Gas Pipeline Co. v. Federal Power Commission,* 128 F. 2d 481, 484.

petitors. For that reason the order against Niehoff is hereby modified by striking the word "forthwith" therefrom and by adding to said order the following: "This cease and desist order shall take effect at such time in the future as the United States Court of Appeals for the Seventh Circuit may direct, *sua sponte* or upon motion of the Federal Trade Commission." As thus modified, the order is affirmed.

ORDER, AS MODIFIED, AFFIRMED.

FINNEGAN, *Circuit Judge.* Dissenting. Affirming this order of the Commission and then directing its indeterminate suspension, causes me to diverge from the majority view. Section 11 of the Clayton Act, as amended, mandates that: "The findings of the Commission * * * as to the facts, if supported by substantial evidence, shall be conclusive," 64 Stat. 1127, 15 U. S. C. § 21 (1952). If, as my brothers find, this order squares with the statutory yardstick then a violation of the Clayton Act has been established. But, on the other hand if the order, approved by the majority, requires modification for the reasons they state, then it would seem the Commission's order is defective since it is unsupported by evidence concerning petitioner's competitors. After all the matter involves an economic problem within a defined industry. In its opinion (T. R. 1027–1028) the Commission stated, *inter alia:* "The initial decision in effect held that the status of the price of respondent's competitors as lawful or unlawful was no controlling to decision here * * * The lawfulness or unlawfulness of its competitors' prices * * * are not in issue inasmuch as respondent's defense has been legally insufficient on other grounds."

We reach much too far into the administrative agency's province by reserving our jurisdiction contingent upon "the future course of the Commission's proceedings against Niehoff's competitors." Either such matters are now before us and we have failed to properly evaluate them in reviewing evidence of price discrimination, or, they are not, now, and in that state of affairs we have no business with them. Just when this Court will decide to infuse vitality into the Niehoff order, currently in suspended animation, escapes me entirely. It appears that the majority's modification compels the Commission to investigate, or complete examination of, Niehoff's competitors at the risk of forfeiting an otherwise approved order. Whether this entails all 19 competitors or a baker's dozen is unrevealed. My grave doubts that our statutory power to *modify* Federal Trade Commission orders can be converted into policing and supervising, though perhaps obliquely, the length, breadth and sequence of Commission investigations brings me to the position I now take. Certainly we would refuse to activate the Commission upon a bare petition for mandamus to investigate the automotive ignition industry. Responsibility of achieving enforcement of the statutes Congress assigned to the Commission lies elsewhere.

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CITATIONS

Cases:

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Miscellaneous:

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 77

MOOG INDUSTRIES, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 507–520) is reported in 238 F. 2d 43. The opinion of the Federal Trade Commission (R. 79–90), and the dissenting opinion of Commissioner Mason (R. 91–95), are reported in 51 F. T. C. 931.

JURISDICTION

The judgment of the Court of Appeals affirming the order of the Federal Trade Commission was entered on November 29, 1956 (R. 523), and its order denying petitioner's motion to hold entry of judgment in abeyance was entered on the same date (R. 522). The

petition for a writ of certiorari was filed on February 4, 1957. The petition was granted, limited to Question 4 presented by the petition, on March 25, 1957 (R. 525). 353 U. S. 908. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the court below erred in denying petitioner's motion to hold its judgment in abeyance until petitioner's competitors, using similar forms of volume discounts, are subjected to like judgments or orders.

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13, provides in part:

> (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *. * * *
>
> (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price * * *, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section,

* * *: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price * * * to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, * * *.

Section 11 of the Clayton Act, 38 Stat. 734, as amended, 15 U. S. C. 21, provides in part:

> That authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:
>
> Whenever the Commission * * * shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7, and 8 of this Act, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing * * *. * * * If upon such hearing the Commission * * * shall be of the opinion that any of the provisions of said sections

have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of section 7 and 8 of this Act, if any there be, in the manner and within the time fixed by said order. * * *

If such person fails or neglects to obey such order * * * the Commission or Board may apply to the United States court of appeals * * * for the enforcement of its order * * *. Upon such filing of the application and transcript the court * * * shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission or Board. The findings of the Commission or Board as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission or Board, the court may order such additional evidence to be taken before the Commission or Board and to be adduced upon the hearing in such manner and upon

such terms and conditions as to the court may seem proper. * * *

Any party required by such order of the Commission or Board to cease and desist from a violation charged may obtain a review of such order in said United States court of appeals by filing in the court a written petition praying that the order of the Commission or Board be set aside. * * * Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission or Board as in the case of an application by the Commission or Board for the enforcement of its order, * * *.

The jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission or Board shall be exclusive.

* * * * *

STATEMENT

The Commission in December 1949 filed a complaint charging that petitioner, which makes and sells certain types of automotive replacement parts, had been discriminating in price between different purchasers of products of like grade and quality in violation of Section 2 (a) of the Clayton Act (R. 1–3). Following the taking of evidence, the Commission's Hearing Examiner filed an "Initial Decision" (R. 59–77), and on appeal the Commission by a written opinion affirmed the Examiner's findings of fact, conclusion, and order (R. 79–90).

Petitioner's business is substantial[1] and it sells its products in every state. Its customers are jobbers, who resell to garages, service stations, fleet owners, and other jobbers. It sells its products under three classifications—coil action line, leaf spring line, and piston ring line—and sales of the first two have always predominated, with the piston ring line accounting for a small proportion of total sales. At the end of each year, it granted a retroactive rebate (usually referred to by petitioner as a "discount") based on the total volume of the year's purchases in each line. The rebates which it granted ranged from zero to 19% for the coil action line, from zero to 15% for the leaf spring line, and from zero to 20% for the piston ring line. (R. 60–63.)

Some of petitioner's sales have been to members of group-buying organizations. In such sales the jobber either ordered directly from petitioner or through the group office; petitioner shipped to the jobber but billed the group office, with which the jobber made settlement; and at the year's end petitioner paid the group office the rebate payable on the dollar volume of the total purchases made by its members, which rebate the group office divided among the members in the proportion of their individual purchases. The Commission found that this method of buying was a mere bookkeeping device to obtain for its members a higher rate of rebate (and consequent lower price) than given nonmembers. (R. 64–65.)

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[1] Petitioner states (Br. 7) that its gross business in 1952 was a little less than $5,000,000.

The Commission found that petitioner, by means of its annual volume rebates, discriminated in price between different purchasers, and that the effect of such discriminations may be substantially to lessen, injure, or destroy competition between customers of petitioner who compete with each other in the resale of its products (R. 67, 78). The Commission concluded that these price discriminations violated Section 2 (a) of the Clayton Act, and it entered an order that petitioner "forthwith" cease from selling replacement parts of like grade and quality to any one purchaser at net prices higher than the net prices charged to any other purchaser who in fact competed, in resales, with the purchaser paying the higher price (R. 76–77, 78). On review of this order, the court below, in an opinion by Whittaker, J., unanimously affirmed the order (R. 507–520).

Petitioner subsequently filed a motion which prayed the court "to set aside the opinion and judgment herein for the time being and hold the same in abeyance until the entire automotive replacement parts industry can be subjected to similar judgments and orders" (R. 521). This motion was denied without opinion (R. 522).

SUMMARY OF ARGUMENT

Since the question presented in this case is, in substance, discussed in the Commission's brief in *Federal Trade Commission* v. *Niehoff & Co.* (No. 110, this Term), we here adopt and rely on the views there expressed. The present brief deals with certain

matters common to both cases, but does so in relation to the facts of the instant case.

1. After the court below had upheld the validity of the Commission's order directing petitioner to cease from further illegal price discrimination, petitioner moved that the court hold its judgment of affirmance in abeyance until petitioner's competitors had been subjected to similar orders and judgments. The motion is premised on the proposition that in the review proceeding under Section 11 of the Clayton Act the court below possessed the same latitude, in limiting or conditioning grant of injunctive relief, exercised by a trial court of equity. The decisions of this Court establish, however, that on judicial review of administrative orders the reviewing court's powers are, generally speaking, confined to correcting errors of law committed by the agency. Petitioner shows no reason for taking this case out of the general rule, a departure from which would give judicial countenance to continuation of an adjudicated violation of a regulatory statute.

A further decisive barrier to the grant of petitioner's motion is that it is based upon facts not supported by any finding made by the Commission. Under the statute, however, fact-finding is the exclusive province of the Commission and a reviewing court has no independent power in that respect.

2. In form, petitioner's motion to hold judgment in abeyance merely requests that entry of judgment be deferred. In practical effect, grant of the motion would bar entry of judgment for all time. Grant of the motion would mean that the Commission, in

order to have the judgment become alive, would have to investigate all facts relevant to determining who are petitioner's significant competitiors, each such company's pricing practices, and the effect of its price differentials upon competition among its customers. It would mean that, following such investigation and appraisal of the facts developed, the Commission would have to undertake an indeterminate number of administrative proceedings and subsequent judicial review proceedings. In view of the Commission's limited staff and funds, this burden would be, if not practically impossible, at least not in the public interest.

In addition, the court below, although vested with no supervisory power over the Commission's administration of the regulatory statute being enforced, would sit in judgment upon the adequacy of the Commission's handling of the exceedingly complex problems incident to meeting the conditions precedent to entry of a judgment of affirmance. We submit that this would be nothing more than judicial intrusion upon the performance of purely administrative functions.

ARGUMENT

THE COURT BELOW, HAVING UPHELD THE VALIDITY OF THE COMMISSION'S ORDER DIRECTING PETITIONER TO CEASE AND DESIST FROM FURTHER ILLEGAL PRICE DISCRIMINATIONS, PROPERLY REJECTED PETITIONER'S MOTION ASKING THE COURT TO WITHHOLD ENTRY OF JUDGMENT OF AFFIRMANCE UNTIL PETITIONER'S COMPETITORS CAN BE SUBJECTED TO LIKE ORDERS AND JUDGMENTS

In this case and in *Federal Trade Commission* v. *Niehoff & Co.* (No. 110, this Term), a court of

appeals, reviewing pursuant to Section 11 of the Clayton Act an order of the Federal Trade Commission directed against illegal price discrimination, upheld the validity of the Commission's order. In *Niehoff* the court, notwithstanding its determination that the order was valid, modified it by eliminating the requirement that Niehoff "forthwith" cease from further violation of the statute and substituted the provision that the order take effect at such future time as the court may direct, to be determined by the future course of the Commission's proceedings against Niehoff's competitors. In the instant case, petitioner sought to achieve a like end by asking the court below to hold in abeyance its judgment affirming the Commission's order "until the entire automotive replacement parts industry can be subjected to similar judgments and orders" (R. 521).

In *Niehoff* the question presented is the validity of the court's modification of the Commission's order, and here the question presented is the validity of the court's refusal to postpone entry of judgment. Although the cases involve differing methods for achieving deferment of enforcement of a valid Commission order, certain questions are common to each case. One is whether the reviewing court in a Section 11 proceeding is clothed with all of the powers of a trial court of general jurisdiction. Other common questions are whether the order of an administrative agency directed against an adjudicated violation of a regulatory statute is enforceable if the agency has not yet proceeded against all other similarly circum-

stanced potential violators of the statute, and whether postponement of enforcement (either by modifying the agency's order or by withholding entry of a decree of affirmance) constitutes unwarranted substitution of the court's judgment for that of the Commission as to the appropriate and requisite remedy. The Commission's views on these questions are set forth in its brief in the *Niehoff* case, and we adopt the views and contentions there made without restatement.[2]

I

Petitioner's basic contention (Br. 11-16) is that in a Section 11 proceeding the reviewing court possesses the same latitude as a trial court of equity in determining whether to grant or withhold judicial relief. Although the Commission's *Niehoff* brief discusses this contention, further elaboration in the light of the facts of the instant case seems desirable.

This Court has ruled that judicial review of administrative orders is, generally speaking, limited to determining whether the agency has committed an error of law and that the reviewing court "exhausts its power when it lays bare a misconception of law and compels correction." *Scripps-Howard Radio v. Federal Communications Commission*, 316 U. S. 4, 10. Here the court below, having found that no error of law had been committed, had no basis for the exercise of its statutory power to "set aside" or "modify" the Commission's order, and there was left only the

[2] Copies of the Commission's *Niehoff* brief have been served on petitioner's counsel.

statutory power and duty to "affirm". If the court has authority to do otherwise, there must be read into the words of the statute defining the court's jurisdiction a latent or inherent power on the part of the court to determine that special and unusual circumstances make enforcement of the regulatory statute so harsh or inequitable that the court should permit continuation of an adjudicated violation of law.

While we believe that the grant of power to "affirm" is not equivalent to a power to withhold affirmance, at the very least the circumstances which would support exercise of the latter power (assuming that it exists) must be factually established in the manner provided by the statute authorizing judicial review. But it is settled that, under the statute, fact-finding is the exclusive province of the Commission and a reviewing court has no independent fact-finding power.

Petitioner's motion to hold judgment in abeyance rests on certain alleged facts, *i. e.*, that immediate entry of judgment would cause petitioner "certain financial loss" and that "the quantity discount pricing system is part and parcel of the whole automotive replacement parts industry" (R. 521). No such facts were found by the Commission, nor do its findings even permit an inference of such facts. Accordingly, petitioner's motion necessarily asked the court to undertake fact-finding, which, under the statute, it is not empowered to do.[3] In passing upon the validity of an

[3] Likewise, the jurisdiction given the reviewing court is "to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript [of the Commission proceeding] a decree affirming, modifying, or setting aside the order of the Commission" (*supra*, p. 4).

order of the Federal Trade Commission, it is error for the reviewing court "to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences. Statute and decision (*Federal Trade Comm'n* v. *Pacific States Paper Trade Assn*, 273 U. S. 52, 61, 63) forbid that exercise of power." *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73.

The very evidence which petitioner brings to the attention of this Court under the heading "The Testimony in the Record Plainly Shows the Necessity of Equitable Relief" (Br. 16–17) illustrates the dangers inherent in the judicial fact-finding necessarily involved in the grant of petitioner's motion. The testimony set forth which is most favorable to petitioner is merely that its "competitors' pricing structures are similar to our own," that since 1935 there has been "a general practice in the marketing of pistons to grant a cumulative retroactive rebate," and testimony by one Ramel which is confined to the piston ring field (R. 499–502).[4] Certainly such evidence falls far short of a conclusive or convincing showing of the facts on which petitioner based its motion to hold judgment in abeyance.[5]

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[4] The Commission found that petitioner's piston ring line accounted for only "a small proportion" of its overall sales (R. 61).

[5] Following the decision by the court below, Sealed Power Corporation, one of petitioner's principal piston ring competitors (R. 462, 501), was willing to become bound by a Commission order against price discrimination substantially identical with the order issued against petitioner, notwithstanding that its competitors (apart from petitioner) were not so bound. See Commis-

II

We also wish to elaborate, in relation to the facts in this case, another matter touched upon in our *Niehoff* brief (p. 15)—namely, that to make enforcement of the Commission's order contingent upon subjecting all "competitors" to similar orders and judgments would preclude for all time, not merely defer for an indefinite time, enforcement of the order. Petitioner's motion asked the court below to defer entry of judgment "until the entire automotive replacements parts industry can be subjected to similar judgments and orders." The motion thus makes the clearly erroneous assumption that every member of the so-called "industry" is a competitor of petitioner. See *infra*, pp. 16–17. But even if petitioner is now prepared to treat as competitors only those who sell automotive replacement parts of the kind sold by petitioner, the administrative task of subjecting all such competitors to similar orders and judgments would be so prolonged and difficult as to be a practical impossibility, having due regard for the Commission's other statutory duties. We indicate below the scope and difficulties of this administrative task.

Petitioner sells its products under three classifications, leaf spring line, coil action line, and piston ring line (R. 61). In each line petitioner has a different set of competitors (R. 451–452, 462, 501). Moreover, the leaf spring line includes leaf springs, coil springs, tie rod ends, shackles, and kingbolts (R. 61), and pe-

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sion order entered by consent on May 3, 1957. *In the Matter of Sealed Power Corporation*, F. T. C. Docket 6654.

titioner has one one set of competitors in leaf springs, another in coil springs, and still another set in tie rod ends, kingbolts, and shackles (R. 452). In leaf springs, one subdivision of one of petitioner's three lines, there are, in addition to numerous concerns of approximately petitioner's size, at least 10 or 12 "just of a local nature," and still other spring service stations who "do some manufacturing and distribution on their own" (R. 451).

The grant of petitioner's motion to hold judgment in abeyance would mean that the Commission, in order to be in a position to obtain entry of judgment, would have to determine: (1) who are petitioner's significant competitors; (2) the pricing practices of each; and (3) the effect of each company's price differentials upon competition among its customers, which effect would involve the question whether the seller had two or more distributors (competing in resale) in particular trade areas (cf., finding 16, R. 67). It would also mean court scrutiny and determination of the Commission's proper performance of this task, *i. e.*, whether it had adequately investigated all pertinent facts as to petitioner's competitors and whether, in the instances in which the Commission decided that there were insufficient grounds to issue a complaint, this decision was warranted. The court would thereby, in substance, exercise supervision over, and intrude upon, duties and functions which are purely administrative. See our *Niehoff* brief, pp. 10, 21. Finally, entry of judgment against petitioner would have to await not only completion of the administra-

tive proceedings on all issued complaints but also judicial affirmance of the cease and desist orders resulting from these proceedings.

III

While the point is, in our view, not relevant, we note petitioner's statement that denial of its motion to defer entry of judgment defeats the very purpose of the Robinson-Patman Act, protection of a small business against its larger competitors (Br. 9–10, 20), as well as the related statement that petitioner's 1952 gross business was less than 1% of the 1952 gross business of the "automotive replacement parts industry" (Br. 7, 17). The implication is that the Commission unfairly proceeded against one minor member of a vast "industry".

Automotive replacement parts are sold under as many as 75 lines (R. 71), and petitioner sells only three lines (*supra*, p. 6). Sellers of wholly unrelated products are not competitors, and we cite below, to illustrate the diversity of products used as automotive replacement parts, the lines sold by companies against which the Commission has issued cease and desist orders which have been judicially reviewed.[6] There plainly is no automotive replace-

[6] Ignition line, hydraulic line, testing equipment line (*Viehoff*); brass line, glass line, brake line (*Edelmann & Co.* v. *F. T. C.*, No. 101, this Term); ignition line, fuel line (*P. & D. Manufacturing Co.* v. *F. T. C.*, No. 491, this Term); cable and related parts (*Whitaker Cable Corp.* v. *F. T. C.*, 239 F. 2d 253 (C. A. 7), certiorari denied 353 U. S. 938)); ignition line, carburetor line, cable line (*P. Sorensen Manufacturing Co.* v. *F. T. C.*, 246 F. 2d 687 (C. A. D. C.)).

ment parts "industry" in any sense of significance to the present proceeding, and we submit that comparison of the sales volume of petitioner with that of the entire "industry" is as empty of meaning and significance as comparison of petitioner's sales volume with that of the entire steel industry or entire automobile industry.

IV

Petitioner refers (Br. 21) to one instance in which the Commission, after judicial affirmance of an order issued under Section 2 (e) of the Clayton Act against a seller of cosmetics, deferred the time for filing a certificate of compliance with its order until disposition of like orders against other cosmetic companies. In that instance, the Commission was exercising the discretion vested in it respecting determination of the time at which its order shall become effective. But a reviewing court is vested with no like discretion to nullify the administrative agency's determination as to an order's effective date. Moreover, this one instance of deferment of enforcement is no indication that the Commission recognizes that, notwithstanding the public interest in achieving compliance with statutory requirements, compliance should invariably be delayed until all other like violators can be required to comply. The Commission's experience in the instance cited may well have led it to conclude that this kind of deferment of enforcement is, as a general matter, neither sound nor in the public interest.

We submit that is is also irrelevant that the Commission did not act upon petitioner's application for a Trade Practice Conference (see Pet. Br. 22–23). There is no showing that the application for such a conference was joined in by a sufficient segment of the so-called "industry" to warrant holding the requested conference. In addition, the Commission's rules barred grant of petitioner's application, which was made after the examiner had rendered his Initial Decision that petitioner had been violating the Clayton Act (R. 59, 76). The Commission's Rules of Practice and Procedure then in effect provided (16 C. F. R. 1.3 (d) (1949)): "But it is not the policy of the Commission to grant the privilege of settling cases through trade practice conference or stipulation agreements to persons who have violated the law where such violations involve * * * violations of the Clayton Act." Explanatory Statement (i), which follows the above section of the rules, also states: "Trade practice conference rules may include rules against restraints of trade and against violations of the Clayton Act. * * * They should not be accepted, however, as a basis for the settlement of cases in which the Commission has reason to believe that such violations have occurred."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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NOVEMBER 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957

No. 77.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

MOOG INDUSTRIES, INC.,
Petitioner,

vs.

FEDERAL TRADE COMMISSION.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITIONER'S MOTION FOR REHEARING.

Petitioner Moog Industries, Inc., herein files its motion to set aside its per curiam opinion filed January 27, 1958, and reported in 78 S. Ct. 377 (Advance Sheet), insofar as per curiam opinion applies to its case No. 77, and for grounds thereof respectfully states:

1. The Court has failed to mention and to rule on the main question in the case and on which it granted certiorari: whether the Court of Appeals has original equitable jurisdiction to protect the rights of petitioner.

2. In failing to mention or to rule on the aforesaid question, the Court has failed to follow its previous rulings in **Old Colony Trust Co. v. Commissioner of Internal Revenue**, 279 U. S. 716, 722, 723, 49 S. Ct. 499, as well as in **Osborne v. U. S. Bank**, 9 Wheat. 738, page 819, 6 L. Ed. 204, and **McConihay v. Wright**, 121 U. S. 201, 7 S. Ct. 940, 942, 30 L. Ed. 392.

3. The aforesaid question presented and on which certiorari was granted has not been settled or decided by the per curiam opinion and is in the same status as it was before certiorari was granted.

ARGUMENT.

This Court granted certiorari on March 25, 1957, 353 U. S. 908, 77 S. C. 665, 1 L. Ed. 662, on the following question, which we reprint below for the convenience of the Court:

> "The petition for writ of certiorari is granted limited to question 4 presented by the petition for the writ which reads as follows:
>
> "'4. Another question presented is that of the denial by the Court of Appeals of petitioner's Motion to Hold Its Judgment and Order in Abeyance or to **exercise** its equitable powers and **original jurisdiction**, until its various numerous competitors who are using similar forms of volume discounts, which are standard in the industry, can be subjected to similar judgments and orders, since only two of its many competitors have been proceeded against similarly by the Federal Trade Commission; whether such denial by the Court of Appeals is inequitable, unjust and unfair when petitioner is subjected to the judgment and decree of the Court while its numerous competitors may still continue to offer volume discounts inevitably causing petitioner to suffer loss of business and subsequent financial loss; **and whether under such circumstances the Court should exercise its original equitable jurisdiction to protect the rights of petitioner.**' (Emphasis ours.)
>
> "The case is transferred to the summary calendar."

The per curiam opinion insofar as it affects the case No. 77 (Moog Industries, Inc.), paragraph 2, incorrectly states the question presented, the last words of said paragraph being:

> "* * * that petitioner would suffer financial loss if prohibited from engaging in pricing practices open to its competitors."

The particular words that seem to be incorrect are the words

> "engaging in pricing practices open to its competitors."

The record shows, as noted in our original brief, by documentary evidence as well as oral evidence, that seventeen competitors of your petitioner are actually engaged in pricing practices from which petitioner is prohibited from using. There is a vast difference between pricing practices open to competitors and pricing practices actually being used by competitors. The record shows that such pricing practices of volume discounts was standard practice in the industry, and in its brief the Federal Trade Commission does not deny this fact. Therefore, the statement of the question presented appears to be incorrect.

The opinion deals solely with the rights of the Commission to decide the question which is not the question that was presented to this Court, and on which it granted certiorari. It is self-evident that in the writing of this opinion the Court has inadvertently overlooked the question on which it granted certiorari and on which this case was briefed. In fact, members of the Court will recall that the numerous questions asked counsel in argument of this case were all directed at the powers of the Federal Trade Commission, and counsel did not have sufficient time in the half hour allowed to even present the question of the original jurisdiction of the Appeals Court on the matter.

The question of original jurisdiction of the Court of Appeals is still in the same status as before the Court granted certiorari. We respectfully submit that certainly this was not the intention of the Court when it wrote its per curiam

opinion. And your counsel respectfully submits that the issue presented requires the settling of this fundamental constitutional question of the jurisdiction as set forth in counsel's brief filed in the cause.

By failing to mention or to rule on the aforesaid question the Court has failed to follow its previous rulings in **Old Colony Trust Co. v. Commissioner of Internal Revenue**, 279 U. S. 716, 722, 723, 49 S. Ct. 499, as well as in **Osborne v. U. S. Bank**, 9 Wheat. 738, page 819, 6 L. Ed. 204, and **McConihay v. Wright**, 121 U. S. 201, 7 S. C. 940, 942, 30 L. Ed. 392. In addition this Court seems to have disregarded Article III, Section 2, of the Constitution of the United States as to the judicial power in United States Courts, all of which was set forth in our brief. (See pages 12 and 13.) In the Old Colony Trust Co. case, pages 722 and 723, this Court has flatly declared that proceedings from administrative tribunal on review before the Court of Appeals were judicial and that it was not important whether such a proceeding was originally begun by an administrative or executive determination if, when it came to the Court, it called for the exercise of judicial power of the Court upon which jurisdiction was conferred In addition this Court flatly held that the jurisdiction in the cause before the Court was exactly like that of review of orders of the Federal Trade Commission and cited in support several cases. (See page 13 of our original brief.)

We respectfully submit that former opinions of this Court holding in such respect should not be entirely disregarded as was done by the per curiam opinion.

In addition, we respectfully submit that members of the Bar who participate in litigation before the Federal Trade Commission and the Courts of Appeal involving questions similar to the one presented, should be given the benefit of a decision by this Court on this fundamental constitutional question.

For the reasons assigned, it is respectfully submitted that the per curiam be set aside and that this case may be set for reargument on the single question of the fundamental constitutional questions presented when certiorari was granted and as briefed by counsel in this case.

Respectfully submitted,

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I hereby certify that this motion for rehearing is presented and filed in good faith for the reasons assigned therein and is not made for purposes of delay.

Malcolm I. Frank,
One of Counsel for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. —

FEDERAL TRADE COMMISSION, PETITIONER

v.

C. E. NIEHOFF & CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit entered in the above cause on March 28, 1957.

OPINION BELOW

The opinion of the court of appeals (Appendix A, *infra*, pp. 11-21) is reported at 241 F. 2d 37.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1957 (Appendix B, *infra*, pp. 22-23). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The court of appeals upheld the Federal Trade Commission's determination that respondent has discrimi-

nated in price between different purchasers of its products in violation of Section 2(a) of the Clayton Act, and it affirmed the prohibitions of the Commission's cease and desist order. The court, however, modified the order by substituting for the provision that it take effect "forthwith" a provision that it take effect at such time in the future as the court "may direct, *sua sponte* or upon motion of the Federal Trade Commission."

The question presented is whether the power of judicial review conferred by Section 11 of the Clayton Act authorizes the reviewing court to postpone the operative date of a Commission order adjudicated to be valid, for the declared purpose of rendering the order a nullity until like orders have been entered against respondent's "competitors."

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, provides in part:

> "(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *. * * *
>
> (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price * * *, the burden of rebut-

ting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, * * *: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price * * * to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, * * *.

Section 11 of the Clayton Act, 38 Stat. 734, as amended, 15 U.S.C. 21, provides in part:

That authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested: In the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:

Whenever the commission * * * shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing * * *. * * * If upon such hearing the commission * * * shall be of the opinion that any of the provisions of said sections have been or are being vio-

lated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, * * * in the manner and within the time fixed by said order. * * *

* * * * *

Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said United States court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside. * * * Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order, * * *.

STATEMENT

Respondent sells automotive replacement parts to jobbers on a nationwide basis, and about 90% of its sales are classified as "ignition line" sales. It sells at list prices but grants discounts ranging from 1% to 17%, which are based upon the dollar volume of the particular customer's purchases during the preceding year. The Commission found that the business of jobbers of automotive parts is highly competitive, and that there is reasonable probability that the effect of the varying net prices at which respondent sells will be to injure or destroy competition among its customers. The court of appeals held that the Commission's findings had ade-

quate evidentiary support, and that its order properly implemented the prohibitions of Section 2(a) of the Clayton Act (*infra*, p. 17).

The court also stated that respondent Niehoff has 19 competitors in its ignition line business, that Commission complaints or orders are pending against only three of these competitors, and that the court was "persuaded" by respondent's contention that its "business will suffer economic extinction before the commission adjudicates upon trade practices of Niehoff's competitors" (*infra*, p. 18). The court believed that its review of Commission orders under Section 11 of the Act is an exercise of original rather than appellate jurisdiction, and that it had the same freedom to grant or withhold relief as a court of equity of original jurisdiction (*infra*, p. 19). The court thereupon decided to modify the Commission's order by eliminating the requirement that respondent "forthwith" cease and desist from selling at discriminatory prices, and substituting the provision that the cease and desist order take effect at such later time as the court "may direct" (*infra*, p. 20). The court explained the purpose and basis of its action as follows (*ibid.*):

> We have no way of knowing in advance what further proceedings, if any, will be had by the commission against Niehoff's competitors to whom we have heretofore referred. The fixing of the time at which the order against Niehoff shall become effective is a matter over which we now reserve jurisdiction, the exercise of which will depend upon the future course of the commission's proceedings against Niehoff's competitors.

REASONS FOR GRANTING THE WRIT

In *Moog Industries, Inc.* v. *Federal Trade Commission*, No. 750, this Term, this Court on March 25, 1957, granted the petition for writ of certiorari, limited to Question 4 presented by the petition, which reads as follows:

> Another question presented is that of the denial by the Court of Appeals of petitioner's Motion to Hold Its Judgment and Order in Abeyance or to exercise its equitable powers and original jurisdiction, until its various numerous competitors who are using similar forms of volume discounts, which are standard in the industry, can be subjected to similar judgments and orders, since only two of its many competitors have been proceeded against similarly by the Federal Trade Commission; whether such denial by the Court of Appeals is inequitable, unjust and unfair when petitioner is subjected to the judgment and decree of the Court while its numerous competitors may still continue to offer volume discounts inevitably causing petitioner to suffer loss of business and consequent financial loss; and whether under such circumstances the Court should exercise its orignial equitable jurisdiction to protect the rights of petitioner.

In the *Moog* case the Government did not oppose review of the issues embraced in Question 4, although it believed that those issues had been correctly decided by the Eighth Circuit, because of the conflict with the decision of the Seventh Circuit in the instant case. Apart from the need for resolving the conflict between

the two circuits,[1] review is warranted because of the obvious substantial importance of the issues and because the holding below departs from principles settled by this Court in a number of cases. In essence, the court below has held that a practice adjudicated to be illegal may be continued until determination of the legality of like practices by the respondent's competitors. As the Commission's opinion states, this would mean that "Commission orders would be forever pending and unlawful practices rarely, if ever, corrected" (R. 1026).

The decision below would, in effect, create a new statutory defense to price discrimination—absence of completed administrative proceedings against competitors. Section 2 of the Clayton Act, however, both defines the limits of the prohibition and specifies what may be set up as a defense.[2]

This Court in an analogous situation has refused to sanction, as a defense to an administrative order, that like orders had not been issued against competitors. *United States* v. *Wabash Railroad Co.*, 321 U.S. 403, sustained the validity of an order of the Interstate Commerce Commission cancelling certain railroad tariff supplements which were found to constitute an unlawful preference to a shipper, notwithstanding the fact

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[1] See also *E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152, pending on petition for a writ of certiorari filed April 10, 1957 (No. 900, this Term), where a different panel of the Seventh Circuit refused to modify the Commission order in the same manner as in this case.

[2] Price differentials which make "only due allowance" for cost differences resulting from differing methods of delivery or quantities of goods sold are legalized by the first proviso to Section 2(a), and the proviso to Section 2(b) permits as an affirmative defense that the seller's lower price "was made in good faith to meet an equally low price of a competitor".

that the Commission had not issued orders prohibiting like preferences to competitors of the shipper. See 321 U.S. at 406. The Court said that suppression of the statutory violation would be "practically impossible if the Commission were required to suppress all simultaneously or none", and that the Commission's duty to enforce the law "would hardly be performed if the Commission were to decline to enforce it against one because it could not at the same time enforce it against all." 321 U.S. at 414.

It is no defense to a charge of violation of Section 5 of the Federal Trade Commission Act that others employ the same unfair method of competition. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483, 492, 494; *Federal Trade Commission* v. *Keppel & Bro.*, 291 U.S. 304, 308-309, 312-313. If this is not a defense to a cease and desist order effective on issuance, we submit that it equally is not a ground for postponing, by court decree, the effective date of an issued order.

The Federal Trade Commission, not the reviewing court, is initially to determine what relief is appropriate and necessary in order to put an end to a violation of law found by the Commission, and judicial review is limited to ascertaining whether the Commission has made "an allowable judgment in its choice of the remedy". This rule applies to proceedings under both Section 2(a) of the Clayton Act (*Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473) and Section 5 of the Trade Commission Act (*Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611-612). See also *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428-429. Determination of when the ordered remedy shall take effect is, we submit, an important

element of determining the requisite relief and is "within the province of the Commission rather than the courts". *El Moro Cigar Co.* v. *Federal Trade Commission*, 107 F. 2d 429, 432 (C.A. 4).

Judge Finnegan, in dissenting from the decision below, said (*infra*, p. 21):

> Just when this Court will decide to infuse vitality into the Niehoff order, currently in suspended animation, escapes me entirely. It appears that the majority's modification compels the Commission to investigate, or complete examination of, Niehoff's competitors at the risk of forfeiting an otherwise approved order. Whether this entails all 19 competitors or a baker's dozen is unrevealed. My grave doubts that our statutory power to *modify* Federal Trade Commission orders can be converted into policing and supervising, though perhaps obliquely, the length, breadth and sequence of Commission investigations brings me to the position I now take. Certainly we would refuse to activate the Commission upon a bare petition for mandamus to investigate the automotive ignition industry. Responsibility of achieving enforcement of the statutes Congress assigned to the Commission lies elsewhere.

The decision below is an open invitation to inject into the administrative proceedings under Section 2(a) collateral issues as to who are substantial competitors of the respondent, the extent to which the pricing practices of these competitors parallel those of the respondent, and the status of proceedings against the competitors. At present, Section 2(a) proceedings usually are

long drawn out and costly, and interjection of such additional issues would further prolong and complicate them. Furthermore, the decision below would be a precedent for injecting like collateral issues in proceedings under the Federal Trade Commission Act and other sections of the Clayton Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
VICTOR R. HANSEN,
Assistant Attorney General.
CHARLES H. WESTON,
Attorney.

APRIL 1957.

APPENDIX A

Opinion of the United States Court of Appeals for the Seventh Circuit

January 9, 1957

Before Major, Finnegan and Schnackenberg, *Circuit Judges.*

Schnackenberg, *Circuit Judge.* Petitioner, sometimes referred to herein as Niehoff, asks us to review an order to cease and desist issued by the respondent, sometimes referred to herein as the commission, upon a complaint charging violation of section 2 (a) of the amended Clayton Act.[1]

The complaint charges that Niehoff, in its nationwide sale of automotive ignition and hydraulic brake parts to automotive jobbers competitively engaged in the resale of such products, discriminates in price between its small quantity purchasers and its large quan-

[1] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States * * *, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receive the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *." 15 U. S. C. A. § 13.

tity purchasers, and that the effect thereof may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which Niehoff and its favored purchasers are engaged, or to injure, destroy or prevent competition with Niehoff, said favored purchasers or with customers of either of them.

Niehoff's amended answer admits that it is engaged at Chicago, Illinois, in the manufacture, sale and distribution in interstate commerce of automotive products and supplies to different purchasers and that it is in active and substantial competition with other companies similarly engaged in manufacturing and selling automotive products and supplies; admits that Niehoff sells its products to different purchasers at different price differentials, but alleges that such differentials are openly available to all of its purchasers and are not discriminatory, and denies that the effect thereof may be substantially to lessen competition and create a monopoly in its line of commerce; alleges that such price differentials make only due allowance for differences in the cost of sale or delivery resulting from the differing methods of quantities in which such products and supplies are sold or delivered to its purchasers; and also alleges that such price differentials as were granted by Niehoff were granted in good faith to meet equally low prices of its competitors.

Following extensive hearings before an examiner, he entered findings of fact. He concluded "that petitioner sold its products of like grade and quality to customers at different prices, that the customers competed with one another in the resale of these products, and that the different prices were discriminatory and in violation of section 2 (a) * * *"; that "* * * the differentials in price were not justified by differences in cost under the cost proviso of section 2 (a)" (except in a minor particular which the commission on review set aside); and that "* * * the discrimina-

tions were not justified under the 'good faith' proviso of section 2 (b) of the Act." Accordingly the examiner entered a provisional order to cease and desist. Upon cross appeals to the commission by both parties, the commission, on May 17, 1955, affirmed the findings and order of the examiner with slight modification and entered the order now under review. Summarized, the basic facts, which are not in real dispute, are now stated.

Niehoff sells and distributes in commerce certain automotive products and supplies. There are many different items classified into three lines: an ignition line, a hydraulic line, and a testing equipment line.

Niehoff's total sales volume in the sample year 1949 was $2,068,499, and of this amount approximately 90% represented sales in the ignition line, 3 to 6% in the hydraulic line, 2% in the testing equipment line, and 2% in rebuilt items.

Its domestic sales were made to some 866 jobber accounts. The prices paid by these customers were based in the first instance on Niehoff's jobber price list which is the base price schedule. Niehoff grants discounts from this schedule which vary the net prices actually paid by its several jobber accounts. For discount purposes Niehoff classified its jobber customers at the beginning of each year on the basis of the purchases made during the preceding year. A 2% discount for prompt payment is accorded to all accounts regardless of classification. Niehoff grants uniform freight allowances to all jobber customers and treats all accounts uniformly in the handling of merchandise returned for credit. As found by the examiner, the various accounts are placed in one of four classifications: [1a]

[1a] The classifications referred to are somewhat confusing, there appearing to be overlapping of the classes. This circumstance is in our view of the case immaterial.

1. Jobbers whose annual purchases are less than $1,200 are classified as "jobbers without agreement"[2] and who pay the regular jobber list price.

2. Jobbers whose annual purchases range from $1,200 to $3,600 receive Niehoff's "jobbers agreement" and as such receive the following discount and allowances from the base jobber price:

Annual volume of purchases	Discount allowance, percent
$1,200-$2,400	5
$2,400-$3,600	7
$3,600 and over	10

3. Jobbers whose annual purchases range from $3,600 to $6,000 are classified as "distributors without agreement" and receive a 10% discount off Niehoff's base jobber price on all purchases.

4. Jobbers whose annual purchases are in excess of $6,000 are classified as "distributors with agreement" and as such receive 10% discount off Niehoff's base prices on all purchases and the following additional discount allowances in the form of merchandise credits:[3]

Annual volume of purchases	Discount allowance, percent
$6,000-$8,400	5
$8,400-$12,000	6
$12,000 and over	[4] 7

[2] In 1950 the designations used to describe the accounts in each classification were changed but the basis of classification and the buying prices remained the same for each class.

[3] The additional discount allowances do not apply to purchases of service stocks, equipment and brake fluid.

[4] In 1949, 299 accounts were in class 1 and purchased at jobber list less cash discount. 228 were in class 2; 241 accounts were in class 3 and 98 accounts in class 4. There was a deviation from the stated price plan in that Niehoff sold to one buying group

The commission found, and it is not disputed, that this system of pricing provided different net purchase prices. It also found, and the record shows, that Niehoff sold to more than one account in a single city or trading area and that the net prices paid by accounts within given trading areas varied. It was further found that accounts within trading areas competed with one another in selling Niehoff's products.

The commission found that Niehoff's price differentials constituted discriminations in price. It was further found that the effect of these discriminations may be to substantially lessen, injure, destroy, or prevent competition in the resale of Niehoff's products. This finding took into account the size of the differentials, amounting to as much as 16% in net purchase price; the fact that the record shows that the automotive parts business is highly competitive; that jobbers stock many lines ranging from 15 or 20 for the small operator to more than 100 for the large operator and these lines generally consist of thousands of items; that net profit depends on the accumulation of small margins on the numerous items handled; and that the record also shows that the margin of profit generally runs about 4% of sales.

The commission also found that Niehoff's discounts to favored distributors contribute a direct and powerful advantage to the recipient and concluded that there was a reasonable probability that Niehoff's pricing practices substantially lessened competition at the

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known as Cotton States, Inc., which in 1949 was composed of nine jobbers. Niehoff treats this group as a single purchaser, selling on its class 4 basis. The jobber member pays the invoice to group headquarters and it in turn remits monthly for all purchases by its members during that month. Except for one monthly billing instead of 9, the operation saves Niehoff nothing. In 1949 the annual purchases of only one member would individually have justified the discount given.

secondary level and that the effect of discriminations may be to injure, destroy or prevent competition between purchasers receiving the benefit of the discriminations and those to whom they were not accorded.

Niehoff introduced evidence for the purpose of justifying its price differentials by differences in costs of sale and delivery. This evidence pertained to sales expenses, advertising expense, and costs of processing orders. Upon consideration of all this evidence the commission rejected Niehoff's claim that its differentials were cost-justified within the meaning of the proviso of section 2 (a).

Niehoff also introduced evidence to prove that its price differentials were made in good faith to meet the equally low price of a competitor or competitors within the meaning of the good faith proviso of section 2.(b) of the Act.[5] The commission found that Niehoff did not establish any price or prices as a response to a particular competitor, and that, once the base price structure was established with reference to general competitive conditions, Niehoff did not deviate to meet the prices of particular competitors. It also found that the net prices accorded by Niehoff were a reflection of its nation-wide pricing system formulated to meet competition generally and not designed to meet

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[5] "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." 15 U. S. C. A. § 13 (b).

any particular competitor's prices. On the basis of this finding the commission rejected the claim that Niehoff's price discriminations were justified under the good faith proviso of section 2 (b).

I. With the exception of certain phases of this case with which we shall hereinafter deal specially, our holding in this case is controlled by our decisions in *Whitaker Cable Corporation* v. *Federal Trade Commission*[6] and *E. Edelmann & Co.* v. *Federal Trade Commission*.[7] We adhere to the views expressed in those cases.

II. We have made a thorough search of the record and considered the evidence introduced by both parties on the issues involving cost justification and the alleged good faith of Niehoff in meeting equally low prices of its competitors. While there may be some conflict in the evidence upon these issues, we find that there is substantial evidence to support the findings of the commission.[8] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U.S. 197, 229.

It is not the law that we may displace the commission's choice between two fairly conflicting views, even though we would justifiably have made a different choice had the matter been before us *de novo*. *Universal Camera Corp.* v. *N. L. R. B.*, *supra*, 488.

For the reasons herein set forth, the commission's order to cease and desist will be affirmed, subject to a modification to which we now refer.

III. At this point we consider Niehoff's prediction that it "would be forced out of business if the tradi-

[6] No. 11494 (C. C. A. 7) decided 12-14-56.
[7] No. 11500 (C. C. A. 7) decided 12-14-56.
[8] 5 U. S. C. A. § 1009 (e) (5); *Universal Camera Corporation* v. *N. L. R. B.*, 340 U. S. 474, 488.

tional pricing practices which it now follows were denied to it while its competitors are free to continue such practices." There is uncontradicted evidence in the record to factually support this prediction.

The record shows that, as to the automotive ignition line which constitutes at least 90% of Niehoff's business,[9] it has 19 competitors, and included in this group are 3 competitors who presently have complaints or orders to cease and desist pending against them before the commission, the other 16 competitors being free to continue their present pricing practices unless and until cease and desist orders are entered against them in proceedings not yet commenced.

It thus appears that the order against Niehoff was entered at a time when the commission had acted against only a few of this firm's competitors. We are persuaded by Niehoff's argument that, in view of the lapse of time which is inevitably involved in proceedings before the commission, Niehoff's business will suffer economic extinction before the commission adjudicates upon trade practices of Niehoff's competitors, which in their purpose and effect are essentially similar to those condemned in the Niehoff order. This result will follow if Niehoff is required by elimination of its present selling methods to charge higher prices for its products than the prices charged by its competitors against whom the commission has not yet ruled.

The commission takes the position that it has no power to stay compliance with its order. It relies upon a part of section 11 of the amended Clayton Act,[10] contending that it has no discretion as to the enforcement of the law. It fails to cite that part of section 11 which provides that the commission "shall issue * * * an order

[9] Another 6% of Niehoff's business is in the hydraulic line where it has 10 principal competitors.

[10] 15 U. S. C. A. § 21.

requiring such person to cease and desist from such violations * * * *within the time fixed by said order.*" (Italics supplied for emphasis.) It is our opinion that this statutory language vests in the commission power to postpone the time at which an order is to take effect.

In any event, the commission in this case has not exercised this permissive power under section 11, and it argues that this court has no power to delay or postpone compliance with the commission's order. If this be true we are impotent to postpone the effective date of the order and, furthermore, under section 11 of the act we can be required to enforce the order in the manner therein provided without delay. In other words, according to the commission, we may witness and participate in, but not interfere with, the economic death of Niehoff while the commission machinery continues to operate toward cease and desist orders against Niehoff's competitors.

However, we do not admit judicial impotency in this situation. Section 11 of the Clayton Act [11] gives this court power, *inter alia*, to modify an order of the commission. This includes the power to change that part of an order stating when it shall take effect. We have held [12] that the power of a court of appeals to enforce, set aside or modify the commission's order is an exercise of original jurisdiction, rather than appellate jurisdiction, and that the court may by its own orders protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit. The order in this case was issued on May 17, 1955 and directed that Niehoff "forthwith" cease and desist. This order is in the nature of an injunction. We have a right to consider its effect upon

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[11] 15 U. S. C. A. § 21.

[12] *Natural Gas Pipeline Co. v. Federal Power Commission*, 128 F. 2d 481, 484.

Niehoff in the light of equitable principles, and to grant relief accordingly. We have no way of knowing in advance what further proceedings, if any, will be had by the commission against Niehoff's competitors to whom we have heretofore referred. The fixing of the time at which the order against Niehoff shall become effective is a matter over which we now reserve jurisdiction, the exercise of which will depend upon the future course of the commission's proceedings against Niehoff's competitors. For that reason the order against Niehoff is hereby modified by striking the word "forthwith" therefrom and by adding to said order the following: "This cease and desist order shall take effect at such time in the future as the United States Court of Appeals for the Seventh Circuit may direct, *sua sponte* or upon motion of the Federal Trade Commission." As thus modified, the order is affirmed.

ORDER, AS MODIFIED, AFFIRMED.

FINNEGAN, *Circuit Judge*. Dissenting. Affirming this order of the Commission and then directing its indeterminate suspension, causes me to diverge from the majority view. Section 11 of the Clayton Act, as amended, mandates that: "The findings of the Commission * * * as to the facts, if supported by substantial evidence, shall be conclusive," 64 Stat. 1127, 15 U. S. C. § 21 (1952). If, as my brothers find, this order squares with the statutory yardstick then a violation of the Clayton Act has been established. But, on the other hand if the order, approved by the majority, requires modification for the reasons they state, then it would seem the Commission's order is defective since it is unsupported by evidence concerning petitioner's competitors. After all the matter involves an economic problem within a defined industry. In its

opinion (T. R. 1027-1028) the Commission stated, *inter alia:* "The initial decision in effect held that the status of the price of respondent's competitors as lawful or unlawful was not controlling to decision here * * * The lawfulness or unlawfulness of its competitors' prices * * * are not in issue inasmuch as respondent's defense has been legally insufficient on other grounds."

We reach much too far into the administrative agency's province by reserving our jurisdiction contingent upon "the future course of the Commission's proceedings against Niehoff's competitors." Either such matters are now before us and we have failed to properly evaluate them in reviewing evidence of price discrimination, or, they are not, now, and in that state of affairs we have no business with them. Just when this Court will decide to infuse vitality into the Niehoff order, currently in suspended animation, escapes me entirely. It appears that the majority's modification compels the Commission to investigate, or complete examination of, Niehoff's competitors at the risk of forfeiting an otherwise approved order. Whether this entails all 19 competitors or a baker's dozen is unrevealed. My grave doubts that our statutory power to *modify* Federal Trade Commission orders can be converted into policing and supervising, though perhaps obliquely, the length, breadth and sequence of Commission investigations brings me to the position I now take. Certainly we would refuse to activate the Commission upon a bare petition for mandamus to investigate the automotive ignition industry. Responsibility of achieving enforcement of the statutes Congress assigned to the Commission lies elsewhere.

APPENDIX B

Final Decree

C. E. Niehoff & Co., petitioner herein, having filed in this Court on July 22, 1955, its petition to review and set aside an order to cease and desist issued on May 17, 1955, by the Federal Trade Commission, respondent herein, in a proceeding before said Commission entitled "In the Matter of C. E. Niehoff & Co., F.T.C. Docket No. 5768"; and the cause having been heard by the Court on briefs and oral argument; and this Court having rendered its decision on January 9, 1957, modifying said order to cease and desist and affirming said order as modified; and this Court having thereafter on February 21, 1957, denied respondent's petition for rehearing and petition for rehearing en banc:

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that said order to cease and desist is modified to read as follows:

> It Is Ordered that respondent C. E. Niehoff & Co., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in, or in connection with, the sale of automotive products in commerce, as "commerce" is defined in the Clayton Act, as amended, do cease and desist from discriminating, directly or indirectly, in the price of said automotive products of like grade and quality, by selling to any purchaser at net prices higher than the net prices charged any other purchaser, which purchasers compete, in fact, in the resale of said products.
>
> It is Further Ordered that this cease and desist order shall take effect at such time in the future as the United States Court of Appeals for the

Seventh Circuit may direct, *sua sponte* or upon motion of the Federal Trade Commission.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the order of the respondent Federal Trade Commission, as hereby modified, is affirmed.

By the Court.

(S.) J. EARL MAJOR,

(S.) ELMER J. SCHNACKENBERG,

United States Circuit Judges.

Dated: March 28, 1957.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 110

FEDERAL TRADE COMMISSION, PETITIONER

v.

C. E. NIEHOFF & Co.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the Court of Appeals and the dissenting opinion of Judge Finnegan (R. 1035–43) are reported in 241 F. 2d 37. The opinion of the Federal Trade Commission (R. 1013–28) is reported in 51 F. T. C. 1114.

JURISDICTION

The Court of Appeals on January 9, 1957, entered a judgment which modified the Commission's order and affirmed the order as thus modified (R. 1044). The court entertained the Commission's petition for rehearing *en banc,* but denied the petition on February 21, 1957, Chief Judge Duffy and Judge Finnegan dissenting (R. 1045). Following such denial, the

court entered its final judgment on March 28, 1957 (R. 1046–7). The petition for a writ of certiorari was filed on April 23, 1957, and was granted on June 3, 1957 (R. 1047). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

The Court of Appeals upheld the Federal Trade Commission's determination that respondent has discriminated in price between different purchasers of its products in violation of Section 2 (a) of the Clayton Act, and it affirmed the prohibitions of the Commission's cease-and-desist order. The court, however, modified the order by substituting for the provision that it take effect "forthwith" a provision that the order "shall take effect at such time in the future" as the court "may direct, *sua sponte* or upon motion of the Federal Trade Commission."

The question presented is whether Section 11 of the Clayton Act, in conferring upon the several courts of appeals jurisdiction to affirm, set aside, or "modify" orders of the Federal Trade Commission directed against violations of the Act, authorized the court below to postpone the effective date of such an order, adjudicated to be valid, pending issuance of like cease and desist orders against respondent's competitors.

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13, provides in part:

> (a) That it shall be unlawful for any person engaged in commerce, in the course of such

commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *. * * *

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price * * *, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, * * *: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price * * * to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, * * *.

Section 11 of the Clayton Act, 38 Stat. 734, as amended, 15 U. S. C. 21, provides in part:

That authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air car-

riers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

Whenever the Commission * * * shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7, and 8 of this Act, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearhearing * * *. * * * If upon such hearing the Commission * * * shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this Act, if any there be, in the manner and within the time fixed by said order. * * *

If such person fails or neglects to obey such order * * * the Commission or Board may apply to the United States court of appeals * * * for the enforcement of its order * * *. Upon such filing of the application and transcript the court * * * shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming,

modifying, or setting aside the order of the Commission or Board. The findings of the Commission or Board as to the facts, if supported by substantial evidence, shall be conclusive. * * *

Any party required by such order of the Commission or Board to cease and desist from a violation charged may obtain a review of such order in said United States court of appeals by filing in the court a written petition praying that the order of the Commission or Board be set aside. * * * Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission or Board as in the case of an application by the Commission or Board for the enforcement of its order, * * *.

The jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission or Board shall be exclusive.

* * * * * *

STATEMENT

The Commission in May 1950 filed a complaint charging that respondent, a producer and seller of automotive products, had been discriminating in price between different purchasers of products of like grade and quality, in violation of Section 2 (a) of the Clayton Act (R. 2–3). Following the taking of evidence, the Commission's hearing examiner filed an "Initial Decision" which set forth his findings of fact, conclusion, and proposed order (R. 980–1011). On cross appeals to the Commission, it filed a written opinion which affirmed the examiner's conclusion that respondent had violated Section 2 (a) and affirmed, with minor modifications, his findings of fact and pro-

posed order (R. 1013–28). The order which the Commission thereupon entered directed that respondent "forthwith" cease and desist, in the sale of automotive parts of like grade and quality, from selling to any purchaser at net prices higher than the net prices charged any other purchaser, when such purchasers in fact compete in the resale of said products (R. 1012).

The basic facts are not in dispute (R. 1036). Respondent sells on a nationwide basis to jobbers, who in turn resell to garages, to fleet owners, to gasoline stations, and over-the-counter (R. 1014). It sells to the jobbers at list price, less discounts granted on the basis of the particular jobber's purchases from respondent during the preceding year, and these discounts ranged from zero on purchases under $1,200 and 5% on purchases from $1,200 to $2,400, to 17% on purchases of $12,000 and over (R. 998, 1014–5). The products sold are resold for use as replacement parts since respondent does not sell any original equipment to automobile manufacturers (R. 1014). Respondent's total sales in 1949 were more than $2,000,000, 90% of which were in the ignition line and the balance in the hydraulic line and testing equipment line (R. 982).

The Commission found that the business of jobbers of automotive parts is "highly competitive" (R. 1017); that such jobbers generally operate on a "very thin margin of profit—four percent of sales or less" (R. 986); that all jobbers must take the 2% cash discount which respondent allows for cash payment since failure to do so would in many instances wipe out or

materially reduce the jobber's profit (R. 1015–6); and that a smaller discount or price differential than that granted by respondent "directly and markedly affects profit margins" (R. 990, 1015). The Commission further found that jobbers located in the same trading area are in competition with each other (R. 985, 1015); that respondent's price differentials "are substantial and materially influence the competitive positions of purchasers who resell respondent's merchandise" (R. 1017); and that respondent's "discounts and rebates to its favored customers carried a direct potentiality of injuring, destroying and preventing competition among its purchasers" (R. 1016).

On respondent's petition for review, the court below held that there was substantial evidence to support the findings made by the Commission in rejecting (1) respondent's defense that its price differentials were cost justified and (2) its defense that its lower prices had been made in good faith to meet the equally low prices of competitors (R. 1040). The court also held that its prior decisions in *Whitaker Cable Corp.* v. *Federal Trade Commission*, 239 F. 2d 253, certiorari denied, 353 U. S. 938, and *Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152, pending on petition for certiorari, No. 101, this Term, were controlling with respect to respondent's attack upon the Commission's finding that respondent's price discriminations would probably injure competition among respondent's jobber customers (R. 1039).

The court, after upholding the Commission's order, modified it by postponing its effective date until such

time as the court might subsequently direct (R. 1042). The court gave the following reasons for this action: in the sale of its ignition line, respondent has 19 competitors; their trade practices are "essentially similar" to those condemned in the order against respondent; the Commission has instituted proceedings against only three of these competitors; and there was uncontradicted evidence to support respondent's "prediction" that it would be forced out of business if it is barred from following its traditional pricing practices while its competitors are not (R. 1040–1). The court concluded that Section 11 of the Clayton Act vested in it the powers of a "trial court of equity of general jurisdiction" and thus empowered it to grant relief on "equitable principles" (R. 1041–2). Accordingly, the court ruled (R. 1042): "The fixing of the time at which the order against Niehoff shall become effective is a matter over which we now reserve jurisdiction, the exercise of which will depend upon the future course of the commission's proceedings against Niehoff's competitors."

SUMMARY OF ARGUMENT

A

The court below decreed that the order of the Federal Trade Commission should not take effect until such time in the future as the court might later direct. The court was not thereby laying bare and correcting an error of law by the Commission, for the court found no such error. The court, although not purporting to correct any error of law, modified the Commission's order so as to render it a nullity

for an indefinite future time. The court sanctioned, on the basis of "equitable principles," continuance of an adjudicated statutory violation. Section 11 of the Clayton Act confers no such authority.

B

A regulatory statute which vests in an administrative agency the power and duty of enforcement does not make simultaneous proceedings against all suspected or probable like violations an implied condition of such enforcement. Stated otherwise, an administrative order directed against violation is not rendered invalid or unenforceable by reason of the fact that no administrative proceedings have been instituted against similarly situated competitors. This Court has so held. *United States* v. *Wabash Railroad Company,* 321 U. S. 403. A contrary ruling would have the effect of stultifying an agency's execution of its statutory responsibilities.

C

Not only was there no ruling by the court below that the Commission's "forthwith" command constituted an abuse of discretion, but on the facts such a ruling would be quite plainly without justification. These facts show that in the replacement ignition parts industry there is neither price uniformity nor uniformity in annual volume discounts. Moreover, in a relatively short time after the filing of the complaint against respondent, the Commission filed Section 2 (a) complaints against other members of the automotive replacement parts industry. Courts of appeals have affirmed the cease-and-desist orders issued in six of these proceedings, and each of the

affirmed orders, except that against respondent, requires "forthwith" compliance. Two of these orders were against companies engaged in selling ignition-line parts and named by respondent as competitors. Thus the judgment below, entered for the avowed purpose of preventing competitive inequality, actually creates this inequality as between respondent and these competitors.

D

Furthermore, the judgment below constitutes judicial intrusion upon purely administrative duties and functions. It is for the Commission—not the courts—to determine the best possible use of staff and funds in enforcing statutes which Congress has charged the Commission with administering.

ARGUMENT

SECTION 11 OF THE CLAYTON ACT, PROVIDING FOR JUDICIAL REVIEW OF ORDERS OF THE FEDERAL TRADE COMMISSION DIRECTED AGAINST VIOLATION OF THE ACT, DID NOT AUTHORIZE THE COURT BELOW TO MODIFY THE ORDER ISSUED AGAINST RESPONDENT, ADJUDICATED TO BE VALID, SO AS TO POSTPONE THE ORDER'S EFFECTIVE DATE UNTIL THE COURT, UPON THE BASIS OF THE COMMISSION'S FUTURE PROCEEDINGS AGAINST RESPONDENT'S COMPETITORS, CHOOSES TO LET THE ORDER GO INTO EFFECT

A

The court below was of the view that its jurisdiction to review orders of the Federal Trade Commission, as conferred by Section 11 of the Clayton Act, is original rather than appellate, and that it was empowered to protect the "rights" of the parties in the same man-

ner as "any trial court of equity of general jurisdiction" (R. 1041–2). We believe that the validity of the court's action in postponing the effective date of the Commission's order turns upon considerations other than whether the jurisdiction of the court is properly labeled original or appellate. There is judicial support for each characterization.[1] But the point here is that the distinction between them, which may be determinative of powers and duties in proceedings involving solely judicial action, is not determinative of a court's powers in reviewing administrative action pursuant to express statutory authorization.

The concepts developed with respect to the "relationship of federal courts *inter se*" have only meager application where the powers which a court may exercise in reviewing administrative action necessarily depend upon the "distribution of authority made by Congress" as between court and administrative body.

---

[1] For decisions stating that statutes empowering courts of appeals to review administrative orders constitute a grant of original jurisdiction, see *Indiana Quartered Oak Co.* v. *Federal Trade Commission*, 58 F. 2d 182, 184 (C. A. 2); *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 128 F. 2d 481, 484 (C. A. 7).

For decisions stating that such reviewing function is an exercise of appellate jurisdiction, see *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U. S. 619, 623–624; *American Chain & Cable Co.* v. *Federal Trade Commission*, 142 F. 2d 909, note 1 at 911 (C. A. 4). In the *Eastman Kodak* case, the Court said that the power to review Commission orders given to courts of appeal "is limited to the question whether or not it [the Commission] has properly exercised the administrative authority given it by the Act", and that such review is "appellate and revisory merely, and not an exercise of original jurisdiction by the court itself".

Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 141. The Court said further (*ibid.*):

> The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of their environment when mechanically applied to determine the extent to which Congressional power, exercised through a delegated agency, can be controlled within the limited scope of "judicial power" conferred by Congress under the Constitution.

In answer to the contention made in *Pottsville* that administrative delay and hardship might result if the Court of Appeals had no power to take the action which was being contested, the Court said (*id.*, 146): "But courts are not charged with general guardianship against all potential mischief in the complicated tasks of government. * * * Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies."

In *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U. S. 4, this Court further delineated the scope of judicial review of administrative action. It said (p. 10):

> Generally speaking, judicial review of administrative orders is limited to determining whether errors of law have been committed. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 139–40. Because of historical differences in the relationship between administrative bodies and reviewing courts and that between lower and upper courts, a court of re-

view exhausts it power when it lays bare a misconception of law and compels correction. * * *

In the instant case, the court below decreed that the order of the Commission should not take effect until such time in the future as the court might later direct. The court, in so acting, was not laying bare and correcting an error of law by the Commission, for the court found no such error. The court, although not purporting to correct any error of law, modified the Commission's order so as to render it a nullity for an indefinite future time.[2] The court sanctioned, on the basis of "equitable principles", continuance of an adjudicated statutory violation.

B

But a regulatory statute which vests in an administrative agency the power and the duty of enforcement does not make simultaneous proceedings against all suspected or probable like violations an implied condition of such enforcement. Stated otherwise, an administrative order directed against a statutory violation is not rendered invalid or unenforcible by reason of the fact that no administrative proceedings have been instituted against similarly situated competitors of the party bound by the order. This Court has so held.

In *United States* v. *Wabash Railroad Co.*, 321 U. S. 403, the Interstate Commerce Commission had issued an order prohibiting carriers serving a particular manufacturing plant from granting it a spotting allow-

[2] The court did not specify the circumstances which would suffice to lift the court-imposed ban.

ance in violation of Section 6 (7) of the Interstate Commerce Act, which prohibits carriers from granting a shipper any privilege not specified in the carrier's tariffs. The Commission had not instituted proceedings against similar spotting service rendered at competing plants, and, on review of the order by a three-judge district court, the order was set aside upon the ground that it would compel the carriers to discriminate unlawfully against the shipper in question. This Court nevertheless held the order valid and enforcible.[3] It said (p. 414):

> The suppression of abuses resulting from violations of § 6 (7) would be rendered practically impossible if the Commission were required to suppress all simultaneously or none. Section 12 (1) imposes on the Commission the duty to enforce the provisions of the Act. That duty under § 6 (7) would hardly be performed if the Commission were to decline to enforce it against one because it could not at the same time enforce it against all.

Cf. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483, 492, 494; *Federal Trade Commis-*

[3] In its brief opposing certiorari (p. 7), respondent urged as a distinction between the *Wabash* case and the present one that Section 13 (1) of the Interstate Commerce Act authorizes a shipper to initiate an administrative proceeding against alleged violations of the Act, whereas the Clayton Act has no such statutory provision. But Section 16 of the Clayton Act, 15 U. S. C. 26, authorizes private parties to bring suits in federal district courts for injunctive relief against violation of the antitrust laws, and Section 4 of the Act, 15 U. S. C. 15, authorizes any person injured by a violation of the antitrust laws to bring suit for recovery of triple the damages sustained. These remedies are plainly more potent than the administrative-complaint remedy authorized by the Interstate Commerce Act.

sion v. *Keppel & Bro.*, 291 U. S. 304, 308–309, 312–313.*

If such orders, effective on issuance, may not be resisted upon the ground that competitors are not equally bound, we submit that this ground also affords no basis for postponing the effective date of a Commission order, and that a reviewing court exceeds the limit of its authority in granting interim nullification of the order. Certainly the underlying considerations are the same. As the Federal Trade Commission stated in the instant case, the grant of respondent's request that the proceeding be held in abeyance until the Commission could place all industry members under identical restrictions "would mean that Commission orders would be forever pending and unlawful practices rarely, if ever, corrected" (R. 1026). The respondent's pricing system, it must again be emphasized, has already been adjudicated to be unlawful and injurious to the public interest.

Applicable decisions are in accord. In *National Candy Co.* v. *Federal Trade Commission*, 104 F. 2d 999, 1004 (C. A. 7), the court, in affirming a Commission order directed against unfair methods of competition, rejected the contention that, because competitors use the same unfair method of competition, it would be prejudicially discriminatory "to permit the order to become operative." In *El Moro Cigar Co.* v.

* See also, *e. g.*, *Standard Oil Co.* v. *United States*, 337 U. S. 293, 295, 309, 314, which upheld a judgment enjoining a company from enforcing or entering into exclusive supply contracts, contrary to Section 3 of the Clayton Act, although no like judgment has been entered against major competitors who were employing similar exclusive contracts.

Federal Trade Commission, 107 F. 2d 429 (C. A. 4), the Commission's order required change in a brand name found to be deceptive, and the cigar company urged that the reviewing court, if it enforced the order, postpone its effective date for a reasonable time. The court, however, declared: "This matter is more properly within the province of the Commission rather than the courts. We are of the opinion that we have no power to order any delay in the putting into effect of a lawful order of the Commission." 107 F. 2d at 432.

C

It is well settled that the Federal Trade Commission, like other administrative agencies under comparable statutes, has "wide discretion" in selecting the remedy necessary and appropriate to terminate practices found to be unlawful; that judicial review is limited to ascertaining whether the Commission has "made an allowable judgment in its choice of the remedy"; and that a reviewing court may interfere only if the Commission has "abused its discretion". *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 611–612. In determining the remedy, the Commission is entitled not only to "appraise the facts of the particular case" but also to "draw from its generalized experience." *Id.*, 614. Congress has "placed the primary responsibility for fashioning orders upon the Commission" (*Federal Trade Commission* v. *National Lead Co.*, 352 U. S. 419, 429), and reviewing courts should not "lightly modify" its orders (*Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 726). These governing principles are not confined to

orders issued under Section 5 of the Trade Commission Act; they equally apply to Commission orders directed against violation of Section 2 (a) of the Clayton Act. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 473.

The Commission's determination of the requisite remedy necessarily involves, as one element, determination of when the remedy shall take effect. But the court below did not consider whether the Commission had exceeded the limits of an allowable judgment in directing respondent to cease forthwith from violating the statute. Instead, the court applied the test of the considerations which guide a court of equity, in the exercise of original jurisdiction, in fashioning injunctive relief.

Not only did the court not rule that the Commission's "forthwith" command constituted an abuse of discretion, but on the facts such a ruling would be quite plainly without justification. These facts show that in the replacement ignition parts industry there is neither price uniformity nor uniformity in annual volume discounts. The Commission set forth in its findings a comparison of respondent's jobber prices (without discount) and the jobber prices (without discount) of ten of its major competitors on 57 of respondent's most popular items constituting 80% of its ignition line volume. The tabulation shows that, as to each competitor, respondent's prices were higher on some items, lower on others, and the same on still others, and it shows 522 comparative prices,[5] with re-

[5] The comparative prices shown do not total 570 because not every competitor made all 57 items.

spondent's prices higher in 226 instances, lower in 152, and the same in 144 (R. 997–8). The findings also set forth the discounts based on annual volume granted by the same ten competitors. Two granted no volume discount, and the other eight had the following maximum discounts: one, 15%; five 20%; one, 23%; one, 25% (R. 998–9). None coincided with respondent's 17% maximum, and seven had a higher maximum.

The Commission's order prohibits the price discriminations found to result from respondent's annual volume discounts, but it leaves respondent complete freedom in determining both the prices it will charge and the discounts which it will grant (provided there is no variation in discount based on annual volume of purchases). Respondent has many alternatives and is not limited to a choice between (1) selling, without discount, at present basic jobber prices and (2) extending to all jobbers its present maximum 17% discount. The fact that, among ten of its leading competitors,* two have granted no volume discounts is difficult to reconcile with respondent's "prediction" of the dire consequences of the Commission's order. Certainly it was well within the area of an allowable administrative judgment for the Commission to conclude that respondent's calamitous predictions were speculative and not likely of realization, and that there were offsetting, overbalancing considerations—namely, the serious difficulties, uncertainties, and delays necessarily resulting if enforcement of the Commission's order were made contingent upon the institution and prose-

* Respondent selected these ten for the purpose of submitting certain comparative data.

cution of proceedings against all discoverable competitors who were or might be violating Section 2 (a).

Respondent is not in a position to complain that the Commission made it a legal guinea pig. Within a relatively short time before or after the filing of the complaint against respondent, the Commission filed 14 Section 2 (a) complaints against members of the automotive replacement parts industry. Courts of appeals have affirmed the cease and desist orders issued in six of these proceedings, and each of the orders affirmed, except that against respondent, requires forthwith compliance.[7] Two of the orders were against companies engaged in selling ignition line parts and named by respondent as competitors (R. 268–270).[8]

Nor is there any basis for contending that, in issuing complaints against those who primarily sell the ignition line, the Commission was improperly selective. The record does not show which of the companies named as competitors did a business comparable in size to respondent's and which offered only localized or relatively insignificant competition.[9] It is fair to presume that the four ignition line com-

[7] See *Moog Industries* v. *Federal Trade Commission*, No. 77, this Term; *Whitaker Cable Corp.* v. *Federal Trade Commission*, 239 F. 2d 253 (C. A. 7), certiorari denied, 353 U. S. 938; *Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152 (C. A. 7), certiorari pending, No. 101, this Term; *P. & D. Manufacturing Co.* v. *Federal Trade Commission*, 245 F. 2d 281 (C. A. 7); *Sorensen Manufacturing Co.* v. *Federal Trade Commission* (C. A. D. C.), decided May 23, 1957, not yet reported.

[8] See *P. & D.* and *Sorensen* cases, *supra* note 7.

[9] Respondent classified as a "competitor" any company which sold ignition parts, irrespective of whether the company had actually competed with respondent (R. 996).

panies against which the Commission filed complaints are the leaders of this segment of the industry.[10]

In view of judicial affirmance of orders against two of respondent's chief competitors, the judgment below, entered for the avowed purpose of preventing competitive inequality, actually creates this inequality as between respondent and these competitors. This illustrates the dangers necessarily involved when a reviewing court reserves to itself power to determine the effective date of a valid Commission order for the purpose of compelling simultaneous administrative action against the members of an industry.

D

The judgment entered below constitutes judicial intrusion upon purely administrative duties and functions.

The court assumed control over the time at which the Commission's order should become effective, exercise of which control was to depend upon "the future course of the commission's proceedings" against respondent's competitors (R. 1042). Under this judgment, three alternatives are open to the Commission. One is to allow the order against respondent to remain a nullity, which would mean that a valid order is, in effect, defeated. The second is to investigate and bring proceedings against each of respondent's various alleged competitors, without regard to whether this allocation of limited manpower and

[10] The yearly sales of the P. & D. Manufacturing Company and the Sorensen Company (see note 7, *supra*) were, respectively, $1,685,000 and $1,300,000.

money is warranted by the economic effect or importance of the possible violations involved. Adoption of this course would mean that the Commission might be compelled to take action without regard to its duty to make the best possible use of staff and funds in enforcing the statutes which it administers. Thirdly, the Commission might seek to establish to the court's satisfaction that, insofar as respondent's competitors have not been proceeded against, there were good and sufficient reasons therefor. Adoption of this course would mean that the court would sit in judgment upon the Commission's exercise of its investigatory and enforcement functions.

Thus, regardless of which of the three alternatives were adopted, the result of affirmance of the judgment below would be substantial interference with the Commission's exercise of its statutory responsibilities. The opinion of Judge Finnegan in the court below, dissenting from the court's modification of the Commission's order, put the matter as follows (R. 1043):

> My grave doubts that our statutory power to *modify* Federal Trade Commission orders can be converted into policing and supervising, though perhaps obliquely, the length, breadth and sequence of Commission investigations brings me to the position I now take. Certainly we would refuse to activate the Commission upon a bare petition for mandamus to investigate the automotive ignition industry. Responsibility of achieving enforcement of the statutes Congress assigned to the Commission lies elsewhere.

In addition, the decision below is an open invitation to inject into the administrative proceedings under Section 2 (a) collateral issues as to who are substantial competitors of the respondent, the extent to which the pricing practices of these competitors parallel those of the respondent, and the status of proceedings against the competitors. This would prolong and complicate proceedings which are already time-consuming and costly. The decision below would also be a precedent for injecting like collateral issues in other Clayton Act and Trade Commission Act proceedings.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be reversed, with directions to affirm the order of the Commission without modification.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~955~~ 110

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

C. E. NIEHOFF & CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT OF RESPONDENT, C. E. NIEHOFF & CO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 935.

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

C. E. NIEHOFF & CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT OF RESPONDENT, C. E. NIEHOFF & CO.

Respondent opposes the granting of the writ of certiorari sought by the Federal Trade Commission in this proceeding.

STATEMENT.

On May 17, 1955 the Federal Trade Commission, pursuant to its complaint charging that the volume discount purchase plan offered by respondent C. E. Niehoff & Co. to its various purchasers violated Section 2(a) of the Clayton Act, entered its final order directing that respondent "forthwith cease and desist" from using such pricing methods.

Respondent thereupon petitioned the United States Court of Appeals for the Seventh Circuit for a review of such order pursuant to Section 11 of the Clayton Act.

The court of appeals found that respondent's volume discount purchase plan violated Section 2(a) of the Clayton Act and affirmed the cease and desist portion of the Commission's order. However, in view of the uncontradicted evidence in the record showing that C. E. Niehoff & Co. would be put out of business if it were required forthwith to cease and desist from using the volume discount pricing methods traditional in the ignition parts field while its 19 competitors in that field were unfettered by a similar injunction, the court of appeals, in the exercise of its original equitable jurisdiction in such matters, struck from the Commission's order the word "forthwith" and inserted in lieu thereof the following:

> "* * * this cease and desist order shall take effect at such time in the future as the United States Court of Appeals for the Seventh Circuit may direct, *sua sponte* or upon motion of the Federal Trade Commission." (Appendix A to Petn. p. 22.)

STATUTE INVOLVED.

The pertinent portions of Section 2 of the Clayton Act here involved (38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13) are set forth at pages 2 and 3 of the petition of the Federal Trade Commission.

At pages 3 and 4 of its petition the Federal Trade Commission sets forth only a part of the applicable portions of Section 11 of the Clayton Act, 38 Stat. 734, as amended, 15 U. S. C. 21. Herewith follows all of the pertinent language of Section 11:

> That authority to enforce compliance with sections

2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested: In the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:

Whenever the Commission * * * shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing * * *. * * * If upon such hearing the Commission * * * shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations * * * in the manner and within the time fixed by said order. * * *

* * * * *

If such person fails or neglects to obey such order * * * the Commission or Board may apply to the United States Court of Appeals * * * for the enforcement of its order * * *. Upon such filing of the application and transcript the court * * * shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission or Board. * * *

* * * * *

Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said United States court of appeals by filing in the court a written

petition praying that the order of the Commission o
Board be set aside. * * * Upon the filing of the tra
script the court shall have the same jurisdiction t
affirm, set aside, or modify the order of the Commis
sion or Board as in the case of an application by th
Commission or Board for the enforcement of it
order, * * *.

* * * * * * *

The jurisdiction of the United States court of ap
peals to enforce, set aside, or modify orders of th
Commission or Board shall be exclusive.

ARGUMENT.

Section 11 of the Clayton Act confers upon the United States court of appeals, in matters coming before it on petitions to enforce as well as upon petitions to review cease and desist orders of the Federal Trade Commission issued pursuant to Section 2 of the Act, the power to enter a decree "affirming, modifying, or setting aside" any such order. After making this specific grant of power Section 11 then provides:

> The jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission or Board shall be exclusive.

Thus, Section 11 of the Clayton Act clearly confers upon the United States court of appeals original jurisdiction to enforce, set aside or modify an order of the Federal Trade Commission under Section 2 of the Act and, in pursuance of such original jurisdiction, the court of appeals may enter orders protecting the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do in an injunction suit. *Indiana Quartered Oak Co. v. Federal Trade Commission*, 58 F. 2d 182, 184 (C. A. 2); *Natural Gas Pipeline Co. et al. v. Federal Power Commission*, 128 F. 2d 481, 484 (C. A. 7).

The court below, in summarizing its jurisdiction pursuant to Section 11, correctly stated in its opinion (Appendix A to Petn. p. 19):

> Section 11 of the Clayton Act gives this court power, *inter alia*, to modify an order of the commission. This includes the power to change that part of an order stating when it shall take effect. We have held that the power of a court of appeals to enforce, set aside or modify the commission's order is an exercise of

original jurisdiction, rather than appellate jurisdiction, and that the court may by its own orders protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit.

The evidence in the record establishes that the principal portion of respondent's business is the manufacture and sale of replacement parts in the automotive ignition field, in which field respondent has only nineteen competitors, all of whom use the volume discount purchase plan traditional in that field (R. 156-158, 189, 265-272, 305; Res. Ex. 3, R. 191).

Of these competing companies only three, other than respondent, have complaints or orders to cease and desist pending against them respecting the use of such pricing methods. Thus respondent's remaining competitors are presently free to continue such pricing practices without restraint, and the evidence clearly shows that respondent will be forced out of business if it is enjoined from using those pricing methods while its competitors are not under similar restraint (R. 156-158, 189, 208-209, 265-272, 305, 457-459; Res. Ex. 3, R. 191; Res. Exs. 17A-C, 24A-D, R. 594).

The court below found the foregoing evidence to be uncontradicted (Appendix A to Petn. p. 18).

Notwithstanding this competitive picture the Federal Trade Commission chose not to follow its customary practice of proceeding simultaneously against all competitors in the field (see *Federal Trade Commission* v. *R. F. Keppel & Bro., Inc.*, 291 U. S. 304, 308, 309), but rather to initiate complaints against only a limited few.

Confronted with this manifestly unjust situation, the court below, in the exercise of its original equitable jurisdiction under Section 11 of the Clayton Act, correctly de-

cided to postpone the effective date of the Commission's order rather than to have it become effective forthwith and thereby force respondent out of business.

At page 7 of its petition the Commission cites *United States* v. *Wabash Railroad Co.*, 321 U. S. 403, as a purported example of an "analogous situation" where this court refused to sanction as a defense to an administrative order the fact that like orders had not been issued against competitors. That case is not analogous. There the Interstate Commerce Commission ordered the Wabash Railroad to cease its practice of spotting freight cars without cost at the plant of A. E. Staley Manufacturing Co., one of its shippers. Staley asked that the order be set aside, since its enforcement would place Staley at a competitive disadvantage unless similar orders were issued against railroads serving its competitors. This court, after pointing out that under the Interstate Commerce Act, Staley, as a shipper, had the right to initiate proceedings with the Commission (under Section 13(1) of the Act) to compel the railroad serving Staley's competitors to stop the preferential practices, concluded that in view of this method available to Staley of "inducing the Commission to perform its duty," the order should not be set aside.

Here there exists no such statutory method whereby respondent Niehoff can induce the Federal Trade Commission to "perform its duty" respecting respondent's competitors.

At pages 6 and 7 of its petition the Federal Trade Commission states that the decision of the Seventh Circuit in the instant case is in conflict with the decision of the Eighth Circuit in *Moog Industries, Inc.* v. *Federal Trade Commission*, 238 F. 2d 43, respecting which this court on March 25, 1957, in Cause No. 750, this Term, granted the petition for certiorari limited to Question 4 presented by the petition.

No such conflict exists. Not only is the opinion of the Court of Appeals for the Eighth Circuit in the *Moog* case silent as to the issue decided by the Seventh Circuit in the instant case respecting which the Federal Trade Commission here petitions for certiorari, but the Eighth Circuit could not even have considered the question since there was no evidence in the record before it showing that Moog would be put out of business if the Commission's order there under review became effective forthwith.

Nor is there any conflict between the decision of the Court of Appeals in the instant case and its decision in the case of *E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152, pending on petition for a writ of certiorari (No. 900, this Term), for there is similarly no evidence in the record in that case showing that Edelmann would be put out of business if the Commission's order against it became effective forthwith. Edelmann's offer of proof that it would be damaged if the order became effective forthwith is far short of either an offer of proof or evidence that it would be put out of business in that event.

Notwithstanding implications to the contrary, while Moog Industries and E. Edelmann & Co. each manufacture and sell automotive replacement parts, neither sells ignition parts and neither is one of the nineteen competitors of respondent Niehoff in the ignition field.

Though it is doubtful that the Federal Trade Commission is correct in its contention at page 8 that it has the initial power to determine what relief is appropriate where a violation of either the Clayton Act or the Federal Trade Commission Act is deemed to exist (see *Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 613, 614), the decision below in no way impinges upon this claimed power, and accordingly the cases cited at page 8 of the petition in support of this contention have no application.

Nor does the decision below in any way conflict with the decision in *El Moro Cigar Co.* v. *Federal Trade Commission*, 107 F. 2d 429 (C. A. 4), for there the court was reviewing an order of the Federal Trade Commission entered pursuant to the Federal Trade Commission Act on February 21, 1939, nearly a year following the adoption by Congress on March 21, 1938 of the amendment whereby Section 5(c) of that Act as originally enacted September 26, 1914 (38 Stat. 720) was changed so that the power of the United States court of appeals to review and enforce orders of the Commission entered pursuant to the Federal Trade Commission Act no longer paralleled the provisions of Section 11 of the Clayton Act which grants such court original jurisdiction to review and enforce orders entered pursuant to Section 2 of the latter Act.

CONCLUSION.

In modifying the order of the Federal Trade Commission in the instant case the court below was only exercising its original equitable jurisdiction pursuant to Section 11 of the Clayton Act. Its decision in that regard in no way conflicts with any other decision of the Court of Appeals for the Seventh Circuit or of any other United States court of appeals, and the petition for writ of certiorari should be denied.

Respectfully submitted,

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May 21, 1957

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 110

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

C. E. NIEHOFF & CO.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR C. E. NIEHOFF & CO.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR C. E. NIEHOFF & CO.

STATEMENT.

There is no dispute concerning the facts relating to the question presented for review in this proceeding.

Respondent manufactures and sells on a nation-wide basis a complete line of automotive ignition replacement parts (excepting spark plugs and batteries), as well as a complete line of hydraulic brake replacement parts and a line of testing equipment (R. 981, 1014).

In the year 1949 Respondent's total sales amounted to approximately $2,000,000, 90 per cent of which were derived from its ignition line (R. 982). Respondent's ignition sales amount to less than one-half of one per cent of the total national ignition replacement parts market (R. 943, 978).

Respondent is unable to sell any of its ignition products to the automobile manufacturers for installation as original equipment on new cars at the factory, this part of the national market being entirely pre-empted by the so-called "original equipment" manufacturers, namely General Motors through its Delco Remy division, Chrysler through its Auto Lite division, and Ford (R. 942, 978, 1014).

Consequently, Respondent's sales are limited entirely to the replacement parts field, referred to in the trade as the "after market". Even in this limited area of the market Respondent is unable to sell its products to any of the franchised automobile dealers, such as Chevrolet, Buick, Chrysler and Ford, that portion of the after market also being pre-empted by the original equipment manufacturers (R. 944, 978, 995, 1014).

Thus, Respondent's sales are confined entirely to jobbers, who in turn supply Respondent's lines to independent garage owners, filling stations and fleet operators (R. 982, 1014).

In the early 1930's, well prior to the enactment of the Robinson-Patman amendment to the Clayton Act, Respondent adopted the annual volume discount sales plan traditional in the automotive replacement parts field (R. 993). Under Respondent's plan, which is fairly and uniformly administered and is made available to all of Respondent's jobber purchasers alike (R. 985), Respondent charges its jobber purchasers the following net prices (R. 945, 979, 982, 983, 1014):

Annual Purchases	Discount Allowance
Under $1,200	None
$1,200-$2,400	5%
$2,400-$3,600	7%
$3,600-$6,000	10%
$6,000-$8,400	10% + 5%
$8,400-$12,000	10% + 6%
$12,000 and over	10% + 7%

Sales to jobbers purchasing less than $1,200 annually represent 7.5% of Respondent's total sales; sales to jobbers whose purchases range from $1,200 to $3,600 annually represent 18.8% of Respondent's total sales; sales to jobbers whose purchases range from $3,600 to $6,000 annually represent 25.8% of Respondent's total sales; and sales to jobbers purchasing more than $6,000 annually represent 47.8% of Respondent's total sales (R. 983).

Respondent has 19 principal competitors in the sale of its ignition line, substantially all of whom offer an annual volume discount purchase plan similar to, though not identical with, the plan used by Respondent (R. 996-999, 1018, 1040).

At hearings held before the Hearing Examiner in Chicago, Illinois, on May 16, 1951 and September 4, 5 and 6, 1951, Respondent introduced into evidence the names of these principal competitors and made proof of the volume discount methods used by each (R. 160, 189-191, 200-391).

The Hearing Examiner found that Respondent has, and for many years has had, severe and bitter competition from its competitors (R. 992), substantially all of whom grant volume discounts similar to Respondent's from list prices which on the average are lower than Respondent's list prices (R. 997-999). Because of this severe competition the Hearing Examiner also found that Respondent is experiencing difficulty in maintaining its sales volume, and from 1949 to 1951 actually showed a decline in the number of

jobber accounts sold by it notwithstanding the fact that the number of potential jobber accounts increased sharply in the same period (R. 992).

The Court of Appeals found that the uncontradicted evidence establishes that Respondent will be forced out of business if the traditional pricing practices which it now follows are denied to it while its competitors are free to continue such practices (R. 1040).

This evidence shows conclusively that if Respondent were compelled by an order of the Commission to sell its products at uniform prices without granting any annual volume purchase discounts, while its competitors were not under similar restraint, Respondent would be forced out of business.[1]

This evidence establishes that if Respondent were so compelled to sell its products uniformly at its list prices without granting any volume discounts therefrom, Respondent would lose all of its present jobber accounts to its competition with the exception only of its small volume accounts which presently receive no discount; that since these accounts represent only 7.5% of Respondent's volume, the adoption of such a uniform price would reduce Respondent's annual sales volume 92.5% and, perforce, Respondent would be compelled to cease its operations (R. 208, 209, 456-460, 578-586).

If, as a second alternative, Respondent granted all of its jobber purchasers a uniform 10% discount from Respondent's list price, Respondent would lose to its competition all of Respondent's jobber accounts presently receiving a greater discount under Respondent's plan. These larger accounts represent 47.8% of Respondent's volume and the

1. The Hearing Examiner declined to make any finding respecting this evidence for the stated reason that it was beyond his jurisdiction. See proposed finding 75 and reasons in support thereof (R. 975-977); and Hearing Examiner's Ruling (R. 980).

ss of this volume would produce an annual operating loss Respondent of $123,000 (R. 208, 209, 457, 458).

Lastly, if Respondent granted a uniform 15% discount om its list prices to all jobber purchasers, Respondent's sses would be so great on its sales to the smaller jobber ccounts that it would incur an annual operating loss of early $100,000 (R. 208, 209, 458, 459).

In its appeal to the Federal Trade Commission from the itial decision of the Hearing Examiner, Respondent assigned exception to the failure of the Hearing Examiner to nclude a finding that Respondent would have to cease its perations and go out of business if it were compelled to ell at a uniform price while its competitors were not under imilar restraint, and requested the Commission to hold the ecommended cease and desist order against Respondent n abeyance until all other ignition parts manufacturers ere similarly enjoined. This the Commission refused to lo, and directed that Respondent "forthwith" cease and lesist its pricing practices (R. 1012, 1026).

In its petition filed with the United States Court of Appeals for the Seventh Circuit for a review of the order of he Federal Trade Commission, Respondent assigned as ne of the grounds upon which it sought relief from the rder of the Commission, the following (R. 1031):

> "The issuance of said order * * * is a misuse of the [Commission's] discretion, for the evidence establishes that any requirement that [Niehoff] sell at uniform prices while its competitors are not under like compulsion will destroy [Niehoff's] business."

The Court of Appeals found that the uncontradicted vidence established that Respondent would be forced out of business if its competitors were not similarly restrained, nd that the Commission did have the power, under Section 11 of the Clayton Act, to postpone the effective date of the

order against Respondent. In this connection the Court stated (R. 1040, 1042):

> "At this point we consider Niehoff's prediction that it 'would be forced out of business if the traditional pricing practices which it now follows were denied to it while its competitors are free to continue such practices.' There is uncontradicted evidence in the record to factually support this prediction.
>
> "The record shows that, as to the automotive ignition line which constitutes at least 90% of Niehoff's business,[9] it has 19 competitors, and included in this group are 3 competitors who presently have complaints or orders to cease and desist pending against them before the commission, the other 16 competitors being free to continue their present pricing practices unless and until cease and desist orders are entered against them in proceedings not yet commenced.
>
> "It thus appears that the order against Niehoff was entered at a time when the commission had acted against only a few of this firm's competitors. We are persuaded by Niehoff's argument that, in view of the lapse of time which is inevitably involved in proceedings before the commission, Niehoff's business will suffer economic extinction before the commission adjudicates upon trade practices of Niehoff's competitors, which in their purpose and effect are essentially similar to those condemned in the Niehoff order. This result will follow if Niehoff is required by elimination of its present selling methods to charge higher prices for its products than the prices charged by its competitors against whom the commission has not yet ruled.
>
> "The commission takes the position that it has no power to stay compliance with its order. It relies upon a part of section 11 of the amended Clayton Act,[10] contending that it has no discretion as to the enforcement of the law. It fails to cite that part of section 11 which provides that the commission 'shall issue * * * an order

9. Another 6% of Niehoff's business is in the hydraulic line where it has 10 principal competitors.

10. 15 U. S. C. A. § 21.

requiring such person to cease and desist from such violations * * * *within the time fixed by said order.'* (Italics supplied for emphasis.) It is our opinion that this statutory language vests in the commission power to postpone the time at which an order is to take effect.

"In any event, the commission in this case has not exercised this permissive power under section 11, and it argues that this court has no power to delay or postpone compliance with the commission's order. If this be true we are impotent to postpone the effective date of the order and, furthermore, under section 11 of the act we can be required to enforce the order in the manner therein provided without delay. In other words, according to the commission, we may witness and participate in, but not interfere with, the economic death of Niehoff while the commission machinery continues to operate toward cease and desist orders against Niehoff's competitors.

"However, we do not admit judicial impotency in this situation. Section 11 of the Clayton Act[11] gives this court power, *inter alia*, to modify an order of the commission. This includes the power to change that part of an order stating when it shall take effect. We have held[12] that the power of a court of appeals to enforce, set aside or modify the commission's order is an exercise of original jurisdiction, rather than appellate jurisdiction, and that the court may by its own orders protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit. The order in this case was issued on May 17, 1955 and directed that Niehoff 'forthwith' cease and desist. This order is in the nature of an injunction. We have a right to consider its effect upon Niehoff in the light of equitable principles, and to grant relief accordingly. We have no way of knowing in advance what further proceedings, if any, will be had by the commission against Niehoff's competitors to whom we have heretofore re-

11. 15 U. S. C. A. § 21.

12. *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 138 F. 2d 481, 484.

ferred. The fixing of the time at which the order against Niehoff shall become effective is a matter over which we now reserve jurisdiction, the exercise of which will depend upon the future course of the commission's proceedings against Niehoff's competitors. For that reason the order against Niehoff is hereby modified by striking the word 'forthwith' therefrom and by adding to said order the following: 'This cease and desist order shall take effect at such time in the future as the United States Court of Appeals for the Seventh Circuit may direct, *sua sponte* or upon motion of the Federal Trade Commission.' As thus modified, the order is affirmed."

SUMMARY OF ARGUMENT.

Throughout this proceeding Respondent has made and preserved the point that the action of the Federal Trade Commission in ordering Respondent to cease and desist from granting to its purchasers the annual volume discounts traditional in the ignition replacement parts field while taking no steps to place Respondent's principal competitors in the ignition field under similar restraint, constitutes an abuse of discretion by the Commission, particularly so in view of the uncontradicted showing by Respondent that the Commission's action will place Respondent at such a competitive disadvantage as to force Respondent out of business.

On review of the Commission's order pursuant to Section 11 of the Clayton Act, the United States Court of Appeals has the power to affirm the cease and desist portion of that order and to defer the effective date thereof until such time in the future as that court, either on its own motion or on motion of the Commission, may direct.

The United States Court of Appeals admittedly has the power to correct an abuse of the Commission's discretion. *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608.

Under Section 11 of the Clayton Act the Commission has the power to postpone the effective date of any cease and desist order entered by it, and, perforce, the United States Court of Appeals, in reviewing an order of the Commission, has the same power. *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U. S. 619, 623.

Section 11 of the Clayton Act confers upon the United States Courts of Appeals original jurisdiction to enforce,

set aside or modify an order of the Federal Trade Commission entered under Section 2 of the Act, and, in pursuance of such original jurisdiction, the Courts of Appeals may enter orders protecting the rights of the parties in any manner in which a trial court of general equity jurisdiction might do in an injunction suit. *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 128 F. 2d 481 (C. A. 7), *Indiana Quartered Oak Co.* v. *Federal Trade Commission*, 58 F. 2d 182 (C. A. 2), *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364.

ARGUMENT.

At every stage of this proceeding Respondent has consistently adhered to the position that the Federal Trade Commission was and is guilty of an abuse of its discretion in seeking to compel Respondent to cease granting the annual volume purchase discounts traditional in the ignition field while taking no steps to compel Respondent's principal competitors in that field also to cease the same pricing practices (R. 208, 209, 593, 975-977, 1031).

In support of this contention Respondent introduced evidence before the Hearing Examiner which conclusively established that Respondent would be forced out of business if it were so enjoined while its principal competitors were free of any such restraint (R. 593).

The Hearing Examiner declined to make any finding respecting this evidence for the stated reason that it was beyond his jurisdiction (R. 975-977, 980).

In its appeal to the Federal Trade Commission from the intial decision of the Hearing Examiner, Respondent took exception to the Hearing Examiner's failure to make any finding respecting such evidence of irreparable injury and requested the Commission to stay the proceedings until all of Respondent's competitors were under similar restrictions (R. 1026). This the Commission refused to do, taking the position that it had no power to stay the effective date of its cease and desist order against Respondent, notwithstanding the unequivocal language of Section 11 of the Clayton Act which clearly grants to the Commission the unrestricted power to fix the time within which any cease and desist order entered by it shall go into effect (R. 1026, 1041).

In its petition to the United States Court of Appeals for a review of the Commission's order Respondent assigned, as one of its grounds for relief from the Commission's order, that the issuance of such order against Respondent was a misuse of discretion by the Commission since the evidence establishes that if Respondent is required to sell at uniform prices while its competitors are not under like compulsion, Respondent's business will be destroyed (R. 1031).

The Court of Appeals first held that there was no merit to the Commission's contention that the Commission had no power under Section 11 of the Clayton Act to stay the effective date of its cease and desist order against Respondent (R. 1041). The Court of Appeals next found that the uncontradicted evidence establishes that Respondent would be irreparably injured if it were forced to comply immediately with the Commission's order while Respondent's principal ignition competitors were not under similar orders. The court below thereupon modified the Commission's order in the manner stated above (R. 1040-1042).

Contrary to the contention made at page 17 of the Commission's brief, the conclusion is inescapable that the Court of Appeals sustained Respondent's assigned error and found that the action of the Commission, in utterly disregarding the ruinous effect its order would have upon Respondent, amounted to an abuse of discretion by the Commission which (as the Commission concedes at page 16 of its brief), the Court of Appeals has the power to correct: *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608.

In staying the effective date of the Commission's order the Court of Appeals did nothing more than grant Respondent relief which the Commission itself had the power to grant under Section 11 of the Clayton Act. This the

Court of Appeals also clearly has the authority to do. *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U.S. 619, 623.

Moreover, Section 11 of the Clayton Act confers upon the United States Court of Appeals, in matters coming before it on petitions to review cease and desist orders of the Federal Trade Commission issued pursuant to Section 2 of the Act, the power to enter a decree "affirming, modifying, or setting aside" any such order. After making this specific grant of power Section 11 then provides:

> "The jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission or Board shall be exclusive."

Thus, Section 11 of the Clayton Act clearly confers upon the United States Court of Appeals original jurisdiction to enforce, set aside, or modify any order of the Federal Trade Commission entered pursuant to Section 2 of the Act and, in pursuance of such original jurisdiction, the court of appeals may enter orders protecting the rights of the parties in any manner in which any trial court of general equity jurisdiction might do in an injunction suit.

In *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 128 F. 2d 481, 484 (C. A. 7), the court stated:

> "We have previously said in *Century Metalcraft Corporation* v. *Federal Trade Commission*, 7 Cir., 112 F. 2d 443, that, under the Federal Trade Commission Act, 15 U. S. C. A. § 41, *et seq.*, Congress has made a grant of original jurisdiction to the court to enforce, set aside or modify the Commission's order and that such power carries with it authority to vacate or modify our own judgment whenever good cause is shown. This is in accord with announcements of other jurisdictions. We think it well settled that in respect to review of orders of Federal Boards and Commissions, the jurisdiction of the Circuit Court of Appeals, when granted by Congress, is original rather

than appellate in character and that, being endowed with original jurisdiction, the court may by its own orders protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit. *Butterick Co.* v. *Federal Trade Commission*, 2 Cir., 4 F. 2d 910; *Silver Co.* v. *Federal Trade Commission*, 6 Cir., 292 F. 752; *Chamber of Commerce* v. *Federal Trade Commission*, 8 Cir., 13 F. 2d 673; *Federal Trade Commission* v. *Balme*, 2 Cir., 23 F. 2d 615, certiorari denied 277 U. S. 598, 48 S. Ct. 560, 72 L. Ed. 1007; *Indiana Quartered Oak Co.* v. *Federal Trade Commission*, 2 Cir., 58 F. 2d 182."

The Court of Appeals for the Second Circuit expressed the same view in its opinion in *Indiana Quartered Oak Co.* v. *Federal Trade Commission*, 58 F. 2d 182, 184 (C. A. 2), wherein it stated:

> "The Circuit Courts of Appeals are granted exclusive jurisdiction to enforce, set aside, or modify orders of the Commission. Judicial Code § 128 (28 U. S. C. A. § 225); Federal Trade Commission Act, § 5, 38 Stat. 719 (15 U. S. C. A. § 45). This court therefore has original jurisdiction in the matter of setting aside or modifying orders of the Commission. With such original jurisdiction, it has the power to vacate its own order upon good cause shown and where equity demands such action. Such power is inherent in a court of equity where a modification of an injunctive order is sought."

Similarly, the Court of Appeals for the Third Circuit, in *H. N. Heusner & Son* v. *Federal Trade Commission*, 106 F. 2d 596, 597, 598 (C. A. 3), in reviewing an order of the Commission directing a cigar manufacturer forthwith to cease and desist branding his cigars "Havana Smokers" (since they in fact contained no Havana tobacco), used its equitable power to modify the order so as to grant the manufacturer two years' time within which

to eliminate the word "Havana" in the designation of its product.

This Court, in *Ford Motor Co.* v. *National Labor Relations Board,* 305 U. S. 364, 373, in considering the jurisdiction of the Court of Appeals to review an order of the National Labor Relations Board, pointed out that the statute with respect to a judicial review of orders of that board follows closely the statutory provisions relating to the review of orders of the Federal Trade Commission; that the jurisdiction to review orders of the Labor Relations Board is vested in a court with equity powers, and that the court "may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action."

See also *Scripps-Howard Radio* v. *Federal Trade Commission,* 316 U. S. 4, 14, wherein this Court stated that courts of appeal have the power to prevent "irreparable injury."

Heretofore the Federal Trade Commission as well as other governmental agencies, when attacking for the first time the legality of a pricing or trade policy traditional to a given segment of the national economy, has, in recognition of the equitable principles announced by the court below, filed simultaneous complaints against the principal competitors in the field.

In *Federal Trade Commission* v. *Cement Institute, et al.,* 333 U. S. 683, in which case the Federal Trade Commission for the first time challenged the use of a multiple basing-point price system as being in violation of Section 2 of the Clayton Act, the Commission named as respondents in 12 separate cases some eighty-five principal competitors in the field.

This policy was also followed when the Commission attacked certain pricing and distribution policies of the

candy industry as shown by this Court's opinion in *Federal Trade Commission v. R. F. Keppel & Bro., Inc.*, 291 U. S. 304, wherein, after pointing out that the practice therein complained of was carried on by forty or more manufacturers, the court stated at page 308:

> "The disposition of a large number of complaints pending before the Commission, similar to that in the present case, awaits the outcome of this suit."

A similar result was achieved in the cosmetic industry by stipulation between the Commission and various competitors in that field whereby it was agreed that the cases against those competitors would abide the final determination by the Court of Appeals in the matter of *Elizabeth Arden, Inc.* v. *Federal Trade Commission*, 156 F. 2d 132 (C. A. 2).

The Justice Department, in attacking the retail financing methods of General Motors, Chrysler and Ford, proceeded against all three of these competitors simultaneously, and in taking consent decrees against Chrysler and Ford, specifically provided that such decrees would not be enforced if an effective final order was not entered against General Motors within a specified time. See *Chrysler Corporation* v. *United States*, 316 U. S. 556, 558, and *Ford Motor Co.* v. *United States*, 335 U. S. 303, 308-311. In the *Ford Motor Co.* case, at page 307 this Court made the following statement:

> "Protection against competitive disadvantage, the appropriateness of which the government recognized, required a time certain at the end of which the restraint against Ford would expire if General Motors were still free of them."

In the instant case it was not until after Respondent made proof in the record on May 16, 1951 (R. 189), of its principal competitors in the ignition field using similar pricing methods that the Commission saw fit to file com-

plaints against two of such competitors, namely, P & D Manufacturing Co. and Sorenson Manufacturing Co.[2] One complaint had previously been filed prior to that time against a third competitor, but with these three exceptions the Commission has filed no complaints against any of Respondent's other principal competitors in the ignition field.

In an effort to deny that it is making Respondent a legal guinea pig, the Commission, at page 19 of its brief, volunteers the gratuitous information derived from sources wholly outside this record, that it has filed 14 complaints against members of the automotive replacement parts industry. However, only three of these are against companies engaged in selling ignition parts in competition with Respondent. The other 11 complaints are entirely immaterial to this case, for Respondent no more competes with a muffler or bumper manufacturer than it does with Kroger or A & P.

The Commission also suggests (at pages 19 and 20 of its brief) that Respondent may have little or no competition from its 19 principal competitors and would have this Court presume that the ignition manufacturers it has filed complaints against are the leaders in the industry. There is no basis in the record for such a presumption. The evidence shows that Respondent in fact has about 100 ignition competitors, 19 of whom are principal competitors, the others selling incomplete lines or competing against Respondent in only limited areas. The evidence also shows that Respondent has bitter competition on a nation-wide basis from these 19 competitors and the Hearing Examiner so found (R. 189, 310, 942, 978, 992). Of these competitors, three are the original equipment manufacturers who domi-

2. The complaint against P & D Manufacturing Co. was issued August 9, 1951 and the complaint against Sorenson Manufacturing Co. on October 16, 1952. These are the only competitors of Respondent named in the Commission's brief. For a complete list of Respondent's principal competitors see R. 942.

nate the market. The remaining 16 principal competitors maintain list prices comparable to Respondent's from which practically all of them grant annual volume purchase discounts similar to those granted by Respondent. Those who do not grant such discounts directly accomplish the same price result by distributing through NAPA or similar outlets (R. 265-319, 953-956, 979, 998, 999).

None of the cases cited by the Commission in its brief deals with a situation comparable to the one here presented to the court.

In *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U. S. 619 (cited at page 11 of the Commission's brief), the Commission ordered Eastman to cease and desist certain unfair practices, and, to implement that order, directed Eastman to dispose of certain processing laboratories. The Court of Appeals affirmed the cease and desist portion of the Commission's order but held that the Commission was without statutory authority to direct the divestiture. This Court affirmed, holding that the Commission did not have the equitable power which it had attempted to exercise. In reaching this conclusion this Court also pointed out that the Court of Appeals, in reviewing an order of the Commission, has the power to enter any order the Commission could have entered, and it was in connection with this discussion that it made the comments quoted in the footnote, page 11, of the Commission's brief.

In *American Chain & Cable Co.* v. *Federal Trade Commission*, 142 F. 2d 909 (C. A. 4), also cited at page 11 of the Commission's brief, a cease and desist order entered by the Commission under Section 5 of the Federal Trade Commission Act had been affirmed by the Court of Appeals. Thereafter the respondent American Chain presented its motion to the Commission requesting that enforcement of the order be stayed on grounds relating to the war emergency. The Commission refused to entertain

the motion, claiming it had no such authority. On American Chain's petition the Court of Appeals held that the Commission did have the authority to consider and pass upon the motion and entered an order directing the Commission to do so. The only bearing this decision has on the instant case is to support Respondent's contention here that the Commission has the authority to postpone the effective date of its orders.

The case of *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, does not involve Section 11 of the Clayton Act, having arisen under the Communications Act. Pottsville's original request for a license to construct a radio station had been denied by the Federal Communications Commission. This order was reversed on appeal and the application was remanded for further consideration. In the meantime two other applications had been filed for stations in the same area and the Commission set all three for joint consideration. On Pottsville's petition, the Court of Appeals issued its writ of mandamus directing the Commission to consider Pottsville's application alone on the basis of the original record. This Court reversed, holding that in dealing with matters involving public convenience and necessity the Commission was not limited to the original record but could consider the circumstances disclosed in the later applications, and it was in this connection that this Court made the statement quoted at page 12 of the Federal Trade Commission's brief.

Scripps-Howard Radio v. *Federal Communications Commission*, 316 U. S. 4, cited on page 12 of the Commission's brief, involves the single question whether the Court of Appeals has the power to stay an order of the Communications Commission pending review. This Court held that the Court of Appeals has such power, stating at pages 13 and 14 of its opinion that the power to stay is "firmly

imbedded'' in our judicial system, particularly where its function is to prevent ''irreparable injury''.

At pages 13 and 14 of its brief the Commission cites *United States* v. *Wabash Railroad Co.*, 321 U. S. 403, as a purported example of an analogous situation wherein this Court refused to sanction as a defense to an administrative order the fact that like orders had not been issued against competitors. That case is not analogous. There the Interstate Commerce Commission ordered the Wabash Railroad to cease its practice of spotting freight cars without cost at the plant of A. E. Staley Manufacturing Co., one of its shippers. Staley asked that the order be set aside, since its enforcement would place Staley at a competitive disadvantage unless similar orders were issued against railroads serving its competitors. This Court, after pointing out that under the Interstate Commerce Act, Staley, as a shipper, had the right to initiate proceedings with the Interstate Commerce Commission (under Section 13(1) of the Act) to compel the railroads serving Staley's competitors to stop the preferential practices, concluded that in view of this method available to Staley of ''inducing the Commission to perform its duty,'' the order should not be set aside.

In the instant case no such statutory method exists whereby Respondent Niehoff can induce the Federal Trade Commission to ''perform its duty'' respecting Respondent's competitors.

In the footnote appearing at page 14 of its brief the Commission, anticipating the foregoing distinction, points out that Respondent can bring treble damage actions or injunctive proceedings against its competitors. This Court's familiarity with the cost, difficulty and time-consuming nature of such alternative remedies is sufficient to disclose their total inadequacy. The Commission ignores the fact that the remedy available to Staley under the

Interstate Commerce Act was one before the Commission itself and that Staley had not seen fit to avail itself of that remedy. Here the situation is quite the reverse. At every turn of this proceeding Respondent has requested the Federal Trade Commission to hold its order in abeyance until similar orders have been entered against Respondent's competitors, but the Commission ignored all such requests, notwithstanding Respondent's showing of irreparable injury.

At page 15 of its brief the Commission cites the cases of *Standard Oil Co.* v. *United States,* 337 U. S. 293, and *National Candy Co.* v. *Federal Trade Commission,* 104 F. 2d 999 (C. A. 7). Neither of these cases touches upon the power of a court, upon a showing of irreparable injury, to stay the effective date of an order of the Commission pending the entry of similar orders against competitors.

Similarly, in *El Moro Cigar Co.* v. *Federal Trade Commission,* 107 F. 2d 429 (C. A. 4), no proof was made that the respondent would be injured by the entry of the proposed order. Cf. *H. N. Heusner & Son* v. *Federal Trade Commission,* 106 F. 2d 596 (C. A. 3) referred to above, where the Court of Appeals stayed an order of the Federal Trade Commission for a two-year period to protect the value of the secondary meaning of a brand name.

Conclusion.

The pricing methods followed by Respondent have been traditional in the ignition replacement parts field since long prior to the passage of the Robinson-Patman amendment to the Clayton Act in 1936. Until the present proceedings the validity of these pricing practices had never been questioned by the Federal Trade Commission. Under such circumstances the Commission, in challenging the validity of these pricing practices for the first time, should

have followed its customary practice of proceeding against all of the principal replacement parts ignition manufacturers simultaneously. Having neglected to do so (because of the Commission's obvious failure to make any investigation of the ignition replacement parts field prior to filing its complaint against Respondent, R. 856, 975-977), after Respondent made proof herein of its principal competitors and their pricing methods, the Commission should have then filed complaints against all such competitors. For reasons known only to itself the Commission followed neither course, but instead it elected to proceed against Respondent and to direct it forthwith to cease and desist such pricing practices in the face of an uncontradicted showing that the immediate enforcement of such an order against Respondent while its principal competitors were not likewise enjoined would force Respondent out of business.

It is impossible to explain the intransigent course which the Commission has followed in this proceeding. Its callous disregard for the economic havoc which the immediate enforcement of its order will inflict upon Respondent and its tenacious refusal to follow its customary methods of procedure in similar cases, establishes that the Commission is guilty of an abuse of discretion which the Court of Appeals, in the exercise of its equitable powers, clearly has the authority to prevent.

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 110

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

C. E. NIEHOFF & CO.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION OF C. E. NIEHOFF & CO. FOR REHEARING.

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In the *per curiam* opinion of January 27, 1958, jointly deciding this case and the case of *Moog Industries, Inc.* v. *Federal Trade Commission* (No. 77), this Court overlooked the fundamental record differences in these two cases which require an affirmance of the *Niehoff* case.

In the *Niehoff* case the Court of Appeals for the Seventh Circuit, in reviewing the action of the Federal Trade Commission, found as a fact from the undisputed evidence in the record that Respondent would be forced out of business by an order of the Commission compelling it forthwith to cease using the pricing methods traditional in the automotive ignition field while its principal competi-

tors were not under a similar restraint, and the inference is inescapable that it also found that the action of the Commission in refusing to exercise its statutory authority to postpone the effective date of the *Niehoff* cease and desist order under such circumstances clearly amounted to an abuse of discretion (R. 1040, 1042).

Where, as here, the record abundantly supports such a finding (R. 208, 209, 456-460, 578-586), the Court of Appeals has the unquestioned power to correct such an abuse of discretion. *Jacob Siegel Co. v. Federal Trade Commission*, 327 U. S. 608 (1945).

Nor will this Court interfere with such a finding by the Court of Appeals, for Congress has charged the Court of Appeals with the primary responsibility for reviewing the actions of administrative agencies and where the Court of Appeals has undertaken to make findings based upon the record this Court will do more than decide whether there was a "fair assessment" of the record. See *Federal Trade Commission v. Standard Oil Co.*, No. 24, October Term 1957; *Labor Board v. American Insurance Co.*, 343 U. S. 395, 409-410 (1952); *Labor Board v. Pittsburgh S. S. Co.*, 340 U. S. 498, 502-503 (1951); *Labor Board v. Universal Camera Corp.*, 340 U. S. 474, 491 (1951).

The Federal Trade Commission succeeded in clouding the issue in the *Niehoff* case by inviting this Court to grant certiorari in the *Moog* case on the Commission's assertion that the decision of the Court of Appeals for the Eighth Circuit in that case was "in conflict" with the decision of the Court of Appeals for the Seventh Circuit in the *Niehoff* case.[1]

Actually, no such conflict ever existed. An examination of the record in the *Moog* case discloses that Moog not only failed to make any proof that it would suffer irrepar-

1 See pages 9 and 10, Memorandum of the Federal Trade Commission in answer to the petition for certiorari filed in *Moog Industries, Inc. v. Federal Trade Commission*, No. 750, October Term 1956.

able injury through the immediate enforcement of the Commission's order, but that Moog never even suggested this possibility to the Commission or the Court of Appeals by motion or otherwise until after the Court of Appeals for the Eighth Circuit had released its opinion in that case.

When this point is raised for the first time in the Court of Appeals without supporting proof in the record, it comes too late.

The Court of Appeals for the Seventh Circuit readily recognized this distinction in its consideration of the case of *P & D Manufacturing Co.* v. *Federal Trade Commission*, 245 F. 2d 281, 282, decided April 30, 1957. There the Court, speaking through Judge F. Ryan Duffy, stated:

> "On oral argument petitioner's counsel requested that we adopt here the same procedure as we did in the *Niehoff* case, that is, postpone the effective date of the Commission's order until some indefinite time in the future.
>
> "In *Niehoff* there was evidence in the record that C. E. Niehoff & Co. would be forced out of business if the traditional pricing practices which it then followed would be denied to it, while its competitors were left free to continue such practices. No such proof or argument was made in the case at bar. The suggestion made at time of oral argument comes too late."

It is thus apparent that there has never been any "conflict" between the decision of the Eighth Circuit in the *Moog* case and the decision of the Seventh Circuit in the *Niehoff* case, and that the Commission obviously invited this Court to grant certiorari in the *Moog* case, not because of any actual conflict, but to tar the *Niehoff* case with the Moog record in the ultimate consideration here of the *Niehoff* case.

It is submitted that the decision of the Court of Ap-

peals for the Seventh Circuit in the *Niehoff* case, when considered on the record in that case alone, should be affirmed.

For the foregoing reasons we respectfully request the Court to grant a rehearing of its decision in the *Niehoff* case.

Respectfully submitted,

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I hereby certify that this petition for rehearing is presented in good faith and not for purposes of delay.

CHARLES R. SPROWL.

February 17, 1958.